STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE ADMINISTRATION,	)	
Petitioner,	)	
vs.	)	Case No. 99-1697
NORTHPOINTE RETIREMENT COMMUNITY,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, this matter was heard on December 1, 1999, in Pensacola, Florida, before Donald R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Michael O. Mathis, Esquire
Agency for Health Care Administration
Building 3, Suite 3431
2727 Mahan Drive
Tallahassee, Florida 32308-5803

For Respondent: Mohamad H. Mikhchi, President
Northpointe Retirement Community
5100 Northpointe Parkway
Pensacola, Florida 32514

STATEMENT OF THE ISSUE

The issue is whether Respondent should have a civil penalty in the amount of $1,600.00 imposed for allegedly failing to timely correct three violations of administrative regulations, as

alleged in the Administrative Complaint filed by Petitioner on February 18, 1999.

PRELIMINARY STATEMENT

This matter began on February 18, 1999, when Petitioner, Agency for Health Care Administration, issued an Administrative Complaint charging that Respondent, Northpointe Retirement Community, a licensed assisted living facility, had failed to timely correct three violations of administrative rules discovered during the course of three inspections by Petitioner in 1998 and 1999. Because of these violations, Petitioner intends to impose upon Respondent a civil penalty in the amount of $1,600.00.

Respondent denied the allegations and requested a formal hearing under Section 120.569, Florida Statutes, to contest the charges. The matter was referred by Petitioner to the Division of Administrative Hearings on April 12, 1999, with a request that an Administrative Law Judge be assigned to conduct a formal hearing. By Notice of Hearing dated July 8, 1999, a final hearing was scheduled on December 1, 1999, in Pensacola, Florida. On November 30, 1999, the case was transferred from Administrative Law Judge Diane Cleavinger to the undersigned.

At the final hearing, Petitioner presented the testimony of Jacqueline Klug, an agency public health nutrition consultant. Also, it offered Petitioner's Exhibits 1-9. All exhibits were received in evidence. Respondent was represented by its

president and owner, Mohamad H. Mikhchi, who testified on its behalf.

The Transcript of the hearing was filed on January 18, 2000. Proposed Findings of Fact and Conclusions of Law were filed by Petitioner on January 31, 2000, and they have been considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

1. When the events herein occurred, Respondent, Northpointe Retirement Community (Respondent), was licensed to operate an assisted living facility (ALF) at 5100 Northpointe Parkway, Pensacola, Florida. As an ALF, Respondent is subject to the regulatory jurisdiction of Petitioner, Agency for Health Care Administration (AHCA).

2. One regulatory responsibility of AHCA is to conduct periodic licensure surveys of ALFs to ensure that they are complying with certain standards embodied in Chapter 58A-5, Florida Administrative Code. If standards are not being met, depending on their nature and severity, the deficiencies are classified as Class I, II, and III violations, with Class I being the most serious violation. After deficiencies are noted in a licensure survey, the facility is given a time certain in which to correct those violations. If no correction is made, AHCA normally imposes a civil penalty upon the erring facility.

3. Respondent is charged with having failed to timely correct one Class II and two Class III violations. By law, a Class II deficiency is one which the agency determines to have a direct or immediate relationship to the health, safety, or security of nursing home residents. A Class III deficiency is a deficiency which the agency determines to have an indirect or potential relationship to the health, safety, or security of the nursing home residents.

4. On October 5 through 7, 1998, an AHCA representative conducted a routine licensure survey of Respondent's facility. During the survey, the representative noted, among other things, that Respondent did not have a staff member within the facility at all times who was certified in first aid, including cardiopulmonary resuscitation (CPR). If true, this omission contravened the requirements of Rule 58A-5.019(5)(f), Florida Administrative Code, and constituted a Class III violation.

5. On November 12, 1998, AHCA conducted a second licensure survey of Respondent's facility. During the survey, its consultant discovered two standards being contravened. First, Respondent failed to comply with good sanitary practices in its food preparation area in various respects, which constituted a violation of Rule 58A-5.020(1)(b), Florida Administrative Code. The specific deficiencies are described in detail in Petitioner's Exhibit 2, and collectively they constituted a Class II violation.

6. The same survey also revealed that Respondent failed to maintain an adequate emergency supply of water for drinking and cooking purposes. While Respondent had a private well on its premises to meet these needs, the quality of the water had not yet been tested by the Escambia County Health Department. In the absence of such testing, or the presence of any other emergency supply of water, Respondent violated Rule 58A-5.020(1)(i), Florida Administrative Code, a Class III violation.

7. After the foregoing inspections had occurred, Respondent was given a written report containing a list of all violations, and it was given until December 3, 1998, in which to make corrections.

8. On February 5, 1999, AHCA conducted a follow-up survey of Respondent's facility and noted that Respondent had still failed to remediate the previously cited deficiencies. First, during the late evening shift (11 p.m.-7 a.m.) on January 29, 1999, there was no person on duty in Phase II of the complex who was certified in first aid, including CPR. Second, the well had still not been inspected and approved for human consumption, and there was an inadequate amount of water on hand for the residents in the event of an emergency. Finally, although the earlier sanitary violations had been corrected, the AHCA representatives discovered a new sanitary violation in the food preparation area involving the improper thawing of meat. Under AHCA policy, unless no sanitary violations are found in the follow-up

inspection, a continuing violation of the rule has occurred. Except for the first-cited deficiency, which is discussed below, the foregoing deficiencies constituted an uncorrected Class II violation and an uncorrected Class III violation.

