STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE ADMINISTRATION, Petitioner, vs. NEW HORIZON'S ADULT LIVING, INC., Respondent.	)	Case No. 98-4688 (8-98-279-ALF)
AGENCY FOR HEALTH CARE ADMINISTRATION, Petitioner, vs. NEW HORIZON'S ADULT LIVING, INC., Respondent.	)	Case No. 98-4689 (8-98-288-ALF)

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Port Charlotte, Florida, on February 3, 1999.

APPEARANCES

For Petitioner: Karel Baarslag
Senior Attorney
Agency for Health Care Administration
State Regional Service Center
2295 Victoria Avenue
Fort Myers, Florida 33901

For Respondent: Violeta D. Sebastian
Qualified Representative

New Horizon's Adult Living Facility
1391 Capricorn Boulevard
Punta Gorda, Florida 33983

STATEMENT OF THE ISSUE

The issues are whether Respondent is guilty of various deficiencies found during surveys of its adult living facility and, if so, the amount of the administrative fines.

PRELIMINARY STATEMENT

In DOAH Case No. 98-4688, an Administrative Complaint dated August 4, 1998, alleges that Respondent provided care for a resident whose needs exceeded the scope of Respondent's license, in violation of Section 400.447(1), Florida Statutes, and Rule 58A-5.0184(1), Florida Administrative Code, for which Petitioner sought a $500 fine (Tag A 006).

In DOAH Case No. 98-4689, an Administrative Complaint dated October 2, 1998, alleges that Respondent failed to provide the required financial accountings due one resident, in violation of Section 400.427(4), Florida Statutes, and Rule 58A-5.021(2)(c)2, Florida Administrative Code, for a fine of $300 (Tag A 102); failed to have a current Radon test, in violation of Section 404.056, Florida Statutes, and Rule 58A-5.023(19), Florida Administrative Code, for a fine of $100 (Tag A 202); failed to include the correct information in their facility contract and, during one survey, lacked a facility contract, in violation of Sections 400.431(3) and 400.424(1)-(3)(a), Florida Statutes, for a fine of $300 (Tag A 303); failed to follow the provisions of

the facility contract, in violation of Rule 58A-5.024(2)(b), Florida Administrative Code, for a fine of $300 (Tag A 304); failed to obtain one resident's health assessment within the required time, in violation of Section 400.426(4) and (5), Florida Statutes, and Rule 58A-5.0181(3)(a)1 and 2, Florida Administrative Code, for a fine of $300 (Tag A 401); allowed residents to continue to reside at the facility after they no longer met the criteria for continued placement, in violation of Rule 58A-5.0181(1)(a) and (e), Florida Administrative Code, for a fine of $1000 (Tag A 407); allowed a resident to continue to reside at the facility after the resident no longer met the criteria for continued placement, in violation of Section 400.426(8), Florida Statutes, and Rule 58A-5.0181(8), Florida Administrative Code, for a fine of $1000 (Tag A 409); failed to train two of four staff in responding to the needs of the residents, in violation of Rule 58A-5.0191(4)(a)-(e) and 7, Florida Administrative Code, for a fine of $300 (Tag A 504); failed to train two of four staff on personal hygiene and assistance of residents with the activities of daily living, in violation of Rule 58A-5.0191(5)(a) and (b), Florida Administrative Code, for a fine of $300 (Tag A 505); failed to designate a staff person to be in charge of medications, in violation of Rule 58A-5.0182(6)(b)1 and 2.b, Florida Administrative Code, for a fine of $300 (Tag A 602); failed to keep all medications in a locked area at all times, in violation

of Rule 58A-5.0182(6)(d)3.a-d, Florida Administrative Code, for a fine of $300 (Tag A 607); failed to provide services appropriate to the residents' needs, in violation of Rule 58A-5.0182(2), Florida Administrative Code, for a fine of $1000 (Tag A 700); and used physical restraints on residents, in violation of Rule 58A-5.0182(8) and (9), Florida Administrative Code, for a fine of $1000 (Tag A 709).

At the hearing, the Administrative Law Judge struck the allegations underlying Tags A 303 and A 304, which concern the facility contract, because the record contains no copy of the contract.

At the hearing, Petitioner called two witnesses and offered into evidence one exhibit. Respondent called one witness and offered into evidence one exhibit. Both exhibits were admitted.

The Administrative Law Judge left the exhibits with Petitioner's counsel for copying, but he did not file them with the Division of Administrative Hearings. Petitioner's exhibit was a copy of a survey, and Respondent's exhibit was a copy of an accounting. The Administrative Law Judge closely examined both of these exhibits at the hearing, so their omission from the record is immaterial for the purpose of preparing this Recommended Order. If the parties desire, they may add the exhibits to the file after the issuance of the Recommended Order.

