

LEGISLATIVE BILL 677

Approved by the Governor April 15, 1992

Introduced by Wesely, 26; Rasmussen, 20

AN ACT relating to long-term care facilities; to amend sections 71-2023, 71-5906, 71-6019, 71-6021, and 71-6035, Reissue Revised Statutes of Nebraska, 1943, and section 71-2017.07, Revised Statutes Supplement, 1991; to adopt the Long-Term Care Ombudsman Act; to provide grounds for denial or discipline of licenses; to provide for access to certain facilities; to prohibit discrimination or retaliation as prescribed; to harmonize provisions; to eliminate provisions relating to access to records by the long-term care ombudsman; and to repeal the original sections, and also section 81-2214.01, Revised Statutes Supplement, 1991.

Be it enacted by the people of the State of Nebraska,

Section 1. Sections 1 to 28 of this act shall be known and may be cited as the Long-Term Care Ombudsman Act.

Sec. 2. For purposes of the Long-Term Care Ombudsman Act, the definitions found in sections 3 to 12 of this act shall be used.

Sec. 3. Department shall mean the Department on Aging.

Sec. 4. Department of Social Services shall mean the adult protective services division of the Department of Social Services.

Sec. 5. Director shall mean the Director on Aging.

Sec. 6. Local long-term care ombudsman program shall mean an entity, either public or private and nonprofit, designated as a local long-term care ombudsman program by the department.

Sec. 7. Long-term care facility shall include:

- (1) A nursing facility;
- (2) A residential care facility;
- (3) A boarding home;
- (4) Any other adult care home;
- (5) A continuing care community;
- (6) Any swing bed in an acute care facility or

extended care facility; and

(7) Any adult day care facility.

Sec. 8. Office shall mean the office of the state long-term care ombudsman.

Sec. 9. Older Americans Act shall mean the federal Older Americans Act, as amended.

Sec. 10. Older individual shall mean an individual who is sixty years of age or older.

Sec. 11. Ombudsman advocate shall mean an employee or a volunteer of the office other than the state long-term care ombudsman or of a local program trained and certified to carry out duties prescribed in rules and regulations of the office.

Sec. 12. State long-term care ombudsman shall mean the person or persons appointed by the director to fulfill the responsibilities of the office.

Sec. 13. Pursuant to the Older Americans Act, the office of the state long-term care ombudsman is hereby created. The department shall establish and operate the office. The director shall appoint the state long-term care ombudsman.

Sec. 14. The department shall establish a long-term care ombudsman program consisting of the state long-term care ombudsman and any local long-term care ombudsman program. The program, as approved and administered by the department, shall:

(1) Investigate and resolve complaints not reportable under the Adult Protective Services Act made by or on behalf of older individuals who are patients, residents, or clients of long-term care facilities relating to action, inaction, or decisions of providers of long-term care services or their representatives, of public agencies, or of social service agencies which may adversely affect the health, safety, welfare, or rights of such older individuals. The director shall adopt and promulgate rules and regulations regarding the handling of complaints received under this section, including procedures for conducting investigations of complaints. The rules and regulations shall include procedures to ensure that no state long-term care ombudsman or ombudsman advocate investigates any complaint involving a provider with which the representative was once employed or associated;

(2) Provide for the training of the state long-term care ombudsman and ombudsman advocates and promote the development of citizen organizations to participate in the program, provide training to ombudsman advocates and staff of local long-term care ombudsman programs, issue certificates attesting to the

successful completion of the prescribed training, and provide ongoing technical assistance to such local programs:

(3) Analyze and monitor the development and implementation of federal, state, and local laws, regulations, and policies with respect to long-term care facilities and services and recommend any changes in such laws, regulations, and policies deemed by the office to be appropriate;

(4) Establish a statewide, uniform reporting system to collect and analyze data relating to complaints and conditions in long-term care facilities for the purpose of identifying and resolving significant problems. The data shall be submitted to the Department of Health at least on an annual basis;

