

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE	)	
ADMINISTRATION,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case Nos. 99-1760
	)	99-1761
MYRTLE GROVE, INC., d/b/a	)	
THREE OAK MANOR,	)	
	)	
Respondent.	)	
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RECOMMENDED ORDER

Pursuant to notice, this cause came on for formal hearing on April 10, 2000, in Pensacola, Florida, before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings. The appearances were as follows:

APPEARANCES

For Petitioner: Michael O. Mathis, Esquire  
Agency for Health Care Administration  
2727 Mahan Drive, Mail Stop 3  
Building 3, Suite 3408D  
Tallahassee, Florida 32308

For Respondent: M. H. Mikhchi, Owner/President  
Myrtle Grove, Inc.  
1012 North 72nd Street  
Pensacola, Florida 32506

STATEMENT OF THE ISSUES

The issues to be resolved in these consolidated cases concern whether the licenses of Myrtle Grove, Inc. and M.H.

Mikhchi should be subject to administrative fines for alleged failure to timely correct seven class III deficiencies at Three Oak Manor (hereinafter Respondent) and, if so, in what amount.

PRELIMINARY STATEMENT

The Respondent was notified by an Administrative Complaint dated February 19, 1999, of the agency's intent to impose administrative fines totaling \$1,600.00 against the Respondent, the licensee of an assisted living facility (ALF), Three Oak Manor, located at 1012 North 72nd Street, Pensacola, Florida, based on the failure to timely correct four class III deficiencies cited during compliance surveys of August 11, 1998, September 30, 1998, and October 1, 1998. The Respondent filed a petition for a formal administrative hearing to dispute the Administrative Complaint and this hearing ensued. The Respondent was also notified, by an Administrative Complaint dated March 15, 1999, of the Petitioner's intent to impose administrative fines totaling \$1,600.00 against the Respondent for failure to timely correct three class III deficiencies cited during the surveys of January 20 through 21, 1999, and March 8, 1999. The Respondent filed a Petition for a formal administrative hearing, and the two proceedings were consolidated. At the hearing, the agency presented the testimony of two witnesses and two composite exhibits. The Respondent presented the testimony of three witnesses and two

exhibits. All these exhibits were admitted into evidence. The Petitioner submitted a Proposed Recommended Order which has been considered in the rendition of this Recommended Order.

#### FINDINGS OF FACT

1. The Petitioner is the state agency responsible for the licensing and regulation of ALFs in Florida. The Respondent is licensed to operate Three Oak Manor as an ALF in Pensacola, Florida.

2. Ms. Jackie Klug was called as a witness for the Petitioner. She is a public health nutrition consultant and a registered dietitian. Her duties included surveying for both state and federal regulation for ALF's, nursing homes, hospitals, and any other health care facility licensed by the state of Florida.

3. Ms. Klug has been in this position for three years. She is familiar with the surveys at issue in these proceedings. "Tag deficiencies" are an agency manual or policy means of indexing rule violations. Ms. Klug participated in a survey of August 11, 1998. She observed the Respondent to have failed to have menus reviewed by a registered or licensed dietitian annually. Ms. Klug testified she cited "Tag A-807" a rule violation pertaining to the appropriate amounts of food being served to the residents on a daily basis. Ms. Klug observed

that the Respondent did not provide the residents with the required daily servings of food.

4. Ms. Klug cited "Tag A-810" for failure to record menu substitutions before or at the time a meal is served. This was based on her observations of what occurred on August 11, 1998. Ms. Klug established that these rule violations are class III deficiencies.

5. Ms. Klug observed deficiencies during the survey of October 1, 1998, as follows: "Tag A-200" for non-compliance with requirements for posting for public view the last Agency for Health Care inspection. "Tag A-205" failure to maintain records, including major incidents. "Tag A-208" failure to report a fire in the facility. "Tag A-804" pertaining to the provision of therapeutic diets according to a written order by the health care provider, as ordered.

6. Ms. Klug observed other deficiencies during the survey of January 21, 1999, as follows: "Tag A-515" failure to maintain minimum staffing levels. "Tag A-804" pertaining to the provision of therapeutic diets according to a written order by the health care provider, as ordered. "Tag A-810" failure to record substitutions before or when the meal is served. These deficiencies are repeat citations from the prior surveys of August 11, 1998 and October 1, 1998.

