

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE )  
ADMINISTRATION, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 99-2057  
 )  
WATCH CARE, INC., )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on July 27, 2000, in Jacksonville, Florida, before the Division of Administrative Hearings, by its designated Administrative Law Judge, Diane Cleavinger.

APPEARANCES

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

For Respondent: Jamie Glavich, General Manager, pro se  
Watch Care, Inc.  
100 West First Street  
Atlantic Beach, Florida 32233

STATEMENT OF THE ISSUE

The issue in this case is whether the licensee, Watch Care, Inc., should be fined for providing services beyond the scope of its adult day care license, and if so, in what amount.

PRELIMINARY STATEMENT

An administrative complaint dated April 9, 2000, was filed against Respondent, Watch Care, Inc. (Watch Care), for alleged violation of regulatory standards for providing services beyond the scope of its adult day care license. Specifically, Petitioner, Agency for Health Care Administration (AHCA), alleged that Respondent was operating an unlicensed assisted living facility on the adult day care center premises. Respondent filed a petition for a formal administrative hearing. Respondent's request for hearing was forwarded to the Division of Administrative Hearings.

At the hearing Petitioner presented the testimony of two witnesses and introduced one composite exhibit into evidence. Respondent presented the testimony of one witnesses and offered five exhibits into evidence.

After the hearing Petitioner submitted its Proposed Recommended Order on September 5, 2000. Respondent did not submit a proposed recommended order.

FINDINGS OF FACT

1. Respondent, Watch Care, is licensed to operate an adult day care center at 100 West First Street, Atlantic Beach, Florida. The day care center is licensed to provide services to 30 people.

2. An adult day care facility is only licensed to provide care-taking services for a limited period of time during the day. A day care facility cannot provide care-taking services 24 hours a day. At the time, Respondent was not licensed to provide 24-hour assisted living services.

3. Watch Care's adult day care center is located in one side of a building at 100 West First Street. The entire building is owned by Watch Care. The other side of the building contained apartments or rooms in which two elderly people had resided for a number of years. The two areas were separated by a wall and had separate entrances. However, both areas had the same address. Even so, the separate area does not appear to have been included for review during any agency inspections done prior to January 27, 1999, since agency inspectors appeared to be unaware of the two occupants living in the separate area. Upon these facts, the evidence did not demonstrate that this separate area was part of the adult day care license. It does appear to be separate property owned by Watch Care and used for a purpose different from the adult day care center next door. Other than the corporation, no human owner lived on either of the two premises.

4. In January 1999, Petitioner received an anonymous complaint that Respondent was running an unlicensed Assisted Living Facility (ALF). On January 27, 1999, the inspector for

Respondent, for the first time found that two people were living next door to the adult day care. Respondent admitted that the two residents lived in the section of the building adjoining the adult day care.

5. Prior to January 1999, Respondent believed that Florida Statutes permitted two unrelated people to reside at a facility without being licensed as an ALF. At some point Respondent discovered the law regarding unrelated residents had changed. By statute, Respondent had six months to comply with the changed law. Respondent moved the residents to another facility within the six months following the statute change.

6. The two residents had been living next door to the adult day care center for more than two years. The residents had lived next door to the day care center at the behest and with the consent of both the residents and their families.

7. During the daytime the residents went to Watch Care's adult day care center. While not at the day care, certain staff persons associated with Watch Care would perform care-taking services for the residents. The care-taking services were provided separate from any services the staff persons may have performed during their shifts at Watch Care and the services were not performed while working on their shift at Watch Care. Importantly, the evidence did not establish the terms of any written or oral contract or the parties to such a contract. In

short, it is just as likely that these separate care-taking services were being provided and paid for separately by the two residents living in the separate part of the building. The evidence was insufficient to establish that Watch Care offered 24-hour care-taking services as part of its day care center program as opposed to providing such services as a private corporation entitled to enter into contracts separate from the day care center and its other business.

8. At the time of the inspection, Respondent intended and eventually did apply for and became licensed as an ALF. The ALF license was issued on July 9, 1999, and is in effect to date. The ALF license covers the area of the building adjacent to the adult day care center where the two residents lived.

#### CONCLUSIONS OF LAW

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

10. Section 58A-6.014(1)(b), Florida Administrative Code, provides:

The owner of a center or its operator or employee found in violation of this part or of rules adopted under this part may be fined by the agency. A fine may not exceed \$500 for each violation. In no event, however, may such fines in the aggregate exceed \$5,000.