(5) Prepare reports as requested by the director and provide policy, regulatory, and legislative recommendations to solve problems, resolve complaints, and improve the quality of care and life in long-term care facilities;

(6) Provide for public forums to discuss concerns and problems relating to action, inaction, or decisions that may adversely affect the health, safety, welfare, or civil rights of residents of long-term care facilities and their representatives, public agencies and entities, and social service agencies; and

(7) Provide information to public agencies, legislators, and others, as deemed necessary by the department, regarding the problems and concerns, including recommendations related to such problems and concerns, of older individuals residing in long-term care facilities.

Sec. 15. The director shall adopt and promulgate rules and regulations to carry out the Long-Term Care Ombudsman Act. The director shall ensure that the state long-term care ombudsman has no conflicts of interest in fulfilling the duties of the office, is capable of administering the office impartially, has an understanding of long-term care issues, has experience in the fields of aging and health care, and has worked with and been involved in volunteer programs.

Sec. 16. The director may designate for two-year periods, within each planning-and-service area designated pursuant to section 81-2213, local long-term care ombudsman programs in accordance with rules and regulations established by the director. Such rules and regulations shall include specifications regarding the sites of the offices of the local long-term care ombudsman programs and requirements concerning staffing.

levels of training required for ombudsman advocates and staff, standards of operation, and program review.

The office may withdraw or provisionally maintain the designation of an entity as a local long-term care ombudsman program if the entity fails to meet the rules and regulations established by the director. If the designation of a local long-term care ombudsman program is provisionally maintained, the office shall notify the program of the reasons for the provisional status, of the changes or corrections necessary for the removal of the provisional status, of the length of time permitted to make the changes or corrections, and that the office will withdraw the designation if the program does not comply with the requirements specified in the notice. If the designation of a local long-term care ombudsman program is withdrawn, the office may provide for the continuation of long-term care ombudsman services for that area.

Sec. 17. (1) The state long-term care ombudsman shall ensure that the staff of the office and of local long-term care ombudsman programs are trained in:

(a) Federal, state, and local laws, regulations, and policies with respect to long-term care facilities in the state;

(b) Investigative techniques;

(c) Management of long-term care facilities;

and

(d) Such other matters as the department deems appropriate.

(2) The state long-term care ombudsman shall develop procedures for the certification of ombudsman advocates.

(3) No ombudsman advocate shall investigate any complaint filed with the office unless such person is certified by the office.

Sec. 18. The office shall investigate and seek to resolve complaints and concerns not reportable under the Adult Protective Services Act communicated by or on behalf of an older individual who is a patient, resident, or client of any long-term care facility. The office may initiate investigations based on its observations of the conditions in a long-term care facility. If the office does not investigate a complaint, the complainant shall be notified of the decision not to investigate and the reasons for the decision.

Sec. 19. (1) When abuse, neglect, or

exploitation of an older individual who is a patient, resident, or client of a long-term care facility is suspected, the office shall make an immediate referral to the Department of Social Services or the appropriate law enforcement agency. The office shall coordinate with the Department of Social Services or the appropriate law enforcement agency, if requested, pursuant to any investigation of such abuse, neglect, or exploitation.

(2) Any state agency or board which responds to a complaint against a long-term care facility or an individual employed by a long-term care facility that was referred to the agency or board by the office shall forward to the office copies of related inspection reports, plans of correction, and notice of any citations and sanctions levied against the long-term care facility or the individual.

Sec. 20. Every long-term care facility shall post in a conspicuous location a notice of the name, address, and telephone number of the office and the name and telephone number of the nearest local long-term care ombudsman program. A brief description of the services provided by the office and the nearest long-term care ombudsman program shall be included in the notice. The form of the notice shall be approved by the office.

Sec. 21. Upon request, the office shall have access to any record of a state or local governmental agency which is necessary to carry out its responsibilities under the Long-Term Care Ombudsman Act.