The court reporter filed the Transcript on March 11, 1999.

FINDINGS OF FACT

1. Pursuant to a license issued by Petitioner, Respondent owns and operates New Horizon, an assisted living facility in Punta Gorda. The license is a standard license. Violeta Sebastian is the owner and president of Respondent and the administrator of the facility.

2. On July 8, 1998, Petitioner conducted a survey of New Horizon. Petitioner's investigator found several residents sitting in the day room when he arrived at the facility between 9:00 a.m. and 9:30 a.m.

3. Resident Number 3, who is very elderly, remained seated in an over-stuffed chair all morning. When staff helped her to the dining room at around 11:30 a.m., the investigator asked to see her buttocks area and found a Stage 2 pressure sore on the coccyx area. Resident Number 3, who was wearing adult briefs, had also urinated on herself at some earlier point in time.

4. Resident Number 3 required the assistance of two staffpersons to get her to stand; she was unable to assist in this process. She also required the assistance of both staffpersons to walk, and she required complete assistance to change her briefs.

5. The records concerning Resident Number 3 revealed nothing about the existence or treatment of a pressure sore or that staff had notified the resident's physician. An aide knew of the pressure sore for three days, but had not informed the administrator nor commenced treatment.

6. The records also revealed that she was admitted to New Horizon on August 28, 1997, and her health assessment was conducted on September 29, 1997, which was 32 days after admission.

7. A Stage 1 pressure sore is a reddened area. A Stage 2 pressure sore is a reddened area with a blister. A Stage 3 pressure sore occurs when the affected area is open to the muscle. A Stage 4 pressure sore is when the affected area is open to the muscle, bone, and tendon.

8. Stage 2 pressure sores are susceptible to infection and may cause a loss of fluids, including protein, around the wound site. The pressure sore on this female resident was about two centimeters wide.

9. As a result of these findings concerning Resident Number 3, Petitioner cited Respondent for Tags A 006, A 401, A 407, A 409, and A 700.

10. Another investigator asked for the most current Radon test. The last Radon test, which the facility passed, was November 16, 1992, which meant that the facility had not been tested in almost five years and eight months.

11. As a result of these findings, Petitioner cited Respondent for Tag A 202.

12. The investigator checked the training records for two of four staffpersons and determined that two employees had not received the two hours' required training in resident behavior

and handling abuse, neglect, and exploitation. The administrator thought that they had received the required training, but was unable to produce documentation of training.

13. As a result of these findings, Petitioner cited Respondent for Tag A 504.

14. The investigator checked the training records for four staffpersons and determined that they had not received the required training in assisting residents in the activities of daily living. The administrator said that this was an oversight and would be corrected.

15. As a result of these findings, Petitioner cited Respondent for Tag A 505.

16. The investigator could not determine who was in charge of medications. However, the administrator and one part-time employee were in charge of medications.

17. As a result of these findings, Petitioner cited Respondent for Tag A 602.

18. The investigator found a bottle of milk of magnesia in an unlocked refrigerator and a bag of medications in an unlocked kitchen drawer.

19. As a result of these findings, Petitioner cited Respondent for Tag A 607.

20. The investigator testified as to restraints of a resident found by another investigator in a 1996 survey and found by her in a 1998 complaint investigation. However, her testimony

concerning the incident of which she had personal knowledge was vague and provides an insufficient basis on which to fine Respondent.

21. As a result of these findings, Petitioner cited Respondent for Tag A 709.

22. The investigator examined a ledger maintained by Respondent for one resident who was receiving certain federal benefits in the form of a monthly $35 check. Respondent's records do not document that it supplies the resident quarterly with a copy of this accounting, and staff and the administrator admitted to not supplying quarterly statements to the resident.

23. As a result of these findings, Petitioner cited Respondent for Tag A 102.

24. Petitioner did not produce admissible evidence to show that any violations were repeat violations.

CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction over the subject matter. Section 120.57(1), Florida Statutes. (All references to Sections are to Florida Statutes. All references to Rules are to the Florida Administrative Code.)

26. Petitioner must prove the material allegations by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, Inc., 670 So. 2d 932 (Fla. 1996) and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). However, the findings would be the same if the preponderance standard applied.

