

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARLENE C. BERTHELOT, d/b/a FOUR)
PALMS MANOR,)
)
Petitioner,)
)
vs.) Case No. 99-2485
)
AGENCY FOR HEALTH CARE)
ADMINISTRATION,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A hearing was held in this case in St. Petersburg, Florida, on October 20, 1999, before Arnold H. Pollock, an Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Renee H. Gordon, Esquire
Gay and Gordon, P.A.
Post Office Box 265
St. Petersburg, Florida 33731

For Respondent: Karel L. Baarslag, Esquire
Agency for Health Care
Administration
2295 Victoria Avenue
Ft. Myers, Florida 33901

STATEMENT OF THE ISSUES

The issue for consideration in this matter is whether Respondent's Extended Congregate Care (ECC) license for the facility at 302 11th Avenue, Northeast, in St. Petersburg,

Florida, should be renewed, and whether her license to operate that assisted living facility should be disciplined because of the matters alleged in the denial letter dated April 16, 1998, and in the Administrative Complaint filed herein on December 15, 1998. Ms. Berthelot requested formal hearing on those issues, and this hearing ensued.

PRELIMINARY MATTERS

By letter dated April 16, 1998, the Agency for Health Care Administration's Bureau of Health Facility Compliance notified Ms. Berthelot that her application for renewal of her ECC license for Four Palms Manor, an assisted living facility she operated, had been denied because the facility failed to maintain a standard license for the two years previous to the application. By letter dated December 2, 1998, the Agency's compliance bureau also advised her that her renewal application for a license to operate the assisted living facility had been denied because the facility failed to meet minimum licensing requirements when, after a period of conditional licensing from April 8 through October 7, 1998, it failed to correct eight deficiencies previously identified. Thereafter, by Administrative Complaint dated December 15, 1998, the Agency indicated its intention to impose administrative fines totaling \$2,400, because of discrepancies noted in a survey of the

facility conducted on December 30, 1997, and followed up on March 26, 1998.

Ms. Berthelot requested formal hearing on these combined allegations, and this hearing ensued.

At the hearing, the Agency presented the testimony of Ann DaSilva, an assisted living facility surveyor for the Agency, and introduced Agency Exhibits 1 through 4. Ms. Berthelot testified in her own behalf and presented the testimony of Betty J. Revels, the senior person on staff at Four Palms. She also introduced Four Palms Exhibits A through F.

A Transcript of the proceedings was filed November 5, 1999. Subsequent to the receipt thereof, both counsel submitted matters in writing. These matters were carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times pertinent to the issues herein, the Agency for Health Care Administration (Agency) was the state agency in Florida responsible for the licensing and regulation of assisted living facilities in this state. Respondent Marlene C. Berthelot operated Four Palms Manor, a licensed assisted living facility located at 302 11th Avenue, Northeast, in St. Petersburg, Florida.

2. Ann DaSilva had been a surveyor of assisted living facilities for the Agency for at least five years at the time of

the initial survey in this matter that took place in December 1997. On that occasion, Ms. DaSilva, in the company of another surveyor, Mr. Kelly, inspected the facility in issue on a routine basis. At that time, Ms. DaSilva noted that with regard to at least one resident, there was no health assessment by the resident's physician in the resident's file. A health assessment should contain the physician's evaluation of the resident's capabilities and needs, as well as his or her initial status upon admission.

3. In this case, Ms. DaSilva found that the health care provider had not addressed the skin integrity of the resident at the time of admission as should have been done. This is important because if the resident had had a skin problem or some other health problem, the resident might well not have been eligible to reside in the facility because facilities of this kind normally do not have the capability of treating pressure sore ulcers.

4. Ms. DaSilva also found that the health assessment did not accurately reflect the resident's status at the time of the survey. She found the resident was far less capable of doing what the health assessment said she could do, and the assessment was neither current nor accurate. The resident required assistance in all activities of daily living, and it was

reported the resident fell out of bed because she could not stand. This situation was written up as Tag A-403.