Sec. 22. A state long-term care ombudsman or an ombudsman advocate shall have immediate access to any consenting patient, resident, or client of a long-term care facility for the purpose of effectively carrying out the Long-Term Care Ombudsman Act if such state long-term care ombudsman or ombudsman advocate identifies himself or herself and presents his or her credentials to the individual in charge of the long-term care facility.

Sec. 23. (1) In order for the office to carry out its responsibilities under the Long-Term Care Ombudsman Act, the office shall have access to the medical and personal records of an older individual who is a patient, resident, or client of a long-term care facility which are retained by the facility. If the older individual:

(a) Has the ability to consent in writing, access may only be obtained by the written consent of the older individual;

(b) Is unable to consent in writing, oral

consent may be given in the presence of a third party as witness before access is given:

(c) Is under guardianship or conservatorship that provides the guardian or conservator with the authority to approve review of records, the office shall obtain the permission of the guardian or conservator for review of the records unless (i) the existence of the guardianship or conservatorship is unknown to the office or the facility, (ii) the guardian or conservator cannot be reached within five working days, (iii) the subject of the complaint is the guardian or the conservator, or (iv) in case of an emergency; and

(d) Is unable to express written or oral consent and there is no guardian or conservator or the notification of the guardian or conservator is not applicable for reasons set forth in subdivision (c) of this subsection or the older individual is deceased, inspection of records may be made by the state long-term care ombudsman.

(2) Copies of records may be reproduced by the office.

(3) Upon request by the office, a long-term care facility shall provide to the office the name, address, and telephone number of the guardian, conservator, attorney in fact, legal representative, or next of kin of any patient, resident, or client.

(4) The long-term care facility and personnel who disclose records pursuant to this section shall not be liable for the disclosure.

(5) The office shall establish procedures to protect the confidentiality of records obtained pursuant to this section.

Sec. 24. (1) Information relating to any complaints or investigation made pursuant to the Long-Term Care Ombudsman Act that discloses the identities of complainants, patients, residents, or clients shall remain confidential except:

(a) When disclosure is authorized in writing by the complainant, patient, resident, or client or the older individual's guardian or legal representative;

(b) When disclosure is necessary to an investigation of abuse, neglect, or exploitation and the disclosure is made to the Attorney General, the county attorney, the Department of Health, or the Department of Social Services;

(c) When disclosure is necessary for the provision of services to the patient, resident, or client and the patient, resident, or client is unable to express written or oral consent; or

(d) Upon court order.

(2) Access to the records and files of the office relating to any complaint or investigation made pursuant to the Long-Term Care Ombudsman Act shall be permitted only at the discretion of the state long-term care ombudsman, except that the identity of any complainant, witness, patient, resident, or client shall not be disclosed by such ombudsman except:

(a) When disclosure is authorized in writing by such complainant, witness, patient, resident, or client or the older individual's guardian or legal representative;

(b) Upon court order; or

(c) Pursuant to subsection (3) of this section.

(3) The records and files of the office shall be released to the Department of Social Services if it so requests for purposes of the Adult Protective Services Act.

(4) The director shall have access to the records and files of the office to verify the effectiveness and quality of the long-term care ombudsman program.

Sec. 25. The department shall ensure that:

(1) No individual involved in the designation of the state long-term care ombudsman has a pecuniary or other interest in a long-term care facility;

(2) No state long-term care ombudsman or ombudsman advocate has a pecuniary or other interest in a long-term care facility;

(3) Mechanisms are in place to identify and remedy all such or other similar conflicts; and

(4) The office has the ability to pursue administrative, legal, and other appropriate remedies on behalf of patients, residents, and clients of long-term care facilities.

Sec. 26. Any local long-term care ombudsman program or any individual certified by the office, whether an employee or an unpaid volunteer, shall be treated as a representative of the office.

