STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE ADMINISTRATION,	)	
Petitioner,	)	
vs.	)	CASE NO. 96-3249
INTEGRATED HEALTH SERVICES, INC., d/b/a HERITAGE PARK OF BRADENTON,	)	
Respondent.	)	

RECOMMENDED ORDER

A hearing was held in this case in Tampa, Florida on September 19, 1996, before Arnold H. Pollock, an Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Thomas W. Caufman, Esquire
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For Respondent: R. Bruce McKibben, Jr., Esquire
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STATEMENT OF THE ISSUES

The issue for consideration in this case is whether Respondent's nursing home operation in Bradenton should be administratively fined because of the matters alleged in the Administrative Complaint filed herein.

PRELIMINARY MATTERS

By Administrative Complaint dated June 4, 1996, James R. Gregory, Bureau Chief for the Agency for Health Care Administration's (Agency) Office of Plans and Construction, (OPC), seeks to impose an administrative fine of $5,000.00 on Respondent, Integrated Health Services, Inc. d/b/a Heritage Park of Bradenton (Heritage), because of Heritage's replacement of an electrical generator in its Bradenton, Florida nursing home in September, 1995 without first obtaining the written approval of the Agency therefor, in violation of rule 59A-4.133, Florida Administrative Code, and Section 400.121, Florida Statutes. Heritage petitioned for formal hearing on the matter and this hearing ensued.

At the hearing, Petitioner presented the testimony of Raymond L. Mehaffey, Jr., a fire inspector for the Agency; James R. Gregory, the Agency's Bureau

Chief for its OPC; and through Petitioner's Exhibit One, the deposition testimony of Weyman Davis, at the time in issue, a professional engineer administrator, electrical. Respondent presented the testimony of Nina K. M. Willingham, administrator of its Bradenton facility; and Duane E. Hathaway, maintenance director at that facility. Respondent also introduced Respondent's Exhibits A - D. The undersigned also officially recognized Rule 59A-4.133, Florida Administrative Code, and Chapter 400, Florida Statutes.

A transcript of the proceedings was furnished and subsequent to the receipt thereof, both counsel submitted Proposed Findings of Fact and written argument which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times pertinent to the issues herein, the Petitioner, Agency for Health Care Administration, was the state agency responsible for the licensing of and the regulation of activities of nursing homes in Florida. The Respondent, Integrated Health Services, Inc., operated Heritage Park of Bradenton, a 120-bed nursing home facility in Bradenton, Florida.

2. Soon after his employment by the Respondent, Duane E. Hathaway, the facility maintenance director, was conducting a familiarization survey of the facility's physical plant. He had previously been briefed on the possible severity of hurricane winds experienced in the area and was interested in the two back-up systems the facility had to provide electrical power in the event the regular power supply was interrupted. One system was a battery system which would operate the nurse call system and fill certain other emergency requirements. The other back-up system was a 90 kw Kohler generator powered by a 460 horsepower Ford propane engine. This generator was to be the main power source during emergency conditions which resulted in the main power supply being interrupted. During the course of his inspection, Mr. Hathaway found that the generator was not performing properly. Not relying only on his own inspection, he had the unit surveyed by a local generator company, Tampa Armature Works, (TAW), which advised him the generator was not holding a load as it was supposed to do. Though the generator worked, its performance was not reliable in an emergency and often resulted in a requirement for each load factor to be brought on line manually. There also was a question as to whether it could carry a full load for an extended period of time.

3. Under the Agency's rules governing the operation of nursing homes, existing licensed nursing homes are not required to have emergency generators unless they employ life support systems in the facility. Heritage Park of Bradenton does employ life support systems and did at the time in issue. Therefore, it was required to have an emergency generator installed and operable in the facility.

4. When the difficulty was discovered with the facility's existing generator, either Mr. Hathaway or Ms. Wilingham telephoned to Mr. Jay Grollman, the director of design and construction for Integrated, Heritage's parent company, who knew of a spare generator located at the company's Miami facility. This generator in Miami was good for Heritage because it was nearby and was certified for use in health care facilities by the Agency. It had been installed and maintained at the Miami facility by TAW which, when contacted, indicated that all factors being considered, it was the best option for Heritage Park of Bradenton and would meet their needs. This generator also met all standards set by the National Fire Protection Association.

