

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE)
ADMINISTRATION,)
)
Petitioner,)
)
vs.) Case No. 98-2347
)
MEGA NURSING SERVICES, INC.,)
d/b/a MEGA NURSING SERVICES,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on February 17, 1999, by video teleconference at Fort Lauderdale, Florida, before Susan B. Kirkland, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jennifer Steward, Esquire
Agency for Health Care Administration
1400 Commercial Boulevard, Suite 110
Fort Lauderdale, Florida 33309

For Respondent: Jason H. Clark, Esquire
Post Office Box 17486
West Palm Beach, Florida 33416

STATEMENT OF THE ISSUE

Whether Respondent violated Rule 59A-8.0185(2)(a), Florida Administrative Code, as set forth in the Administrative Complaint, and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated April 17, 1998, Petitioner, Agency for Health Care Administration (Agency), notified Respondent, Mega Nursing Services, Inc., d/b/a Mega Nursing Services (Mega), that the Agency intended to impose an administrative fine of \$1,000 based on Respondent's alleged violation of provisions of Chapter 59A-8, Florida Administrative Code. Mega requested an administrative hearing, and the case was forwarded to the Division of Administrative Hearings on May 14, 1998.

The final hearing was scheduled for August 26, 1998. On August 26, 1998, an Agreed-To Motion for Continuance was filed, requesting a continuance. The Motion was granted, and the final hearing was rescheduled for October 30, 1998. On September 28, 1998, another Agreed-To Motion for Continuance was filed. The case was rescheduled for February 17, 1999.

At the final hearing, Petitioner called Jeanne Tarr and Frank C. Braxton as its witnesses. Petitioner entered no exhibits into evidence. Respondent called Donna Lycan as its witness. Respondent's Composite Exhibit 1 was entered into evidence.

At the final hearing, the parties agreed to file proposed recommended orders within ten days of the filing of the transcript, which was filed on March 19, 1999. On March 18, 1999, Respondent filed a Motion for Continuance, requesting an

extension of time in which to file its proposed recommended order. By Order dated March 22, 1999, the time for filing proposed recommended orders was extended to May 17, 1999. The parties timely filed Proposed Recommended Orders, which have been considered in rendering this Recommended Order.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, Respondent, Mega Nursing Services, Inc., d/b/a/ Mega Nursing Services (Mega) was licensed to operate a home health agency (HHA) at 1879 West Hillsboro Boulevard, Deerfield Beach, Florida 33442, in compliance with Chapter 400, Part IV, Florida Statutes, and Chapter 59A-8, Florida Administrative Code.

2. Petitioner, Agency for Health Care Administration (Agency), routinely inspects licensed HHA's once a year. The Agency employs surveyors trained to evaluate HHA's compliance with Chapter 400, Part IV, Florida Statutes, and Chapter 59A-8, Florida Administrative Code.

3. HHA's are licensed according to the geographic service areas that they serve, and the Agency surveys each HHA in accordance with its particular geographic service area. Geographic service areas roughly correspond to counties. Thus, if an owner has HHA's licensed in more than one geographic service area, each licensed HHA is surveyed individually.

4. During the survey process, the Agency's surveyors enter the HHA, announce the survey to whoever is in charge, and then

begin the survey. The survey consists of reviews of the HHA's administrative and patient records, interviews with staff, and interviews with patients. The HHA's provide the documents which are reviewed by the surveyors. For example, if the surveyor requests the personnel files for the personnel who work for the HHA, the HHA provides such files to the surveyor.

5. After the survey is concluded, the surveyors memorialize their findings in a report that is sometimes referred to as a "Statement of Deficiencies" or a "2567 form." A copy of the report is sent to the HHA to inform it of the Agency's findings.

6. Mega has offices in Deerfield Beach, Hypolux, and North Palm Beach. Each is licensed separately to operate as a home health agency.