7. Ms. Klug identified the Petitioner's Composite Exhibit 1, item 6 as a copy of the license for Myrtle Grove, Inc., d/b/a Three Oak Manor with an effective date of August 5, 1998, and with an expiration date of August 4, 2000. Myrtle Grove, Inc., d/b/a Three Oak Manor is the licensee.

8. Ms. Paula Faulkner was called as a witness for the Petitioner. She is a Health Facility Evaluator III. Her duties included investigation of consumer complaints as well as routine surveys.

9. Ms. Faulkner is familiar with the facility at issue. She has had numerous opportunities to survey this facility. Ms. Faulkner participated in the survey of October 1, 1998. Based on her observations at this survey she found a failure to meet minimum staffing requirements in the facility. Ms. Faulkner established that Ms. Donna Danley of the agency found this deficiency still uncorrected at the January 20 through 21, 2000 survey. Ms. Faulkner had no further involvement in this case, other than her participation in the team decision to cite these violations as a class III deficiency.

10. Ms. Klug identified the Petitioner's Composite Exhibit 2, item 1 as a copy of the summary statement of deficiencies for the re-visit survey of January 21, 1999. Based on her

observations, the Respondent was out of compliance with state regulation "Tag A-006" pertaining to an un-stageable pressure sore.

11. Ms. Klug identified the Petitioner's Composite Exhibit 2, item 2 as an accurate representation of deficiencies still existing during a re-visit that was made on January 21, 1999, and a re-visit of March 8, 1999. Ms. Klug participated in these surveys. Based on her observations she found the Respondent was still out of compliance due to the fact that "resident No. 7" had a stage-two pressure ulcer which had been identified and was being treated since February 16, 1999.

12. Ms. Klug observed other deficiencies during the re-visit survey of March 8, 1999, which were previously cited on January 21, 1999, as follows: Failure to have a completed evaluation for residents; the nurse on duty failing to have a current license in the state of Florida; failure to maintain documentation on file with regard to the qualifications of individuals performing limited nursing services. In fact, the nurse had applied for Florida licensure but had not yet received it. Ms. Klug identified the Petitioner's Composite Exhibit 2, item 4 as a copy of the Respondent's limited nursing license for Three Oak Manor. The license has an effective date of August 5, 1998, and an expiration date of August 4, 2000. Mr. M.H. Mikhchi is the licensee.

## CONCLUSIONS OF LAW

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

14. The Respondent operates an ALF. The mission of an ALF is to serve its disabled and frail elderly residents in a home-like setting, and the goal of state regulation is to promote the dignity, privacy, health, and safety of the residents of such homes. See Section 400.401(2), Florida Statutes (1997).

15. The services provided by an ALF are room, board, and assistance as needed with walking, bathing, dressing, eating, grooming, toileting, taking of medicines, and similar activities. Section 400.402(1), (3), and (25), Florida Statutes (1997).

16. When a licensed operator of an ALF challenges an alleged violation of a regulatory requirement in a Section 120.57(1), Florida Statutes, proceeding, the burden of establishing that the charged violation of law has occurred is on the agency. The standard of proof required for the agency to establish that the alleged violation has occurred is "clear and convincing" evidence. Department of Banking and Finance, Division of Securities and Investor Protection vs. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996).

17. Section 400.419(1)(c), Florida Statutes (1999), provides that class III violations are those conditions or occurrences related to the operation and maintenance of a facility, or to the personal care of residents, which the agency determines indirectly or potentially threaten the physical or emotional, health, safety, or security of facility residents, other than class I or class II violations. A class III violation is subject to an administrative fine of not less than \$100.00 and not exceeding \$1,000.00 for each violation. A citation for a class III violation shall specify the time within which the violation is required to be corrected. If a class III violation is corrected within the time specified, no fine may be imposed, unless it is a repeated offense.

18. Section 58A-5.020(1)(h), Florida Administrative Code, provides that planned menus shall be conspicuously posted or easily available to residents.

19. Section 58A-5.0182(1), Florida Administrative Code, provides an administrator shall provide staff and services appropriate to the needs of the residents living in the facility.

