

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH)
CARE ADMINISTRATION,)
)
Petitioner,)
)
vs.) Case No. 99-2748
)
SAN JUAN RETIREMENT)
HOME-UNLICENSED,)
)
Respondent.)
)
-----)
AGENCY FOR HEALTH)
CARE ADMINISTRATION,)
)
Petitioner,)
)
vs.) Case No. 99-2755
)
ELVIRA DEMDAM, d/b/a)
INGLESIDE RETIREMENT HOME,)
)
Respondent.)
-----)

RECOMMENDED ORDER

Upon due notice, this cause came on for a disputed-fact hearing on October 21, 1999, in Jacksonville, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Elvira Demdam, Administrator
Ingleside Retirement Home
732 Camp Milton Lane
Jacksonville, Florida 32220

STATEMENT OF THE ISSUES

1. In Case No. 99-2748, should Elvira Demdam, d/b/a San Juan Retirement Home, be administratively fined for operating an unlicensed facility, and if so, in what amount?

2. In Case No. 99-2755, should Elvira Demdam, d/b/a Ingleside Retirement Home, be administratively fined for exceeding the home's licensed capacity, and if so, in what amount?

PRELIMINARY STATEMENT

Respondent, Elvira Demdam, was notified by Petitioner, Agency for Health Care Administration (AHCA), in an Administrative Complaint dated May 26, 1999, of its intent to impose an administrative fine in the amount of \$1000.00 against Respondent, the licensee of an Assisted Living Facility (ALF), Ingleside Retirement Home, located at 732 Camp Milton Lane, Jacksonville, Florida, because Respondent exceeded its maximum licensed capacity of 18 by one resident. (DOAH Case No. 99-2755)

Respondent was also notified by the Agency in an Administrative Complaint dated May 26, 1999, of its intention to impose an administrative fine in the amount of \$1000.00 against her for operating an unlicensed ALF, San Juan Retirement Home, a facility located at 6561 San Juan Avenue, Jacksonville, Florida. (DOAH Case No. 99-2748)

Respondent requested a disputed-fact hearing in both cases, which were referred to the Division of Administrative Hearings on or about June 25, 1999. The two cases were consolidated.

At the disputed-fact hearing, Petitioner presented the oral testimony of Robert Dickson and Gloria Wolfe and had seven exhibits admitted in evidence with regard to Case No. 99-2748, and eleven exhibits admitted with regard to Case No. 99-2755. Respondent testified and had six exhibits admitted in evidence. Several of Respondent's exhibits were sub-labeled "A", "B" and "C" for clarity.

Each party timely filed Proposed Recommended Orders, which have been considered. However, the Transcript was not filed until December 13, 1999, after both proposals. It has been considered, also.

FINDINGS OF FACT

1. AHCA is the state agency responsible for licensing and regulation of ALFs in Florida.

2. Respondent, Elvira Demdam, operates both Ingleside Retirement Home and San Juan Retirement Home in Jacksonville, Florida.

3. Gloria Wolfe is employed by AHCA to inspect ALFs for compliance with state and federal regulations for such facilities.

4. Elvira Demdam is the licensee for Ingleside Retirement Home. The effective date of the license for Ingleside was October 27, 1997. Its expiration date was October 26, 1999.

5. On April 26, 1999, Ms. Wolfe surveyed a facility doing business as San Juan Retirement Home due to a complaint that San Juan was operating as an unlicensed ALF.

6. During Ms. Wolfe's inspection, San Juan Retirement Home had four residents, all of whom were being provided personal services by the home, including assistance with meals, administration of medications, and assistance with other essential activities of daily living. Therefore, the San Juan facility was being operated as an ALF on April 26, 1999.

7. In a letter dated April 27, 1999, AHCA imposed a moratorium on admissions, effective April 26, 1999, on Ingleside Retirement Home, because Ms. Demdam had an interest in Ingleside Retirement Home and an interest in San Juan Retirement Home, which was operating without a license. The moratorium for Ingleside was to remain in force until the unlicensed facility (San Juan) ceased operation, and no residents could be readmitted without approval of AHCA.

8. On April 27, 1999, Ms. Wolfe's superior, Mr. Robert Dickson, recommended a \$1,000.00 sanction, based on Ms. Wolfe's report and because he believed that previous sanctions had been recommended against the Ingleside Retirement Home within the licensure period for the same type of deficiency. However, at

hearing, he did not specify any previous sanctions against Ingleside, similar or otherwise.

9. Elvira Demdam is the licensed administrator of Ingleside Retirement Home and should have known of the legal requirement that San Juan Retirement Home be licensed.

10. Indeed, by her own admission, Ms. Demdam had been a nursing home administrator for four years, knew of the licensure requirement, and had been attempting to license the San Juan facility since at least 60 days before the property was transferred to her. San Juan was licensed to another person at the time Ms. Demdam took it over. That prior license had expired in December 1998, and Ms. Demdam did not get San Juan Retirement Home licensed in her name until July 1999.

11. Ms. Demdam's exhibits support her testimony that much of her license application paperwork for San Juan Retirement Home was lost in the mail or within AHCA and that ACHA repeatedly required that she re-submit the same documents. However, she did not establish that the Agency failed to grant or deny her application within 90 days of submission of all necessary application items. The fact remains that on April 26, 1999, Ms. Demdam was operating San Juan Retirement Home without a valid ALF license.