Sec. 27. No state long-term care ombudsman or ombudsman advocate shall be liable for the good faith performance of official duties pursuant to the Long-Term Care Ombudsman Act. Pursuant to the Older Americans Act, the department shall ensure that adequate legal counsel is available to the office for advice and consultation and that legal representation is provided to any state long-term care ombudsman or ombudsman advocate against whom any legal action is brought in

connection with his or her official duties.

Sec. 28. (1) No person shall willfully interfere with the lawful actions of the office, including the request for immediate entry into a long-term care facility by an individual certified pursuant to section 17 of this act who identifies himself or herself and presents his or her credentials to the individual in charge of the long-term care facility.

(2) No person shall institute discriminatory, disciplinary, or retaliatory action against any officer or employee of a long-term care facility or governmental agency or against any patient, resident, or client of a long-term care facility or guardian or family member thereof for any communications by him or her with the office or for any information given or disclosed by him or her in good faith to aid the office in carrying out its duties and responsibilities.

Sec. 29. That section 71-2017.07, Revised Statutes Supplement, 1991, be amended to read as follows:

71-2017.07. The Department of Health may waive either (1) the requirement of subdivision (22) of section 71-2017.01 that a nursing facility or long-term care hospital certified under Title XIX of the Social Security Act, as amended, use the services of a licensed registered nurse for at least eight consecutive hours per day, seven days per week, or (2) the requirement of subdivision (22) of section 71-2017.01 that a nursing facility or long-term care hospital certified under Title XIX of the Social Security Act, as amended, use the services of a licensed registered nurse or licensed practical nurse on a twenty-four-hour basis seven days per week, including the requirement for a charge nurse on each tour of duty, if:

(a) The facility or hospital demonstrates to the satisfaction of the department that it has been unable, despite diligent efforts, including offering wages at the community prevailing rate for the facilities or hospitals, to recruit appropriate personnel;

(b) The department determines that a waiver of the requirement will not endanger the health or safety of individuals staying in the facility or hospital; and

(c) The department finds that, for any periods in which licensed nursing services are not available, a licensed registered nurse or physician is obligated to respond immediately to telephone calls from the facility or hospital.

A waiver granted under this section shall be subject to annual review by the department. The department shall provide notice of the granting of a waiver to the office of the state long-term care ombudsman of the Department on Aging and to the Nebraska Advocacy Services or any successor designated for the protection of and advocacy for persons with mental illness or mental retardation. A nursing facility granted a waiver shall provide written notification to each resident of the facility or, if appropriate, to the guardian, legal representative, or immediate family of the resident. As a condition of granting or renewing a waiver, a facility or hospital may be required to employ other qualified licensed personnel.

The department may grant a waiver under this section if it determines that the waiver will not cause the State of Nebraska to fail to comply with any of the applicable requirements of medicaid so as to make the state ineligible for the receipt of all funds to which it might otherwise be entitled.

Sec. 30. That section 71-2023, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

71-2023. The Department of Health shall issue licenses for the operation of health care facilities subject to sections 71-2017 to 71-2029 and the Nebraska Nursing Home Act which are found to comply with such sections or act and such rules and regulations as are lawfully adopted and promulgated by the department. As a condition for licensure or renewal of a license, such institutions shall submit to the department a list of the names of all individual owners, partners, and members of boards of directors owning or managing such institutions and any other persons with financial interests or investments in such institutions. Every such licensed institution shall have a sign prominently posted in the lobby or entry area of such institution. Such sign shall be in the form of a printed card with a minimum height of twenty inches and a width of fourteen inches with each letter to be a minimum of one-fourth inch in height. The sign shall contain the name, street address, city, state, and zip code of all individual owners, partners, and members of the board of directors owning or managing such institution, except that the name of any owner who owns less than five percent of the institution shall not be included on the sign.