7. On March 31, 1997, Jeanne Tarr, a Registered Nurse Specialist employed by the Agency, performed an annual survey of Mega's HHA located at 1879 W. Hillsboro Boulevard, Deerfield Beach. During the survey in order to evaluate Mega's compliance with the Agency's requirements pertaining to personnel, Ms. Tarr asked Mega's Director of Nursing for a list of all personnel and their files.

8. The Director of Nursing supplied Ms. Tarr with eight personnel files and the personnel file of Mega's Administrator. After reviewing these files, Ms. Tarr determined that two of the eight files contained documentation of a current physical examination but no statement from a healthcare professional that

the employees were free from communicable diseases. Further, Ms. Tarr determined from a review of the file of Mega's Administrator, Donna Lycan, that the most recent documentation showing that Ms. Lycan was free from communicable diseases was dated April 1993. Ms. Lycan, who was also a nurse, made supervisory visits to patients' homes when the Director of Nursing was not available to do so.

9. Ms. Tarr advised the Director of Nursing and the person in charge of personnel that the files did not contain documentation to show that the employees were free from communicable diseases. No further documentation was supplied to Ms. Tarr.

10. After the survey was completed, Ms. Tarr prepared a report of her findings. The report was furnished to Mega.

11. On February 23, 1998, Frank C. Buxton, a Registered Nurse Specialist employed by the Agency, performed an annual survey of Mega's Deerfield Beach HHA. In order to evaluate Mega's compliance with personnel requirements, Mr. Buxton requested Mega's Director of Nursing to provide him with a list of all personnel and their files.

12. Mega's Director of Nursing gave Mr. Buxton eleven personnel files, including the Administrator's file, to review. After his review, Mr. Buxton concluded that two of the eleven personnel files contained no documentation to prove that the employees had the required physical examinations and were free

from communicable diseases, including tuberculosis. The employees were Donna Lycan, the Administrator, and Elaine Lewis, a certified nursing assistant.

13. During the survey, Mr. Buxton advised the Director of Nursing, Bernice Craven, that the information was not in the files and gave her an opportunity to locate the documentation. No further documentation was supplied.

14. After the survey was completed, Mr. Buxton prepared a report of his findings. A copy of the report was provided to Mega.

15. During the March 1997 and February 1998 surveys, the Agency's surveyors relied on Mega's representatives to identify the personnel for Mega's Deerfield HHA and to provide the files for those personnel.

16. Ms. Lycan was the administrator of three of Mega's offices, including the Deerfield Beach office. Her complete personnel file was maintained in an office other than the Deerfield office.

17. At the final hearing Mega produced records establishing that Donna M. Lycan had been examined by Dr. Sebastian on January 23, 1996, and by Dr. Ahmed on March 5, 1998, and was found to be free of communicable diseases. The records also indicated that Ms. Lycan had a tuberculin test on October 24, 1995, and March 5, 1998.

18. Mega also produced documents stating that Elaine Lewis was free of communicable diseases on February 2, 1996, and free of tuberculosis on February 27, 1998.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Section 120.57(1), Florida Statutes.

20. The Agency has alleged that Mega violated Rule 59A-8.0185, Florida Administrative Code, which provides:

(1) The [home health] agency shall have written policies and procedures to ensure the provision of acceptable, adequate and appropriate services.

(2) Personnel policies available to all full and part-time employees shall include the following:

(a) requirement that, prior to contact with patients, the employee must submit a statement from an appropriately licensed health care professional, based on an exam within the last six months, that the employee shows no apparent signs or symptoms of communicable disease and the results of a tuberculosis test. . . .Every two years, each employee shall submit a statement from a appropriately licensed health care professional that the employee is not a risk of communicating diseases including tuberculosis to any person under the care of the [home health] agency;

* * *

(3) The [home health] agency shall maintain a file for all employees which shall include name and address of employee, social security number, date of birth, name and address of next of kin or guardian, evidence of qualifications, licensure or registration if applicable, contracts if applicable, and dates of employment and separation from the

[home health] agency. Evidence of continuing education, in-service, training for home health aides shall be on file, and this information shall be kept in the personnel files or in a separate filing system maintained for this purpose and shall be available for inspection within three hours of request.