5. Tag A-403 was re-cited in a follow-up survey conducted on March 26, 1998. At that time the surveyor found that the health assessment did not address the resident's method of medication administration. On admission, the resident was receiving no medications at all. After she began taking medications, the facility failed to get an order from her physician to indicate how the medications were to be administered, self or with help of staff administration. Tag A-403 was cited for a third time in the October 1998 survey where the same deficiency, as cited in the March survey, the failure of the file to reflect how the resident's medications were to be administered, was again cited. The record still did not indicate how the resident was to receive her medications. This tag was classified as a Class III deficiency and that classification appears to be appropriate.

6. Tag A-406, which deals with the facility's need for an evaluation of the resident's ability to self-preserve in case of emergency, was also cited as a deficiency in the December 30, 1997, survey. There was no evidence in the file that such an evaluation was accomplished during the first 30 days after admission regarding this resident as is required by rule.

Ms. DaSilva observed the resident in bed at 9:30 a.m., and the nurses' notes reflected she was totally dependent and needed help with locomotion. The resident suffered from cerebral palsy with severe paresis (weakness) on one side. This situation raised the surveyor's concern as to whether the resident could get out of the facility in the event of an emergency. No indication appeared in the records or documentation regarding this resident, and no supplement was provided upon the request of the surveyor.

7. Ms. DaSilva also heard the resident call out for assistance, a call which remained unanswered because the one staff member on duty at the time was not in the immediate area. Ms. DaSilva observed that the resident was not able to stand without assistance but the facility's paper-work indicated the resident could self-ambulate. This was obviously incorrect. When the facility administrator, Ms. Berthelot, was called by her staff manager, she came to the facility to assist in finding the requested paperwork, but was unable to locate in the file any evaluation of the resident's capability to self-preserve.

8. Tag A-406 was re-cited in the March 1998 survey because again there were two residents who had been in the facility for over 30 days without any evaluation of their ability to self-preserve. It was cited for a third time during the October 1998 survey when the surveyor found two other residents who had been

in the facility for over 30 days but who had not been evaluated for their ability to self-preserve, and notwithstanding a request for such documentation, none was found or produced. This resulted in Tag 406 being classified as a Class III deficiency.

9. At the March 26, 1998, survey, Ms. DaSilva cited Tag A-504, which deals with the requirement for direct care staff to receive training in patient care within 30 days of being hired. The Agency requires documentation of such training, and surveyors look at the files of the staff members on duty to see if the employee's file contains certification of the proper training, appropriate application information, references, and like material. This information is needed to ensure that the employee is qualified to do the job. Here, examination of the facility's files failed to show that the one staff person on the premises during the evening shift Monday through Friday, Employee No. 1, had had the proper training. It also appeared that Employee No. 3, who was hired to work alone on Thursday and Friday evenings and Saturday and Sunday day shifts, also did not have any record of required training. This subject matter was again cited during the October 1998 survey. When Ms. DaSilva requested the file of the individual on duty, there was nothing contained therein to reflect the individual

had had the required training. This was properly classified as a Class III deficiency.

10. Tag A-505 was also cited as a result of the March 1998 survey. This tag deals with the requirement for staff who provide personal services to residents to be trained in providing those services. Ms. DaSilva asked for and was given the facility's files but could find no evidence of proper training having been given. This subject matter was again cited as a result of the October 1998 survey. At the hearing, Respondent presented certificates of training in personal hygiene, medication policy and training, and direct care 2-hour staff training, given to all employees of all Respondent's facilities. These certificates reflect, however, that the training was administered on April 22, 1998, after the March 1998 survey but before the October 1998 survey, though that survey report reflects the item was again tagged because of employees scheduled to work alone who did not have documentation of appropriate training. This was a Class III deficiency.

11. As a result of the December 1997 survey, Ms. DaSilva also cited the facility under Tag A-602, which deals with medication administration, and requires staff who administer medications to be trained in appropriate methods. At the time of the survey, Ms. DaSilva observed a staff member pour medications from prescription bottles into her hand, take the

medications to the resident, and give them to her. This staff member was not a licensed person and only licensed staff may administer medications. At the time, when asked by Ms. DaSilva, the staff member admitted she was not licensed and had not received any training in medication administration.