27. Section 400.426 provides in part:

> (4) If possible, each resident shall have been examined by a licensed physician or a licensed nurse practitioner within 60 days before admission to the facility. The signed and completed medical examination report shall be submitted to the owner or administrator of the facility who shall use the information contained therein to assist in the determination of the appropriateness of the resident's admission and continued stay in the facility. The medical examination report shall become a permanent part of the record of the resident at the facility and shall be made available to the agency during inspection or upon request. An assessment that has been completed through the Comprehensive Assessment and Review for Long-Term Care Services (CARES) Program fulfills the requirements for a medical examination under this subsection and s. 400.407(3)(b)6.
>
> (5) Except as provided in s. 400.407, if a medical examination has not been completed within 60 days before the admission of the resident to the facility, a licensed physician or licensed nurse practitioner shall examine the resident and complete a medical examination form provided by the agency within 30 days following the admission to the facility to enable the facility owner or administrator to determine the appropriateness of the admission. The medical examination form shall become a permanent part of the record of the resident at the facility and shall be made available to the agency during inspection by the agency or upon request.
>
> (8) If, at any time after admission to a facility, a resident appears to need care beyond that which the facility is licensed to provide, the agency shall require the resident to be physically examined by a licensed physician or licensed nurse practitioner. This examination shall, to the extent possible, be performed by the resident's preferred physician or nurse

practitioner and shall be paid for by the resident with personal funds, except as provided in s. 400.418(1)(b). Following this examination, the examining physician or licensed nurse practitioner shall complete and sign a medical form provided by the agency. The completed medical form shall be submitted to the agency within 30 days after the date the facility owner or administrator is notified by the agency that the physical examination is required. After consultation with the physician or licensed nurse practitioner who performed the examination, a medical review team designated by the agency shall then determine whether the resident is appropriately residing in the facility. The medical review team shall base its decision on a comprehensive review of the resident's physical and functional status, including the resident's preferences, and not on an isolated health-related problem. In the case of a mental health resident, if the resident appears to have needs in addition to those identified in the community living support plan, the agency may require an evaluation by a mental health professional, as determined by the Department of Children and Family Services. A facility may not be required to retain a resident who requires more services or care than the facility is able to provide in accordance with its policies and criteria for admission and continued residency. Members of the medical review team making the final determination may not include the agency personnel who initially questioned the appropriateness of a resident's placement. Such determination is final and binding upon the facility and the resident. Any resident who is determined by the medical review team to be inappropriately residing in a facility shall be given 30 days' written notice to relocate by the owner or administrator, unless the resident's continued residence in the facility presents an imminent danger to the health, safety, or welfare of the resident or a substantial probability exists that death or serious physical harm would result to the resident if allowed to remain in the facility.

28. Section 400.427(4) provides:

> Any funds or other property belonging to or due to a resident, or expendable for his or her account, which is received by a facility shall be trust funds which shall be kept separate from the funds and property of the facility and other residents or shall be specifically credited to such resident. Such trust funds shall be used or otherwise expended only for the account of the resident. At least once every 3 months, unless upon order of a court of competent jurisdiction, the facility shall furnish the resident and his or her guardian, trustee, or conservator, if any, a complete and verified statement of all funds and other property to which this subsection applies, detailing the amount and items received, together with their sources and disposition. In any event, the facility shall furnish such statement annually and upon the discharge or transfer of a resident. Any governmental agency or private charitable agency contributing funds or other property to the account of a resident shall also be entitled to receive such statement annually and upon the discharge or transfer of the resident.

29. Section 400.447(1) provides:

> It is unlawful for any person or public body to offer or advertise to the public, in any way by any medium whatever, personal services as defined in this act, without obtaining a valid current license. It is unlawful for any holder of a license issued pursuant to the provisions of this act to advertise or hold out to the public that it holds a license for a facility other than that for which it actually holds a license.

30. Section 404.056(5) provides:

> (5) Mandatory testing.--All public and private school buildings or school sites housing students in kindergarten through grade 12; all state-owned, state-operated, state-regulated, or state-licensed 24-hour care facilities; and all state-licensed day

care centers for children or minors shall be measured to determine the level of indoor radon, using measurement procedures established by the department. Initial measurements shall be completed and reported to the department by July 1, 1990, and repeated measurements shall be performed and reported to the department at 5-year intervals. . . .

31. Rule 58A-5.0181 provides in part:

(1) In order to be admitted to any facility, an individual shall meet the following criteria:
(a) The individual is able to perform the activities of daily living, with supervision or assistance if necessary.
(e) The individual has no bedsores or skin breaks classified by a health care provider as stage 2, 3, or 4 pressure ulcers.