20. The agency has proved that the Respondent violated Rule 58A-5.020(1)(h), Florida Administrative Code, in that planned menus were not conspicuously posted or easily available to residents. On or about September 30, 1998, the Petitioner



conducted a re-visit survey of Three Oak Manor. During the survey, the Petitioner determined that the Respondent again failed to comply with Rule 58A-5.020(1)(h), Florida Administrative Code, in that food substitutions were not recorded in the menu substitution log. On or about January 21, 1999, upon the second re-visit survey the Respondent had failed to comply with Rule 58A-5.020(1)(h), Florida Administrative Code. This violation is properly classified as a class III deficiency. A fine of \$300.00 should be imposed for this deficiency.

21. The Petitioner has proved that the Respondent violated Rules 58A-5.020(1)(f) and 58A-5.052(2)(c), Florida Administrative Code, in that on or about October 1, 1998, it failed to provide a therapeutic diet as ordered for one of the residents. The Respondent still was out of compliance with Rules 58A-5.020(1)(f) and 58A-5.024(2)(c), Florida Administrative Code, upon the re-visit survey of January 21, 1999. The violation is properly classified as a class III deficiency. A fine of \$300.00 should be imposed for this violation.

22. The Petitioner has proved that the Respondent has violated Rules 58A-5.0182(1) and 58A-5.019(5), Florida Administrative Code, in that it failed to provide sufficient staff for proper care of and services for residents in Three Oak

Manor. The Respondent was still out of compliance with Rules 58A-5.0182(1) and 58A-5.019(5), Florida Administrative Code, upon the re-visit survey of January 21, 1999. This violation is properly classified as a class III violation. A fine of \$300.00 should be imposed for this violation.

23. The Petitioner has proved that on or about January 20 through 21, 1999, the Respondent violated Rule 58A-5.031, Florida Administrative Code, in that:

- a. The Respondent's nurse, hired on October 10, 1998, was not currently licensed in Florida, and there was no documentation to indicate that she had submitted an application for Florida licensure. In fact she had submitted an application. The violation is properly classified as a class III deficiency. A fine of \$100.00 should be imposed for this violation.
- b. The Respondent did not have a nurse currently licensed in Florida on the premises to provide limited nursing services. This violation separate from a. above, is properly classified as a class III deficiency. A fine of \$200.00 should be imposed for this violation.
- c. The Respondent did not maintain documentation of the qualifications of individuals performing limited nursing services. The violation is properly classified as a class III deficiency. A fine of \$200.00 should be imposed for this violation.

24. The Petitioner has established that on or about March 8, 1999, the three violations previously cited in the January 20 through 21, 1999, survey or re-visit were still outstanding. This constituted three uncorrected class III

violations within the intent and meaning of Section 400.419, Florida Statutes.

25. During the aforesaid survey of January 20 through 21, 1999, the Petitioner further determined that the Respondent failed to comply with Section 400.407, Florida Statutes, in that a resident was observed with an un-stageable pressure sore on the left trochanter. An ALF is not authorized by law to serve a resident with a pressure sore greater than a "stage I" pressure sore. A resident with a pressure sore greater than "stage I" is not appropriately placed in an ALF.

26. The Petitioner has proved that the Respondent was still out of compliance with said Section 400.407, Florida Statutes, upon the re-visit survey of March 8, 1999, in that a resident had a "stage II" pressure sore which had been identified and treated since at least February 16, 1999. This constituted an uncorrected violation within the intent and meaning of Section 400.419, Florida Statutes. The violation is properly classified as a class III deficiency. A fine of \$1,000.00 should be imposed for this violation.

#### RECOMMENDATION

Having considered the foregoing Finding of Facts, Conclusions of Law, the evidence of record and the candor and demeanor of the witnesses, it is

RECOMMENDED:

That the Petitioner, Agency for Health Care Administration, enter a final order imposing fines totaling \$2,400.00 against the Respondent, in the aggregate, for failure to timely correct seven class III deficiencies found during the above-referenced surveys, related to both administrative complaints.

DONE AND ENTERED this 5th day of October, 2000, in Tallahassee, Leon County, Florida.

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P. MICHAEL RUFF  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 5th day of October, 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.