12. Tag A-602 was again cited as a result of the March 1998 survey because at that time Ms. DaSilva observed a staff member assist a resident correctly, but when she looked at the records, she found the member had not received the required training. This has, she contends, a potential for improper medications being given which could result in possible harm to the resident. This Tag was again cited as a result of the October 1998 survey. On this occasion, Ms. DaSilva's review of records or employees who had indicated they had assisted with medications revealed no evidence of appropriate training. Here again, the training was certified as having been given in April 1998, and Respondent contends that by the time of the October 1998 survey, the certificates were in the records. They were not found by the surveyors, however, and it is the operator's responsibility to make the records available. This constitutes a Class III violation.

13. Under the rules supporting citation Tag A-703, a facility must have an ongoing activities program into which the residents have input. On December 30, 1997, Ms. DaSilva

interviewed the residents who indicated there was no activities program at Four Palms. Ms. DaSilva observed no planned activities taking place over the six to seven hours she was there. This deficiency was re-cited during the March 1998 survey. Again, Ms. DaSilva interviewed the residents who indicated they watched TV or walked. A calendar of activities was posted, but there was no indication any were taking place, and upon inquiry, a staff member indicated none were being done that day. The activities calendar provided by the staff member merely listed potential activities, but did not indicate when or where they would take place.

14. Ms. DaSilva again cited the facility for a deficiency in its activities program as a result of the October 1998 survey. At this time, she observed no activities during the time she was at the facility. The staff member on duty reported that the planned activity was not done because she did not have time to do it. At that time, residents were observed to be lying on their beds or watching TV. The one staff person on duty was cooking, cleaning, or helping residents with care issues. This is a Class III deficiency.

CONCLUSIONS OF LAW

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

16. Assisted living facilities in Florida are licensed by the Agency under the provisions of Chapter 400, Part III, Florida Statutes, and the Agency is required to conduct periodic evaluations of those facilities for compliance with pertinent statute and rule.

17. Deficiencies noted during an evaluation are classified as either Class I, Class II, or Class III deficiencies. Class III deficiencies are those which are determined to have an indirect or potential relationship as opposed to an immediate danger or direct relationship to the health, safety, or security of the residents.

18. Ratings assigned by Agency evaluators are designated as standard, conditional, or superior. A standard rating means the facility has no Class I or II deficiencies, has corrected all Class III deficiencies within the time specified therefor, and is in substantial compliance with established criteria.

19. The conditional rating, which the Agency seeks to award here, means that this facility, due to the presence of Class III deficiencies not corrected within the time set therefor, is not in substantial compliance at the time of the survey with established criteria.

20. The Agency has the burden of proof in this case to establish, by a preponderance of the evidence, that there was a basis for imposing a conditional rating on Four Palm Manor's

license. Florida Department of Transportation v. J.W.C., Inc., 396 So. 2d 776 (Fla. 1st DCA 1981; Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977)).

21. The evidence of record clearly establishes that the Agency correctly issued Class III deficiencies in the initial or first follow-up inspection which remained uncorrected by the subsequent follow-up evaluations. Therefore, it properly awarded Four Palms Manor a Conditional license for the period from April 8, 1998 through October 7, 1998.

22. In its letter to Ms. Berthelot, Four Palms' Administrator, dated December 2, 1998, the Agency cites as its basis for denial of her renewal application for an operating license the fact that the facility:

. . . failed to meet the minimum licensing requirements pursuant to s. 400.414(1)(I), F.S. After a period of conditional license 4/8/98 through 10/7/98, the facility failed to correct 8 deficiencies cited during surveys conducted 12/10/97, 3/26/98 and 10/26/98.

This citation is incorrect. Section 400.414(2)(e) Florida Statutes, authorizes the Agency to deny, revoke, or suspend a license for:

Five or more repeated or recurring identical or similar Class III violations of this part which were identified by the agency during the last biennial inspection, monitoring visit, or complaint investigation and which,

in the aggregate, affect the health, safety, or welfare of the facility residents.