(3) Admission procedures are as follows:
(a) Residents not placed by the department, by HRS, or by an agency under contract with the department or HRS.
1. Each resident, in accordance with Section 400.426(4), F.S., shall be examined by a health care provider within 60 days before admission to the facility. The medical examination report shall be submitted to the administrator of the facility, who shall use the information therein to assist in the determination of the appropriateness of admission of the resident to the facility.
2. If a medical examination has not been completed within 60 days prior to the resident's admission to the facility, a health care provider shall examine the resident and complete an assessment report using the Health Assessment for Assisted Living Facilities, DOEA Form 1823, dated October 1995, which is hereby incorporated by reference, within 30 days following the resident's admission to the facility, to enable the administrator to determine the appropriateness of admission. . . .

(8) The administrator is responsible for monitoring the continued appropriateness of placement of a resident in the facility.

32. Rule 58A-5.0182 provides in part:

(2) Facilities shall offer personal supervision, as appropriate for each resident, including the following as needed:

(a) Supervision of diets as to quality and quantity, including documentation of the resident's refusal to comply with a therapeutic diet and notification to the health care provider of such refusal. However, a competent individual shall not be compelled to follow a restrictive diet. If a resident refuses to follow a therapeutic diet after the benefits are explained, a signed statement from the resident refusing the therapeutic diet is acceptable documentation of a resident's preferences. In such instances, daily documentation is not necessary.

(b) Daily observation by designated staff of the activities of the resident while on the premises and daily awareness of the general health, safety, and physical and emotional well-being of the individual.

(c) Awareness of the resident's general whereabouts, although the resident may travel independently in the community.

(d) Encouragement of residents to participate in social, recreational, vocational, treatment services, and other activities within the community and the facility.

(e) Promptly noting in the resident's personal record any apparent deviations from his normal appearance or state of health or well-being.

(f) Contacting the resident's family, guardian, health care surrogate, or health care provider and case manager or mental health case manager when a resident exhibits a significant change, when the resident moves out of the facility, or when there is an emergency, in accordance with written procedures.

* * *

(6)(b) Supervision of self-administered medication.

1. A staff person, designated in writing, who is at least 18 years of age and who has access to, is responsible for, and is trained in the supervision of self-administered medications in accordance with Rule 58A-5.0191, shall be available at all times.

2. The designated staff person shall supervise the self-administered medication in the following manner:

b. Ensure that the medication is given to the resident for whom it is prescribed at the time indicated on the prescription.

(d)3. Centrally stored medications shall be:

a. Kept in a locked cabinet or other locked storage receptacle or area at all times.

b. Accessible only to the staff responsible for supervision of self-administration and for administration of medication. Such staff shall have ready access to keys to medication storage areas at all times.

c. Located in an area free of dampness and abnormal temperature, except that a medication requiring refrigeration shall be refrigerated. Refrigerated medications shall be secured by being kept in a locked container within the refrigerator, by keeping the refrigerator locked, or by keeping the area in which refrigerator is located locked.

d. Each container of medication shall be kept closed or sealed.

(8) No resident shall be held in a facility against his will, unless it is necessary for his personal protection while awaiting law enforcement or professional help.

(9) Physical restraints. Physical restraints shall not be used in facilities. However, half-bedside rails, when used only as half-bedside rails, shall be used only upon the written order of the resident's

health care provider, who shall review the order at least every 6 months. Any device which the resident chooses to use and can remove without assistance shall not be considered a restraint.

33. Rule 58A-5.0184(1) provides: "No facility shall hold itself out to the public as providing any services other than those consistent with the license it has."

34. Rule 58A-5.0191 provides in part:

(4) FIRST AID AND CARDIOPULMONARY RESUSCITATION (CPR). A staff member who has completed courses in First Aid and CPR and holds a currently valid card documenting completion of such courses must be in the facility at all times.

(a) Documentation of attendance at First Aid or CPR course offered by an accredited college, university or vocational school; a licensed hospital; the American Red Cross, American Heart Association, or National Safety Council; or if offered by a provider approved by a health-related professional board in the Department of Health, shall satisfy this requirement.

(b) Other courses taken in fulfillment of this requirement must meet the following criteria and be approved and documented in accordance with subsection (10) of this rule:

1. First Aid training must be a minimum of 3 hours and cover disease transmission; care of abrasions, scratches, cuts, and insect bites; care of wounds; control of bleeding; identification and care for injuries to muscles, bones and joints; care of burns; care for hypothermia and heat related illnesses; management of seizures; identification and care for injuries to the head and spine; when to move victims with injuries; and poison control. Persons providing First Aid training must:

a. Hold a current First Aid instructor's card from the American Red Cross, the National Safety Council, or an accredited university; or

b. Be a registered nurse with a minimum of 1 year's experience in long-term or acute care or 1 year's teaching experience in a health-related topic; or emergency medical technician or paramedic currently certified under part III of chapter 401, F.S., with a minimum of 1 year's teaching experience in a health-related topic.