(4) The agency shall maintain a record of the employment or contractual history of all agency personnel, both employed and under contract, shall make submission of such history a condition of employment or contract, and shall verify the history unless through diligent efforts such verification is not possible. Diligent efforts shall involve at least two documented attempts to verify.

21. During the 1997 survey, the personnel files at Mega's Deerfield Beach office did not show that Ms. Lycan and two other Mega employees had timely physical examinations and tuberculin tests showing that they were free of communicable diseases. Although the Agency's surveyor advised the Director of Nursing and the personnel officer that the documentation was missing, no further documentation was supplied.

22. During the 1998 survey, a review of Ms. Lycan's file and Ms. Lewis' file showed no evidence that Ms. Lycan and Ms. Lewis were free of communicable diseases, including tuberculosis. Again Mega's Director of Nursing was advised that the documentation was missing, but no additional documentation was given to the surveyor.

23. At the final hearing, Mega produced documentation establishing that on the date of the 1998 survey neither Ms. Lycan nor Ms. Lewis had documentation in existence anywhere

that showed they were free from communicable diseases two years since the last physician's statement.

24. Based on the evidence, there were three employees without documentation on the absence of communicable diseases during the 1997 survey. One of the employees was identified as Ms. Lycan. The other two employees were not identified. Even if one of the unidentified employees was Ms. Lewis, the evidence shows that Mega did not demonstrate that the third employee had been examined and pronounced free from communicable diseases.

25. Respondent argues that Rule 59A-8.0185, Florida Administrative Code, requires only that the employee present a statement every two years and not that the HHA has to maintain the documentation. Respondent's argument is without merit. It is the responsibility of the HHA to ensure that its employees who have client contact be free from communicable diseases. In order to do so, the HHA must require the employees to provide statements from health care professionals that the employees are free from communicable diseases. The commonsense way for the HHA to demonstrate to the Agency that its employees are free from communicable disease as required by the rule is to provide the Agency with a copy of the health care professional's statements when requested to do so. Whether the HHA maintains the statements in one particular office is up to the HHA as long as the HHA can show the documentation to the Agency on request. Mega was given an opportunity both in 1997 and 1998 to get the

documentation from its other offices but failed to do so. In 1998, it would have been impossible because the documentation was not in existence because the employees had not had the required physical examinations or tuberculin tests.

26. The Agency has established that Mega violated Rule 59A-8.0185, Florida Administrative Code, in the 1997 and the 1998 survey. Thus, the violation in 1998 is a repeat deficiency.

27. Rule 59A-8.0086(2), Florida Administrative Code, provides:

(2) The AHCA shall suspend or revoke a license or impose a fine,

* * *

(c) if the home health agency fails to comply with the other provisions of this rule or Home Health Services Act (Chapter 400, Part IV, F.S.).

(3) The action taken by AHCA regarding subsections (1) and (2) above shall be based on the following:

(a) The gravity of the violation, including the probability that death or serious physical or emotional harm to a patient will result or has resulted, and the severity of actual or potential harm;

(b) Actions taken by the home health agency to correct violations; and

(c) Any previous violations.

28. Mega had violations of Rule 59A-8.0185, Florida Administrative Code, in 1997 and 1998. It does not appear that Mega took actions to correct the 1997 violation since it occurred again in 1998 and involved at least one of the same employees involved in 1997. It is obviously important to have employees who are providing home health services to patients to be free

from communicable diseases. In order to ensure that this requirement is fulfilled, the HHA must receive physician statements that the employees are free from communicable diseases.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding that Mega Nursing Services, Inc., d/b/a Mega Nursing Services violated Rule 59A-8.0185, Florida Administrative Code, and imposing a fine of \$1,000.

DONE AND ENTERED this 9th day of June, 1999, in Tallahassee, Leon County, Florida.

SUSAN B. KIRKLAND
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of June, 1999.

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 Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.