The department may (1) deny, suspend, or revoke licenses of such health care facilities or (2) take other disciplinary measures against the license of

any such health care facility, other than a hospital, on any of the following grounds:

(a) Violation of any of the provisions of sections 71-2017 to 71-2029 or the Nebraska Nursing Home Act or the rules and regulations lawfully adopted and promulgated pursuant thereto;

(b) Permitting, aiding, or abetting the commission of any unlawful act; or

(c) Conduct or practices detrimental to the health or safety of patients, residents, and employees of the facility, except that this subdivision shall not be construed to have any reference to healing practices authorized by law;

(d) Failure to allow a state long-term care ombudsman or an ombudsman advocate access to such facility for the purposes of investigation necessary to carry out the duties of the office of the state long-term care ombudsman as specified in the rules and regulations promulgated by the Department on Aging; or

(e) Discrimination or retaliation against an employee or resident of any such facility who has presented a grievance or information to the office of the state long-term care ombudsman.

If the department Department of Health determines to deny, suspend, or revoke a license, it shall send to the applicant or licensee, by either registered or certified mail, a notice setting forth the particular reasons for the determination. The denial, suspension, or revocation shall become final thirty days after the mailing of the notice unless the applicant or licensee, within such thirty-day period, requests a hearing in writing. Thereupon the applicant or licensee shall be given a fair hearing before the department and shall have the right to present such evidence as may be proper. On the basis of such evidence, the determination involved shall be affirmed or set aside, and a copy of such decision setting forth the finding of facts and the particular reasons upon which it is based shall be sent by either registered or certified mail to the applicant or licensee. The decision shall become final thirty days after the copy is mailed unless the applicant or licensee, within such thirty-day period, appeals the decision under section 71-2027. The procedure governing hearings authorized by this section shall be in accordance with rules and regulations adopted and promulgated by the department. A full and complete record shall be kept of all proceedings. Witnesses may be subpoenaed by either party and shall be allowed fees at a rate prescribed by the rules and

regulations.

Other disciplinary actions taken shall be in accordance with the applicable provisions of sections 71-2023.01 to 71-2023.07 or 71-6025 to 71-6031.

Sec. 31. That section 71-5906, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

71-5906. The Department of Health shall issue licenses for the operation of boarding homes subject to sections 71-5901 to 71-5909 which are found to comply with the provisions of such sections 71-5901 to 71-5909 and such the rules and regulations as are lawfully promulgated by the department pursuant to such sections. The Department of Health department shall deny, suspend, or revoke licenses on any of the following grounds:

(1) Violation of any of the provisions of sections 71-5901 to 71-5909 or the rules and regulations lawfully promulgated pursuant thereto;

(2) Permitting, aiding, or abetting the commission of any unlawful act; or

(3) Conduct or practices detrimental to the health or safety of patients and employees of the boarding home, except that this provision subdivision shall not be construed to have any reference to healing practices authorized by law;

(4) Failure to allow a state long-term care ombudsman or an ombudsman advocate access to the boarding home for the purposes of investigation necessary to carry out the duties of the office of the state long-term care ombudsman as specified in the rules and regulations promulgated by the Department on Aging; or

(5) Discrimination or retaliation against a resident or an employee of a boarding home who has presented a grievance or information to the office of the state long-term care ombudsman.

Should the department determine if the Department of Health determines to deny, suspend, or revoke a license, it shall send to the applicant or licensee, by either registered or certified mail, a notice setting forth the particular reasons for the determination. The denial, suspension, or revocation shall become final thirty days after the mailing of the notice, unless the applicant or licensee, within such thirty-day period, shall give gives written notice of desire for hearing. Thereupon the applicant or licensee shall be given a fair hearing before the Department of Health department and shall have the right to present such evidence as may be proper. On the basis of such

evidence the determination involved shall be affirmed or set aside, and a copy of such decision setting forth the finding of facts and the particular reasons upon which it is based shall be sent by either registered or certified mail to the applicant or licensee. The decision shall become final thirty days after a copy thereof is mailed, unless the applicant or licensee, within such thirty-day period, appeals the decision under section 71-5907. The procedure governing hearings authorized by this section shall be in accordance with rules and regulations promulgated by the department. A full and complete record shall be kept of all proceedings. Witnesses may be subpoenaed by either party and shall be allowed fees at a rate prescribed by the rules prescribed by the department and regulations.