5. Thereafter, Respondent hired TAW to move the generator from the Miami facility to the Bradenton facility and install it. It was packaged at Miami, placed on a truck and transported to Bradenton where it was installed. Once installed, done in one day, a load bank test was done which indicated some minor difficulties which were remedied at once. The building load test was then done successfully and so was a subsequent bank test. The generator now is working properly and is currently tested weekly. Only minor discrepancies are ever noted and these are immediately corrected.

6. On December 20, 1995, during the course of an annual inspection of the Respondent's Bradenton facility, Mr. Mehaffey, the Agency team's fire inspector, was advised by Mr. Hathaway that the facility's emergency generator recently had been changed out because they had been having problems with it in the past and had chosen to replace it. When Mr. Mehaffey asked if the facility had submitted plans for approval in advance of the change, Mr. Hathaway did not know. Somewhat later that day, however, in the Administrator's office, Ms. Willingham indicated that plans for the change-out had not been submitted in advance. At that point, Ms. Willingham indicated the facility had other approved work under way and she thought the generator change-out might be included in that. Nonetheless, Mr. Mehaffey wrote up the change-out as a violation on a formal complaint which was consistent with other prior instructions he had received.

7. According to Ms. Willingham, who has been an administrator with the Respondent for several years, renovations other than the replacement of the generator had been granted a CON waiver by the Agency and submitted to the Agency's OPC before the generator work was contemplated, She was advised in September, 1995 by Mr. Hathaway that the existing generator was not up to snuff, and because it was the middle of a very active hurricane season, she called Mr. Grollman for advice. Because the Heritage Park facility has contracts to receive evacuees from other facilities during emergencies, and also has the need to shelter staff families and others in need, a reliable emergency generator is important to have in the event of a hurricane or other disaster. Ms. Willingham's immediate concern was for resident safety. When Mr. Grollman recommended the change in the generator, the new unit was installed within a week and a half of identification of the problem.

8. As a result of the December 1995 annual survey, the facility was awarded a superior rating. Aside from the write-up for the generator, only a few minor deficiencies were identified, none of which were serious and all of which were corrected immediately. The generator write-up was included only because representatives of the facility, Mr. Hathaway and Ms. Willingham, had advised the Agency inspector of the change-out. No attempt was made to hide it.

9. After the inspection, on December 31, 1995, Mr. Grollman, by letter, contacted the OPC to see if the generator replacement could be added to the existing project. Mr. Grollman's rationale in support of that proposal was that the failure to secure advance approval was an oversight occasioned by the emergency situation and the partial and impending failure of the system during the hurricane season. No immediate response from the Agency was forthcoming. However, on June 4, 1996, Mr. Gregory signed the Administrative Complaint reflecting the intention to impose a $5,000.00 fine. On June 24, 1996, another official from OPC, by letter, advised Ms. Willingham that the construction project had been surveyed and occupancy of the area approved subject to certain deficiencies noted in the survey. Only six deficiencies were noted. Of these, only one related to the generator, and that one required " a grade in wall opening at the generator exhaust area." In reality, that was a construction item.

10. The cost of the project to which the generator was added was initially $285,000. The cost of shipping and moving the generator was an additional $25,000.

11. Ms. Willingham recognized that the Agency's rule requires that all "contemplated" new construction or acquisition be submitted for prior approval but she is bemused by what the term "contemplated" actually means. Her prior inquiries to the Agency provided no clear answer. One source she contacted, not further identified, indicated that replacement of a product with a like product does not require prior approval. A question as to the need to seek prior approval to replace wall paper met with diametrically opposing advice. Ms. Willingham contends, and it is obvious, that she did not make a conscious decision not to seek agency approval of the generator change. She merely felt it was not that sort of project which needed to be reported. Fire alarm and nurse call replacements were called in for prior approval.

12. OPC employs teams of architects and engineers to review all plans for modifications of and improvements to regulated health care facilities and reviews on site the construction related thereto for compliance with pertinent agency rules and statutes dealing with fire safety. It also reviews system installations and design criteria, air distribution, pressure relationships and fire alarm, nurse call and gas transmission systems. OPC is a part of the Governor's Emergency Operation Center and provides response teams in hurricane, flood or emergency areas to do assessments and give assistance as necessary. Some teams are based at diverse areas throughout the state. Teams are constantly on the road, and other teams stand ready in the office to be deployed in any emergency situation.