2. CPR training must be a minimum of 3 hours; include the opportunity for "hands on" learning through practice exercises; and be in accordance with the recommendations of the 1992 Conference on Cardiopulmonary Resuscitation and Emergency Cardiac Care, American Health Association, published in the Guidelines for Cardiopulmonary Resuscitation and Emergency Cardiac Care, I and II, JAMA, 1992;268:2172-2198, which is incorporated by reference. Persons providing CPR training must hold a current CPR instructor's card from the American Red Cross, the American Heart Association, or National Safety Council.

(c) A nurse shall be considered as having met the training requirement for First Aid. An emergency medical technician or paramedic currently certified under part III of chapter 401, F.S., shall be considered as having met the training requirements for both First Aid and CPR.

(5) SUPERVISION OF SELF-ADMINISTERED MEDICATION. Persons designated to supervise the self-administration of medication pursuant to Rule 58A-5.0182 must receive a minimum of 2 hours of training prior to assuming this responsibility. Training must cover state law and rule requirements with respect to the supervision, administration, and management of medications in facilities, procedures for assisting the resident with self-administration of medication, common medications, recognition of side effects and adverse reactions and procedures to follow when residents appear to be experiencing side effects and adverse reactions, documentation and record keeping, and medication storage. Completion of the core training program shall satisfy this requirement. Other courses

taken in fulfillment of this requirement must be documented in accordance with this rule.

(7) EXTENDED CONGREGATE CARE TRAINING.
(a) The administrator and extended congregate care supervisor, if different from the administrator, must complete core training and 6 hours of initial training in extended congregate care provided by the department prior to the facility's receiving its extended congregate care license or within 3 months of beginning employment in the facility. Completion of core training shall be a prerequisite for this training. Supervisors who attended core training prior to April 20, 1998, shall not be required to take the core training competency test.
(b) The administrator and the extended congregate care supervisor, if different from the administrator, must complete a minimum of 6 hours of continuing education every two years in any of the core topics identified in s. 400.452, F.S.; or physical, psychological, or social needs of frail elderly and disabled persons, or persons with Alzheimer's disease or related disorders.
(c) All direct care staff employed in a facility licensed to provide extended congregate care must complete at least 6 hours of in-service training provided by the facility within 6 months of beginning employment in the facility. The training must address extended congregate care concepts and requirements, including statutory and rule requirements, and delivery of personal care and supportive services in an extended congregate care facility.

35. Rule 58A-5.021(2)(c)2 provides that "the facility shall":

(c) Assure that facility staff manage, use, and dispose of residents' property as provided by law in Section 400.427, F.S.
2. Statements of resident trust funds, including any property held for safekeeping, shall be sent at least quarterly to the resident, guardian, individual holding a power of attorney, or resident

representative, with copies maintained in the resident's file.

36. Rule 58A-5.023(19) provides: "Indoor radon testing as mandated by Section 404.056, F.S., shall be completed by all facilities."

37. Petitioner has proved the following tags with the corresponding fines: A 401--$300; A 407--$1000 (due to inability of Resident Number 3 to do certain activities of daily living and the presence of a pressure sore); A 700--$1000 (due to failure to make prompt notation of pressure sore in records of Resident Number 3 and contact the family or health care provider after significant change in condition of Resident Number 3); A 202--$100; A 607--$300; and A 102--$300.

38. Petitioner failed to prove the remaining tags for the noted reasons: A 006 (prohibition against facility holding itself out in certain way; no evidence that Respondent held itself out in any fashion); A 409 (requirement of 30 days' notice prior to relocation of resident; no evidence that Respondent proposed relocation of Resident Number 3, and Petitioner's theory for this tag duplications Tag A 700); A 504 (administrator denied training deficiency; no other admissible evidence of deficiency); A 505 (administrator admitted oversight concerning training, but cited authority is predicated on the designation of staffperson to supervise self-administration of medications, and evidence failed to establish such a designation among any of the untrained staff); A 602 (lack of evidence); and A 709 (lack of evidence).

RECOMMENDATION

It is

RECOMMENDED that the Agency for Health Care Administration enter a final order imposing an administrative fine against New Horizon's Adult Living, Inc., in the amount of $3000.

DONE AND ENTERED this 6th day of April, 1999, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of April, 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 must be filed with the agency that will issue the final order in this case.