Sec. 32. That section 71-6019, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

71-6019. Any employee, representative, or agent of the Department of Public Institutions, the office of the state long-term care ombudsman, a law enforcement agency, or the local county attorney shall be permitted access at any hour to any resident of any nursing home. Friends and relatives of a resident shall have access during normal visiting and business hours of the facility. Representatives of community legal services programs, volunteers, and members of community organizations shall have access, after making arrangements with proper personnel of the home, during regular visiting and business hours if the purpose of such access is to:

- (1) Visit, talk with, and make personal, social, and legal services available to all residents;
- (2) Inform residents of their rights and entitlements and their corresponding obligations under federal and state laws by means of educational materials and discussions in groups and with individual residents;
- (3) Assist residents in asserting their legal rights regarding claims for public assistance, medical assistance, and social security benefits, as well as in all other matters in which residents are aggrieved. Assistance may include counseling and litigation; or
- (4) Engage in other methods of asserting, advising, and representing residents so as to extend to them full enjoyment of their rights.

Sec. 33. That section 71-6021, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

- 71-6021. (1) Notwithstanding the provisions

of sections 71-6019 and 71-6020, the administrator of a nursing home may refuse access to the nursing home to any person if the presence of ~~that~~ such person in the nursing home would be injurious to the health and safety of a resident or would threaten the security of the property of a resident or the nursing home, or if the person seeks access to the nursing home for commercial purposes. Any person refused access to a nursing home may, within thirty days of such refusal, request a hearing by the department. The wrongful refusal of a nursing home to grant access to any person as required in sections 71-6019 and 71-6020 shall constitute a violation of ~~sections 71-6008 to 71-6037~~ the Nebraska Nursing Home Act. A nursing home may appeal any citation issued pursuant to this section in the manner provided in sections 71-6029 to 71-6031.

(2) Nothing in sections 71-6019 to 71-6021 shall be construed to prevent (a) an employee of the Department of Health or Department of Social Services, acting in his or her official capacity, from entering a nursing home for any inspection authorized by sections 71-6008 to 71-6037 the act or any rule or regulation adopted and promulgated pursuant thereto or (b) a state long-term care ombudsman or an ombudsman advocate, acting in his or her official capacity, from entering a nursing home to conduct an investigation authorized by any rules and regulations promulgated by the Department on Aging.

Sec. 34. That section 71-6035, Reissue Revised Statutes of Nebraska, 1943, be amended to read as follows:

71-6035. (1) A nursing home shall not discriminate or retaliate against a resident or employee of a nursing home who has initiated or participated in any proceeding authorized by ~~sections 71-6008 to 71-6037~~ the Nebraska Nursing Home Act or who has presented a grievance or information to the administrator of the nursing home, office of the state long-term care ombudsman, or public officials. A nursing home which violates this subsection shall be subject to (a) a civil fine of not less than two hundred fifty nor more than five thousand dollars, to be assessed and collected by the director, or (b) the immediate revocation of the nursing home's license to operate after notice and opportunity for hearing.

(2) A resident or an employee may compel the department to determine whether a violation of subsection (1) of this section has occurred through a private action. A resident may maintain an action under

sections 71-6008 to 71-6037 the act for any other type of relief, including injunctive and declaratory relief, permitted by law.

Sec. 35. That original sections 71-2023, 71-5906, 71-6019, 71-6021, and 71-6035, Reissue Revised Statutes of Nebraska, 1943, and section 71-2017.07, Revised Statutes Supplement, 1991, and also section 81-2214.01, Revised Statutes Supplement, 1991, are repealed.