13. According to Mr. Davis, a professional engineer who was working for the Agency at the time, personnel from OPC's Orlando office were available to go to Bradenton on very short notice if necessary and, in fact, were going there on a regular basis. As such, they could have taken part in an approved generator swap-out had Respondent sought approval. That being the case, the Agency contends, there was no emergency situation justifying non-compliance with the "prior approval" rule.

14. Another function of OPC is to see that all required tests are carried out on new generators and that they are properly installed and within code before they come on line. The office also participates in the development of generator watch situations in the case of temporarily non-conforming generators. A significant part of the office operation is to approve plans for emergency situations.

15. A generator is a part of the electrical system of a nursing home. In the instant case, a 30-bed medical specialty unit was being constructed which would hold patients needing life support. In a case such as here, the existing generator might be increased in size and the generator integrated with the existing electrical system.

16. Nursing home administrators are advised by an Agency newsletter of all new requirements. In August 1994, this newsletter included an article concerning the requirements for submittal of plans for any construction or modification, regardless of how small. In addition, in either April or May 1994, Mr. Gregory sent a mass mailing to every nursing home administrator in the state regarding the need to advise OPC in advance of every modification so that a determination could be made if further review is necessary.

17. Mr. Gregory receives three to four replies per day (300 - 400 per year) from which he determines whether the proposed project is sufficient or what else might be needed. Generator problems he has experienced include leaking oil, a loss of coolant or air pressure, overheating, a lack of monitoring alarms and the like.

18. In the instant case, the Respondent did not submit plans for any generator upgrade in 1995 prior to the installation. What Mr. Gregory describes as "upgraded construction" came to his attention through a December 20, 1995 recommendation for administrative complaint submitted by Mr. Mehaffey. After receiving it, Mr. Gregory discussed the situation and what had to be done to rectify the situation by telephone with the planning director for Integrated, Mr. Grollman. He also had a discussion with the architect of the approved project. That project did not address the need for a different generator.

19. Mr. Gregory contends that when Respondent identified the need for a replacement generator it should have phoned OPC and so indicated. The parties would then have had a dialogue on what had to be done to include, if necessary, sending an engineer to the site to insure the generator was installed correctly and according to code. In the instant case, TAW, which installed the generator, was not under the supervision of a professional engineer as Gregory indicates was required.

20. The generator in issue was installed before any plans were submitted for review. As a result, according to Mr. Gregory nothing was done to insure it was installed and tested properly and according to code. No information was provided to the Agency to indicate if the new generator matched the need it would be used to meet or if it was the proper size, had the proper breaker ratings or the appropriate ACI ratings.

21. Even though the Agency learned of the installation in December 1995, it did not send out an engineer to inspect the work until April 1996. Information received from the installer by the Agency's design engineers, and from the plans sent in, indicated deficiencies. Inspection showed the generator had an overheating problem along with other installation issues relating to alarms. These deficiencies, acknowledged by Mr. Hathaway, were corrected and the installation approved with the other construction in June 1996, well after the generator was installed.

22. Mr. Gregory knows of no Agency rule which refers to emergency situations, except for the state emergency plan, EFS-8, which deals with natural or nuclear disasters. The plans for the generator were finally submitted in March 1996, after Mr. Gregory spoke with the architect who was supervising the new approved project. The architect said he would arrange for the plans to be submitted for inclusion in the ongoing project. Mr. Gregory concurred with this plan subject to CON office approval. Nevertheless, even in light of this and considering the conversations with Mr. Grollman and Mr. Mehaffey; and recognizing there was no intent to deceive shown by the Respondent, Mr. Gregory still recommended imposition of the maximum fine. This was after Respondent, in December 1995, requested, in writing, a waiver of the Administrative Complaint and agreed that the plans and installation would be modified as required.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter in this case. Section 120.57(1), Florida Statutes.

24. Rule 59A-4.133(3), Florida Administrative Code, requires that all contemplated additions, conversions, renovations or alterations shall be submitted for approval or exemption from the plans review process prior to implementation. Subsection (5) of that rule outlines the process for plan submission and at subsection (5)(b)5, specifically references electrical engineering drawings of alternate power supplies. Subsection (7) of the rule provides that construction work shall not be started on covered projects until written approval has been given by the Agency.