11. ALF's are required to be licensed in Florida pursuant to Section 400.407, Florida Statutes.

12. The only exemption for licensure is set forth in 400.404, Florida Statutes which states:

(1) For the administration of this part, facilities to be licensed by the agency shall include all assisted living facilities as defined in this part.

(2) The following are exempt from licensure under this part:

(a) Any facility, institution, or other place operated by the Federal Government or any agency of the Federal Government.

(b) Any facility or part of a facility licensed under chapter 393 or chapter 394.

(c) Any facility licensed as an adult family-care home under part VII.

(d) Any person who provides housing, meals, and one or more personal services on a 24-hour basis in the person's own home to not more than two adults who do receive optional state supplementation. The person who provides the housing, meals, and personal services must own or rent the home and reside therein.

(e) Any home or facility approved by the United States Department of Veterans Affairs as a residential care home wherein care is provided exclusively to three or fewer veterans.

(f) Any facility that has been incorporated in this state for 50 years or more on or before July 1, 1983, and the board of directors of which is nominated or elected by the residents, until the facility is sold or the ownership is transferred; or any facility, with improvements or additions thereto, which has existed and operated continuously in this state for 60 years or more on or before July 1, 1989, is directly or indirectly owned and operated by a nationally recognized fraternal

organization, is not open to the public, and accepts only its own members and their spouses as residents.

(g) Any facility certified under chapter 651, or a retirement community, may provide services authorized under this part or part IV of this chapter to its residents who live in single-family homes, duplexes, quadruplexes, or apartments located on the campus without obtaining a license to operate an assisted living facility if residential units within such buildings are used by residents who do not require staff supervision for that portion of the day when personal services are not being delivered and the owner obtains a home health license to provide such services. However, any building or distinct part of a building on the campus that is designated for persons who receive personal services and require supervision beyond that which is available while such services are being rendered must be licensed in accordance with this part. If a facility provides personal services to residents who do not otherwise require supervision and the owner is not licensed as a home health agency, the buildings or distinct parts of buildings where such services are rendered must be licensed under this part. A resident of a facility that obtains a home health license may contract with a home health agency of his or her choice, provided that the home health agency provides liability insurance and workers' compensation coverage for its employees. Facilities covered by this exemption may establish policies that give residents the option of contracting for services and care beyond that which is provided by the facility to enable them to age in the place. For purposes of this section, a retirement community consists of a facility licensed under this part or under part II, and apartments designed for independent living located on the same campus.

(h) Any residential unit for independent living which is located within a facility certified under chapter 651, or any residential unit which is colocated with a nursing home licensed under part II or colocated with a facility licensed under this part in which services are provided through an outpatient clinic or a nursing home on an outpatient basis.

13. Section 400.551(1), Florida Statutes, provides that "adult day care center" means:

Any building, buildings, or part of a building, whether operated for profit or not, in which is provided through its ownership or management, for a part of a day, basic services to three or more persons who are 18 years of age or older, who are not related to the owner or operator by blood or marriage, and who require such services. (emphasis supplied)

14. Section 400.451, Florida Statutes, provides:

Any facility which is in operation at the time of promulgation of any applicable rules or standards adopted or amended pursuant to this part may be given a reasonable time, not to exceed six months, within which to comply with such rules and standards.

15. In this case, Respondent is not charged with operating an unlicensed ALF. Respondent is charged with providing services outside the scope of its adult day care license. The difficulty is that this case involves two different licenses with separate statutory schemes and a person's right to enter into contracts or conduct other business separate from any license granted by the state. In order for such a charge not to

conflict with and interfere with a person's or entity's right to contract privately, the services must be performed or offered under the adult day care license and on the adult day care premises. Neither of these conditions was established by the evidence. Therefore, the Petitioner has failed to establish that Respondent provided services outside the scope of it's license and the Administrative Complaint should be dismissed.

#### RECOMMENDATION

Based upon the findings of fact and conclusions of law, it is

#### RECOMMENDED:

That Petitioner Agency for Health Care Administration enter a final order finding Respondent Watch Care, Inc., not guilty of providing services beyond the scope of its license and dismissing the Administrative Complaint.

DONE AND ENTERED this 29th day of September, 2000, in  
Tallahassee, Leon County, Florida.

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DIANE CLEAVINGER  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 29th day of September, 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.