

STATE OF FLORIDA  
AGENCY FOR HEALTH CARE ADMINISTRATION

STATE OF FLORIDA, AGENCY FOR  
HEALTH CARE ADMINISTRATION,

Petitioner,

vs.

MARLENE C. BERTHELOT d/b/a  
FOUR PALMS MANOR,

Respondent.

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CASE NO.: 99-2485  
AHCA NO.: 5-98-250-ALF  
5-98-145-ALF  
5-98-142-ALF  
RENDITION NO.: AHCA-00-096-  
FOF-OLC

FINAL ORDER

This cause was referred to the Division of Administrative Hearings for a formal administrative hearing. The assigned Administrative Law Judge (ALJ) has submitted a Recommended Order to the Agency for Health Care Administration (AGENCY). The Recommended Order of December 13, 1999, entered herein is incorporated by reference.

PRELIMINARY STATEMENT

Four Palms Manor (Respondent) is a licensed assisted living facility (ALF). By a letter dated April 16, 1998, the Respondent was notified of the Agency's intent to deny the licensee's application for renewal of the authority to provide "extended congregate care" (ECC) at Four Palms Manor. By a letter dated December 2, 1998, the Respondent was notified of the Agency's intent to deny the pending application for renewal of the license to operate Four Palms Manor as an ALF. Finally, by an administrative complaint dated December 15, 1998, the Respondent was notified of the Agency's intent to impose fines for Class III violations of regulatory standards at Four Palms Manor. The Respondent initiated this proceeding to challenge the Agency's intended decisions.

FINDINGS OF FACT

The agency hereby adopts the findings of fact set forth in the Recommended Order.

## CONCLUSIONS OF LAW<sup>1</sup>

1. This is an adjudicatory proceeding pursuant to Section 120.57(1), Florida Statutes (1999).

2. When an agency's "free form" decision is challenged by a timely request for a hearing under Section 120.569 or 120.57, Florida Statutes, the agency's "free form" decision becomes a tentative decision.<sup>2</sup> Section 120.57 adjudicatory proceeding is part of the agency's decision making process. State Contracting vs. Department of Transportation, 709 So.2d 607, 609 (Fla. 1st DCA 1998).

3. An important feature of an adjudicatory proceeding is the hearing presided over by an ALJ where each party has a full opportunity to develop an evidentiary record for the consideration of the agency in making its final decision. Intercontinental vs. Department of Health and Rehabilitative Services, 606 So.2d 380, 386 (Fla. 3rd DCA 1992).

4. The Respondent operates Four Palms Manor as 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. Section 400.401(2), Florida Statutes (1999).

5. 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)(6), and (17), Florida Statutes (1999).

6. A standard license is the licensure baseline, but an ALF may be licensed to provide one or more of the following enhanced categories of care: extended congregate care, limited nursing services, or limited mental health. Section 400.407(3), Florida Statutes (1999). The authority of a licensee to provide one or more of the enhanced categories is indicated on the face of the standard license. Section 400.407(3)(a), Florida Statutes (1999).

7. "Extended congregate care" is a more intensive level of assistance than that authorized under a standard license, the purpose of which is to allow a resident to remain in a familiar residential environment as he/she becomes more impaired. Sections 400.402(12) and 400.407(3)(b)5, Florida Statutes (1999).

8. Unless suspended or revoked, a standard license expires two years from the date of issuance. Section 400.417(1), Florida Statutes (1999)

9. The authority to provide ECC is indicated by a designation on a standard license. Section 400.407(3), Florida Statutes (1999). ECC authority expires on the date of expiration of the standard license containing the ECC designation. Section 400.417(1), Florida Statutes (1999).

10. Prior to the renewal of an ALF's license the agency is required to inspect the facility to determine the level of compliance with regulatory standards. Rule 58A-5.033(1), Fla. Admin. Code.

11. At the time of expiration of the current license, the Agency may grant or deny an application for renewal or issue a conditional license depending on the level of compliance with regulatory standards. Section 400.414(1), 400.417(2), and 400.417(5), Florida Statutes (1999).

12. An existing ALF seeking renewal of its ECC designation must maintain its standard license and have no history of administrative sanctions during the previous two years. Section 400.407(3)(b)1, Florida Statutes (1999).

13. The Agency classifies violations of regulatory standards from Class I, the most serious to Class IV, the least serious, "according to the nature of the violation and the gravity of its probable effect on facility residents." Section 400.419(1), Florida Statutes (1999).

14. The Agency may impose fines for violations of regulatory standards. Within the statutory range, the amount of a fine is based on the gravity of the violation, actions taken to correct a violation, history of violations, financial benefit to the licensee by allowing the violations to exist, and the licensed capacity of the facility. Section 400.419(3), Florida Statutes (1999).

15. A fine is imposed for a Class III violation may range from \$100 to \$1,000. Section 400.419(1)(c), Florida Statutes (1999).

16. The Agency may deny an application for renewal of licensure for failure of the licensee to meet regulatory requirements. Section 400.414(1j)(I), Florida Statutes (1999).

17. The ALJ found that the Respondent is guilty of six Class III violations, but recommends imposition of a minimum fine for only four of the violations. See paragraphs 23 and 25 through 27 of the Recommended Order. As noted in paragraph 15 of this Final Order, the minimum fine, which may be imposed for a

Class III violation is \$100. Based on a review of the complete record, the Agency concludes that a minimum fine is appropriate for each of the six Class III violations. See § 120.57(1)(e), Fla. Stat. (1999).

The Respondent having failed to maintain a standard license, the application for renewal of the extended congregate care designation is denied. A standard license without the ECC designation is approved. Finally, a fine of \$100 is imposed for each Class III violation for a total of \$600.