23. Here, the evidence shows that there were more than five recurring identical or similar Class III violations identified in the last three surveys. However, though each, taken alone or in combination with the other, might constitute a threat to residents, there was no significant evidence of record to indicate that the health, safety, or welfare of any of the residents was actually being affected. Therefore, it would be inappropriate to deny renewal of the basic operating license.

24. The Agency also has denied the facility renewal of its Extended Congregate Care license because it failed to maintain a standard license for the previous two years prior to renewal. The letter denying the license renewal is dated April 16, 1998, and it refers to the conditional license period extending from April 8, 1998 to October 7, 1998, almost six months in the future. However, the Agency failed to establish when the prior ECC license was due to expire or when the application for renewal was submitted. Section 400.407(3)(b), Florida Statutes, provides that application for renewal of an ECC license may be denied if the facility did not maintain a standard license for two years. This provision also requires the Agency to give notice of approval or denial within 90 days after receipt of request for issuance or application. In the instant case, since

the denial letter was dated April 16, 1998, the application must have been submitted subsequent to January 16, 1998. Since the two year period relates to the date of application for renewal, and since the denial letter was dated on April 16, 1998, only eight days after the issuance of the conditional license, the Agency has not established, by a preponderance of the evidence, that the disqualification period applies in this case. Therefore, denial of the renewal of the ECC license is not appropriate.

25. Section 400.419(3)(c), Florida Statutes, authorizes the Agency to impose an administrative fine upon licensed facilities for uncorrected Class III deficiencies. The statute provides that the fine shall be not less than \$100 nor more than \$500 for each violation. In the Administrative Complaint as filed, the Agency cited eight separate violations for each of which it sought to impose a fine of \$300. However, at hearing, the Agency presented evidence on only six of the alleged violations. Therefore, it seeks to impose a total administrative fine of \$1,800. Under the circumstances of this case, only four of the six alleged violations present any reasonable basis for discipline. That dealing with the activity schedule, while proven, must be looked at in the light of reason. This facility is not a large facility with extended staff. Only a few individuals reside in the facility, and there

is no indication that any of them evidenced any displeasure or dissatisfaction with the activities available to them. Consequently, no fine is appropriate.

26. With regard to the administration of medications, this is by far the most significant of the alleged violations. Even here, however, the evidence or record showed that upon re-evaluation, the staff member properly dispensed the medication but the surveyor's review of the records failed to reveal the member had received the appropriate training. Again, since the staff member was properly dispensing the medications, it may be assumed the individual had been trained to do it that way. Therefore, the discrepancy is one of record keeping rather than action. No fine is appropriate.

27. The remaining four alleged violations all relate to record keeping and the failure to document training or examinations. Under the circumstance of this case, imposition of more than a \$100 fine for each of the four violations would be inappropriate.

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 granting Respondent renewal of a license to operate Four Palm Manor, an assisted living facility at 302 11th

Avenue, Northeast in St. Petersburg, Florida; granting renewal of the ECC license for the same facility; and finding Respondent guilty of Class III deficiencies for Tags 403, 406, 504, 505, 602, and 703 on the surveys done on December 30, 1997, and March 26, 1998. An administrative fine of \$100 should be imposed for each of Tags 403, 404, 504, and 505.

DONE AND ENTERED this 13th day of December, 1999, in Tallahassee, Leon County, Florida.

ARNOLD H. POLLOCK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850)488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6947
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of December, 1999.

COPIES FURNISHED:

Karel L. Baarslag, Esquire
Agency for Health Care Administration
2295 Victoria Avenue
Fort Myers, Florida 33901

Renee H. Gordon, Esquire
Gay and Gordon, P.A.
Post Office Box 265
St. Petersburg, Florida 33731

Sam Power, Agency Clerk
Agency for Health Care Administration
Fort Knox Building 3, Suite 3431
2727 Mahan Drive
Tallahassee, Florida 32308

Julie Gallagher, General Counsel
Agency for Health Care Administration
Fort Knox Building 3, Suite 3431
2727 Mahan Drive
Tallahassee, Florida 32308

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.