9. While admitting that a person certified in first aid was not present in one of his buildings during the late shift on January 29, 1999, Respondent's owner contended that the AHCA rule was still satisfied. Under his interpretation, the rule only requires that he have one person trained in first aid, including CPR, within the entire facility, rather than in each building; AHCA, however, interprets the word "facility" as meaning each building within the facility, and because there was no person in Phase II of the facility, it maintains that the rule was violated. For the reasons given in the Conclusions of Law, this interpretation of the rule is found to be clearly erroneous.

10. As to the second violation, which pertains to sanitary food practices, Respondent admits that the violation occurred, but suggested that it pertained to mildew which developed behind loose caulking in the kitchen, which was later corrected. At the hearing, however, the ACHA consultant pointed out that the violation occurred because of improper thawing of food, and not caulking, and thus there was a continuing sanitary violation in the food preparation area.

11. As to the lack of an emergency water supply, Respondent's owner pointed out that he had made a good faith

effort to comply with the regulation, but had difficulty in determining from the local disaster preparedness authority exactly how much water per resident was required in the event of an emergency. Shortly after the follow-up survey, he purchased adequate amounts of bottled water to meet the requirements of the rule.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

13. Because Respondent is subject to the imposition of an administrative fine, Petitioner bears the burden of proving by clear and convincing evidence that the allegations in the Administrative Complaint are true. See, e.g., Osborne Stern & Co. v. Dep't of Banking and Finance, 670 So. 2d 932, 935 (Fla. 1996).

14. By clear and convincing evidence, Petitioner has established that Respondent violated Rule 58A-5.020(1)(b) and (i), Florida Administrative Code, as charged in the Administrative Complaint. Therefore, Respondent is guilty of one Class II and one Class III violation.

15. The final allegation concerns a charge that Respondent violated Rule 58A-5.019(5)(f), Florida Administrative Code, which requires that the licensee assure that "there is at least one staff member within the facility at all times who has a

certification in first aid as required by Rule 58A-5.019(2), F.A.C." In making this charge, Petitioner has interpreted the rule to mean that a trained person must be in each building of the licensed premises rather than one in each facility. Whether this interpretation is correct depends on its conformity with several judicial principles. First, an agency's interpretation of its rules will not be overturned unless the interpretation is clearly erroneous. Dep't of Insurance v. Southeastern Volusia Hospital Dist., 438 So. 2d 815, 820 (Fla. 1983). However, interpretation of agency rules is appropriate only where such rules contain ambiguities, or the language is not plain or the meaning clear. Kimbrell v. Great American Insurance Co., 420 So. 2d 1086, 1088 (Fla. 1982). Where the administrative ruling or policy is contrary to the plain and unequivocal language being interpreted, the ruling or policy is clearly erroneous. Woodley v. Dep't of Health and Rehab. Svrs., 505 So. 2d 676, 677 (Fla. 1st DCA 1987). See also Eager v. Fla. Keys Aqueduct Authority, 580 So. 2d 771, 772 (Fla. 3d DCA 1991).

16. Here, the rule is clear and unambiguous and requires only that a properly trained person be within the "facility" at all times. By expanding the definition of the word "facility" to require that a trained person be within each building of a facility constitutes a clearly erroneous interpretation. Cf. Garcia-Cantera v. Dep't of State, 605 So. 2d 804, 805-06 (Fla. 3rd DCA 1993)(agency's discretion in interpreting a statute

somewhat more limited where penalties may be imposed). Therefore, the final allegation must fail.

17. In its Proposed Recommended Order, Petitioner seeks to impose a $1,000.00 penalty for the Class II violation and a $300.00 penalty for the Class III violation, or a total of $1,300.00. The source of authority for those penalties is found in Section 400.419(3)(b) and (c), Florida Statutes (1997). The first provision authorizes AHCA to impose "a civil penalty in an amount not less than $500 and not exceeding $1,000 for each [uncorrected Class II] violation," while the latter provision authorizes AHCA to impose "a civil penalty of not less than $100 nor more than $500 for each [uncorrected Class III] violation." Because the statutes contain a range of penalties, this implies that the amount of the fine to be imposed depends on the facts of each case and any mitigating or aggravating circumstances that may be present.

18. As to the Class II violation, which involved the improper thawing of food during the follow-up inspection, except for this violation, Respondent had corrected all other deficiencies previously found in earlier surveys. Given Respondent's good faith efforts to correct the deficiencies, it is concluded that a $500.00 fine is more appropriate. AHCA's suggested fine in the amount of $300.00 for the uncorrected Class III violation falls within the mid-range of the penalties and is likewise appropriate.

RECOMMENDATION

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

RECOMMENDED that the Agency for Health Care Administration enter a final order determining that Respondent has violated Rule 58A-5.020(1)(b) and (i), Florida Administrative Code, and that an $800.00 civil penalty be imposed. The remaining violation should be dismissed.

DONE AND ENTERED this 10th day of February, 2000, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of February, 2000.

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.