

**TITLE 9            HUMAN RIGHTS**  
**CHAPTER 2        AGE**  
**PART 21           CIVIL PENALTY ASSESSMENTS BY THE STATE LONG-TERM CARE OMBUDSMAN**

**9.2.21.1            ISSUING AGENCY:** Aging and Long-Term Services Department.  
[9.2.21.1 NMAC - N, 4/1/2004]

**9.2.21.2            SCOPE:** This rule applies to the general public.  
[9.2.21.2 NMAC - N, 4/1/2004]

**9.2.21.3            STATUTORY AUTHORITY:** This rule is adopted pursuant to the terms of 42 U.S.C. Section 3058g(j), Sections 28-4-6(B), 28-17-5 and 28-17-19 NMSA 1978 and Laws 2004, Ch. 23, Sec. 6(E).  
[9.2.21.3 NMAC - N, 4/1/2004]

**9.2.21.4            DURATION:** Permanent.  
[9.2.21.4 NMAC - N, 4/1/2004]

**9.2.21.5            EFFECTIVE DATE:** April 1, 2004, unless a later date is cited in the history note at the end of a section.  
[9.2.21.5 NMAC - N, 4/1/2004]

**9.2.21.6            OBJECTIVE:** This rule establishes a schedule of civil penalties that will be imposed on persons or entities that violate Section 28-17-19 NMSA 1978.  
[9.2.21.6 NMAC - N, 4/1/2004]

**9.2.21.7            DEFINITIONS:** The following terms are used in this rule:

**A.            “civil penalty assessment”** means a civil monetary penalty imposed on a person or entity by the state long-term care ombudsman pursuant to the terms of Section 28-17-19 NMSA 1978 and this rule;

**B.            “department”** means the aging and long-term services department. It is the state department charged, among other things, with implementing the requirements of the federal Older Americans Act of 1965, as amended (42 U.S.C. Section 3001, et seq.);

**C.            “long-term care ombudsman program”** means the program administered by the state long-term care ombudsman; and

**D.            “state long-term care ombudsman”** means the office established pursuant to the terms of 42 U.S.C. Section 3058g and Section 28-17-4 NMSA 1978 to, among other things, identify, investigate and resolve complaints that are made by, or on behalf of, residents of long-term care facilities and that relate to action, inaction or decisions that may adversely affect the health, safety, welfare or rights of the residents.

[9.2.21.7 NMAC - N, 4/1/2004]

**9.2.21.8            WILLFUL INTERFERENCE WITH LONG-TERM CARE OMBUDSMAN PROGRAM:**

**A.            Any person or entity that willfully interferes with the lawful actions of the long-term care ombudsman program shall be subjected to civil penalties up to a maximum of \$5,000 per occurrence as follows:**

**(1)** failing to allow an ombudsman immediate entry into a long-term care facility: \$500 minimum per occurrence;

**(2)** imposing unreasonable time limits or constraints on visiting a long-term care facility or its residents or employees: \$500 minimum per occurrence;

**(3)** failing to provide an ombudsman, upon proper written request, immediate access to readily available medical, personal, financial or other nonmedical records, including administrative records, policies, procedures or documents that concern, involve or pertain to a resident’s diet, comfort, health, safety or welfare, but not including internal quality assurance or risk management reports: \$500 minimum per occurrence;

**(4)** failing to provide an ombudsman, upon proper written request, access within twenty-four hours to nonreadily available medical, personal, financial or other nonmedical records, including administrative records, policies, procedures or documents that concern, involve or pertain to a resident’s diet, comfort, health, safety or welfare, but not including internal quality assurance or risk management reports: \$500 minimum per occurrence;

**(5)** failing to honor a legally-executed HIPAA-compliant authorization form from a resident or a resident’s surrogate decision maker for release of records, or failing to honor a written authorization form signed by

the state long-term care ombudsman or an ombudsman coordinator in accordance with Section 28-17-13(B) NMSA 1978, or requiring redundant or legally-unnecessary forms to be completed: \$500 minimum per occurrence;

(6) eavesdropping on any private conversation between an ombudsman and a resident or any other person: \$500 minimum per occurrence;

(7) failing to provide a quiet private place for an ombudsman to meet with a resident or any other person: \$500 minimum per occurrence;

(8) instructing a resident, employee or any other person not to file a complaint with the long-term care ombudsman program, or not to provide information to, or otherwise cooperate with, the long-term care ombudsman program: \$2,500 minimum per occurrence;

(9) willfully concealing facts from, or misrepresenting facts to, an ombudsman: \$2,500 minimum per occurrence;

(10) failing to acknowledge and act timely upon communications with an ombudsman relating to an investigation: \$500 minimum per occurrence; and

(11) any other willful action that interferes with the lawful actions of the long-term care ombudsman program: \$250 minimum per occurrence.