DONE and ORDERED this 22nd day of May, 2000, in Tallahassee, Florida.

STATE OF FLORIDA, AGENCY FOR  
HEALTH CARE ADMINISTRATION

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RUBEN J. KING-SHAW, JR., DIRECTOR

ENDNOTES

1/ See the attached appendix for identification of modified and rejected conclusions of law, the agency's explication, and the finding required by Chapter 99-379, §6, Laws of Florida; section 120.57(1)(e), Fla. Stat.(1999).

2/ Silver Show vs. Department of Business and Professional Regulation, 706 So.2d 386, 389 (Flat 4th DCA 1998); Fortune Life vs. Department of Insurance, 569 So.2d 1325, 1327 (Fla. 1st DCA 1990); Boca Raton Artificial Kidney Center vs. Department of Health and Rehabilitative Services, 475 So.2d 260, 262 (Fla. 1st DCA 1985); and Capeletti vs. Department of General Services, 432 So.2d 1359, 1363 (Fla. 1st DCA 1983).

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO A JUDICIAL REVIEW WHICH SHALL BE INSTITUTED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A SECOND COPY ALONG WITH THE FILING FEE AS PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR MERE A PARTY RESIDES. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DA YS OF RENDITION OF THE ORDER TO BE REVIEWED.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served on the above-named people by U. S. Mail this 24th day of May, 2000.

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APPENDIX

To comply with the requirement that the agency explicate the modification or rejection of a recommended conclusion of law, a ruling is made on each numbered paragraph of the administrative law judge's recommended conclusions of law. Chapter 99-379, § 6, Laws of Florida, Section 17!0.57(1~(1), Florida Statutes.

1. Paragraph 15 is accepted.

2. Paragraph 16 is accepted.

3. Paragraph 17 is modified as follows. The agency classifies violations of regulatory standards from Class I, the most serious to Class IV, the least serious ". . . according to the nature of the violation and the probable effect on facility residents." Section 400.419(1), Florida Statutes (1999).

4. Paragraph 18 apparently alludes to nursing home quality rating and is therefore stricken as irrelevant. ALF regulation does not include a quality-rating program such as is found in nursing home regulation. For an exposition of the quality rating of nursing homes see Daytona Manor vs. Agency for Health Care Administration, 21 F.A.L.R. 119 (Fla. Agency for Health Care Administration 1998) and Fla. Health Care Association vs. Agency for Health Care Administration, 18 F.A.L.R. 3458 (Division of Administrative Hearings 1996)

5. Paragraph 19 contains an allusion the nursing home quality rating and is corrected by deleting the word "rating" and substituting the word "license".

6. Paragraph 20 is accepted.

7. Paragraph 21 is accepted.

8. Paragraph 22 is modified as follows. Section 400.414(13, Florida Statutes (1999) sets forth alternative grounds for denial of an application for renewal of licensure including paragraph (e) for a history of five or more repeated Class III violations in the previous years and paragraph (I) for failure of the licensee to meet minimum regulatory standards.

9. Paragraph 23 is modified as follows. The ALJ suggests that the Agency must show actual harm to residents to justify denial of renewal of a license to operate an assisted living facility. While actual harm is relevant to the severity of the discipline to be imposed, such a showing is not required as a matter of law to justify denial of re-licensure. For example, if a licensee's disciplinary history indicates either an inability or unwillingness to comply with the regulatory standards denial is appropriate. Agency for Health Care Administration vs. Dora Retirement Home, 17 F.A.L.R. 3951 (Fla. Agency for Health Care Administration), affd. without opinion 668 So.2d 610 (Fla. 2nd DCA 1995).

10. Paragraph 24 is modified as follows. The ALJ concludes that AHCA lacks the authority to deny renewal of the ECC designation based on the Respondent's failure to maintain a

standard license during the previous two years. The statutory phrase ". . . during the previous 2 years . . ." inapplicable to the sanctions history of a licensee, not the requirement that the licensee maintain a standard license. Because the Agency's decision to issue a conditional license is in lieu of approving or denying an application for renewal, the ALJ's retrospective interpretation of the requirement that the licensee maintain a standard license is logically inconsistent with the authority of the agency to issue a conditional license upon the expiration of the license for which renewal is sought. The ALJ concluded that there was a factual and legal basis for the Agency's intent to issue a conditional license to Four Palms Manor. The ALJ's interpretation of the statute regarding the two-year look-back period is rejected. As construed by the Agency, the statutory phrase ". . . during the previous 2 years . . ." is applicable to the requirement for a lack of a history of administrative sanctions, not the requirement that the licensee maintain a standard license. Section 400.407(3)(b)1, Florida Statutes (1999). The Agency reaches its conclusion by considering in pari materia the statutory requirement of Section 400.407(3)(b) 1, Florida Statutes (1999) that the applicant maintain a standard license and the limited statutory authority of Section 400.417(5), Florida Statutes (1999) which allows the agency to issue a conditional license in lieu of approving or denying an application for renewal.

11. Paragraph 25 is corrected as follows: a fine for a violation of a Class III violation may range from \$100 to \$1,000. Section 400.419(1)(c), Florida Statutes (1999). Because the minimum fine is \$100, the recommendation that no fine be imposed for failure of the licensee to implement a schedule of activities available to the residents is rejected and a minimum fine is imposed. Otherwise, paragraph 25 is accepted.

12. Paragraph 26 is modified. The ALJ recommends no fine be imposed for the violation pertaining to administration of medications to residents. Again, the recommendation of no fine is rejected and a minimum fine of \$100 is imposed.

13. Paragraph 27 is accepted.

14. As required by Chapter 99-379, § 6, Laws of Florida, Section 120.57(1)(1), Florida Statutes the agency states its conclusion that the Agency's conclusions of law are more reasonable.