25. Respondent defends against the Agency's proposed discipline by urging that the Agency's use of the word, "construction", as contained in Subsection (7) of the rule, to support its proposed action is improper, contending that no construction was undertaken or accomplished in this case by the removal of the existing generator and the installation of the replacement. It contends that the Agency's reliance on the fact that Integrated did not seek or obtain approval to replace the generator prior to initiating replacement action to support discipline is misplaced.

26. To be sure, the word "construction" is not defined in the rule. Respondent urges that a reading of the entire rule makes it clear that the term contemplates events which affect the occupancy of the building or the physical plant.

27. It should be noted that consistent with Rule 59A-4.133(8), Florida Administrative Code, the Agency allows approved projects under construction to be expanded in scope if the applicant deems the additional work is necessary, and in this case, the Agency subsequently approved the generator replacement in issue as an addition to an approved project.

28. In the instant case the Respondent claims, and the Agency does not contest, that the replacement was a response to an emergency situation. The Agency contends, however, and that contention has not been clearly rebutted, that it had a program in place to provide for expedited evaluation and approval of emergency situations through inspection by field office representatives who could, upon short notice, come to the scene of the proposed work, assess its requirement and the sufficiency of the proposed corrective action, and recommend approval or denial with a near-time response. Respondent notes, however, that the Agency has no rule in place to address emergency situations such as here but instead, relies on the existing rule provisions discussed herein and a non-rule policy to resolve situations on a case by case basis.

29. In such cases, the Agency must establish its policy by expert testimony or other competent and substantial evidence which is "appropriate to the nature of the issues involved." Health Care and Retirement Corp. of America v. DHRS, 559 So.2d 665 (Fla. 1st DCA 1990); Beverly Enterprises-Florida, Inc. v. DHRS, 573 So.2d 19, 22 (Fla. 1st DCA 1990). While in this case the evidence presented by the Agency did not include expert testimony in the classical sense, the evidence for the Agency clearly established the reasonableness of its policy and ample reason therefor.

30. In addition, the evidence established that there was a sufficient hiatus between the time the generator problem was discovered and the time the replacement was moved and installed to allow the Respondent to notify the Agency of its need. Had Respondent done so, the onus would have been transferred to the Agency to evaluate the situation and take appropriate action.

31. Further, the evidence also established that once the replacement generator was installed, operational difficulties existed with it which required correction. These corrections were accomplished, but it was not until several months after installation that Respondent submitted its request to have the replacement of the generator included in the previously approved construction program. Under the circumstances, it is clear that Respondent failed to submit its plans for generator replacement in advance as required.

32. Sections 400.102(1)c and 400.121, Florida Statutes, authorize the Agency to impose a fine of $500 per day, up to $5,000 for a violation of rules adopted under Chapter 400, Part II, Florida Statutes. The Agency has chosen to assess a fine of $5,000, the maximum. No evidence was presented to indicate whether the Agency, in assessing its penalty, considered any of the mitigating factors which existed at the time.

33. Among those factors which might be considered as mitigating are the fact that the then existing generator was defective and needed replacement; that the facility needed an emergency generator to provide appropriate care for its residents; that the value of the improvement, when considered independently, was not significant; that the Respondent brought the replacement to the attention of the Agency voluntarily; that Respondent's previous attempts to determine the definition of the term "contemplated" had not been successful; that the instant project reasonably might not be considered construction or modification and that the replacement was eventually approved by the Agency. While the need for the Agency to maintain control over the expenses of health care facilities is abundantly clear, in this case the violation does not seem so egregious that mitigation should not be considered. Under the circumstances, a fine of $500 would seem to be appropriate.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is, therefore:

Recommended that the Agency for Health care Administration assess an administrative fine of no more than $500 for Respondent's failure to submit plans for generator replacement to the Agency in advance of project initiation, as required.

RECOMMENDED this 15th day of November, 1996, in Tallahassee, Florida.

ARNOLD H. POLLOCK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommend Order. Any exceptions to this Recommended Order should be filed with the agency which will issue the Final Order in this case.