**B.** Factors that will be considered in imposing civil penalties greater than the minimum amounts include, but are not limited to, the following:

(1) whether the interference with the long-term care ombudsman program caused actual harm to any resident of the facility;

(2) the number and amounts of civil penalties that have been assessed against a facility or its owners previously; and

(3) whether the interference with the long-term care ombudsman program was based on a facility policy or a policy of its owners (as opposed, for example, to an isolated incident caused by a lower-level employee). [9.2.21.8 NMAC - N, 4/1/2004]

#### **9.2.21.9 RETALIATION:**

**A.** Any person or entity that discriminates against, disciplines, or retaliates against any resident, employee, or other person for filing a complaint with the long-term care ombudsman program, or for providing information to, or otherwise cooperating with, the long-term care ombudsman program shall be subjected to civil penalties up to a maximum of \$10,000 per occurrence as follows:

(1) discharging a resident: \$10,000 per occurrence;

(2) withholding treatment to, or medication from, a resident: \$2,500 minimum per occurrence;

(3) isolating a resident or changing a resident's room: \$1,000 minimum per occurrence;

(4) restricting a resident's ability to communicate with others: \$1,000 minimum per occurrence;

(5) ignoring a resident's request for assistance or delaying response to a request: \$1,000 minimum per occurrence;

(6) taking a resident's property, even if the property has no value: \$1,000 minimum per occurrence;

(7) terminating an employee of a long-term care facility: \$10,000 per occurrence;

(8) suspending, demoting or taking any other action with monetary consequences against an employee of a long-term care facility: \$2,500 minimum per occurrence;

(9) barring a person from a facility: \$1,000 minimum per occurrence; and

(10) instituting any other discriminatory, disciplinary or retaliatory action against a resident, a resident's family member or other representative, an employee, or any other person: \$500 minimum per occurrence.

**B.** Factors that will be considered in imposing civil penalties greater than the minimum amounts include, but are not limited to, the following:

(1) whether the discrimination, discipline or retaliation caused actual harm to any resident of the facility;

(2) the number and amounts of civil penalties that have been assessed against a facility or its owners previously; and

(3) whether the discrimination, discipline or retaliation was based on a facility policy or a policy of its owners (as opposed, for example, to an isolated incident caused by a lower-level employee).

[9.2.21.9 NMAC - N, 4/1/2004]

#### **9.2.21.10 CIVIL PENALTY ASSESSMENT:**

**A.** Upon determining that there has been a violation of Section 28-17-19 NMSA 1978 and this rule, the state long-term care ombudsman may deliver to the person or entity charged with the violation a notice of civil

penalty assessment. The notice shall be delivered in person or by certified mail, return receipt requested. The notice shall include:

- (1) the name and address of the person or entity to whom the civil penalty assessment is directed;
- (2) the date of the civil penalty assessment;
- (3) the basis for the civil penalty assessment;
- (4) the amount of the civil penalty assessment;
- (5) the date the civil penalty assessment is due for payment; and
- (6) notice of the right to request a hearing before the department to challenge the civil penalty

assessment.

**B.** Unless a hearing is requested, the civil penalty assessment shall be paid to the department within thirty (30) calendar days from the date of the assessment. Payment shall be in the form of cash, cashier's check or money order.

[9.2.21.10 NMAC - N, 4/1/2004]

**9.2.21.11 RECOVERY PROHIBITED:** No person or entity that has been issued a civil penalty assessment shall recover or attempt to recover the assessment or any portion of it, directly or indirectly, from any resident of a long-term care facility or from any person, insurer, governmental agency or other entity that may be responsible for paying for the services rendered to a resident of a facility.

[9.2.21.11 NMAC - N, 4/1/2004]

**History of 9.2.21 NMAC:** [RESERVED]