12. Although Ms. Demdam asserted that one or more of the San Juan residents were non-blood relatives who had lived with her as family members since 1995, she offered no corroborative

evidence on this issue, and this assertion is not found to be credible.

13. Ms. Wolfe also participated in a May 4, 1999, monitoring visit and survey of Ingleside Retirement Home. At that time, she found Ingleside to be operating in excess of its licensed capacity. Ingleside Retirement Home is licensed for 18 residents, but in fact, had 19 residents on that date.

14. Ms. Wolfe personally reviewed residents, room by room, and made a census of Ingleside Retirement Home on May 4, 1999. Her census shows that a nineteenth resident, S.W., had been admitted to Ingleside in March 1999. Ms. Wolfe's investigation revealed that this resident was not noted in Ingleside's admissions/discharge log. Despite arguments that this deficiency constituted a Class III violation, an A-004 "not classified" deficiency was actually issued. (See ACHA Exhibit 4, page 3)

15. Ms. Demdam's explanation for the extra resident in Ingleside Retirement Home was that she had taken in S.W. at the request of a case worker for the Department of Children and Family Services (DCF) as an emergency placement on a weekend for a projected stay of only two to four weeks but that due to unforeseen circumstances, DCF had not removed S.W. timely. It is unclear from this record whether the patient, S.W., put the census of Ingleside over 18 patients in March, the time that she was first taken in. It is also unclear exactly how long S.W. caused Ingleside's census to exceed the 18 patients provided for

on its license, but as of May 1999, Ms. Demdam was providing care for S.W. and another Ingleside resident, J.J., without pay.

16. Mr. Dickson testified that he recommended a \$1000.00 fine as a sanction for having the one extra resident in Ingleside Retirement Home on May 4, 1999, because of prior sanctions recommended within the licensure period for the same type of deficiency. However, the only similar deficiency or sanction he noted during his testimony was the Ingleside moratorium which had been based upon the lack of licensure of the San Juan facility.

17. By a letter dated May 7, 1999, AHCA notified the Respondent of the findings supporting the imposition of a moratorium at Ingleside.

18. Ms. Demdam testified credibly that she moved S.W. out of Ingleside Retirement Home as soon as she was notified and that she cleared-out the four residents of San Juan Retirement Home as soon as possible.

19. Mr. Dickson views both ALF citations very seriously because operating an ALF without a license can be prosecuted by the State Attorney as a third-degree felony (see Section 400.408(1)(b)-(c), Florida Statutes, (Supp. 1998) and because he views Ms. Demdam's long practice and licensure in the ALF field to demonstrate her knowing and willful disregard of the law.

CONCLUSIONS OF LAW

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

21. Despite citations to other years' statutes provided among the exhibits admitted without objection and provided within Petitioner's Proposed Recommended Order, the undersigned has determined that the 1998 Supplement to Florida Statutes 1997, applies to the inspection dates herein of April 26, 1999, and May 4, 1999.

22. Section 400.407(1), Florida Statutes (Supp. 1998) provides that a license issued by AHCA is required to operate an ALF in Florida.

23. Section 400.408 (1)(a), Florida Statutes (Supp. 1998), renders it unlawful to own, operate, or maintain an ALF without a license.

24. Section 400.408, Florida Statutes (Supp. 1998), further provides in pertinent part:

(1)(f) When a licensee has an interest in more than one assisted living facility, and fails to license any one of those facilities, the agency may impose a moratorium on any or all of the licensed facilities until such time as the unlicensed facility applies for licensure or ceases operation.

25. Section 400.414, Florida Statutes (Supp. 1998) provides in pertinent part:

(1) The agency may deny, revoke, or suspend any license issued under this part, or impose

an administrative fine in the manner provided in Chapter 120, for any of the following actions by an assisted living facility, any person subject to level 2 background screening under s. 400.4174, or any facility employee:

(m) Knowingly operating any unlicensed facility or providing without a license any service that must be licensed under this chapter.

26. Rule 58A-5.033(3)(a), Florida Administrative Code, provides for fines of \$500-\$5,000 for operation of an unlicensed ALF.

27. The violation of operating an unlicensed facility at San Juan Retirement Home has been proven by clear and convincing evidence, and the \$1,000.00 fine sought by the Agency is appropriate.

28. Section 400.419(1)(a)-(d), Florida Statutes (Supp. 1998), classifies the gravity of violations of ALFs. Subsections (2) and (3) provide as follows:

(2) The agency may set and levy a fine not to exceed \$1,000 for each violation which cannot be classified according to subsection.

(3) In determining if a penalty is to be imposed and in fixing the amount of the fine, the agency shall consider the following factors:

(a) The gravity of the violation, including the probability that death or serious physical or emotional harm to a resident will result or has resulted, the severity of the action or potential harm, and the extent to which the provisions of the applicable laws or rules were violated.

(b) Actions taken by the owner or administrator to correct violations.

(c) Any previous violations.

(d) The financial benefit to the facility of committing or continuing the violation.

(e) The licensed capacity of the facility.

29. Since the Agency assessed the extra resident of Ingleside Retirement Home, S.W., as an "unclassified" violation, Section 400.419(2), Florida Statutes (Supp. 1998), applies.

30. Violation of the maximum-licensed capacity at Ingleside Retirement Home has been proven by clear and convincing evidence. However, the fine sought by the Agency is excessive under the circumstances, especially since (1) no harm to any resident was proven, (2) Respondent was not profiting from the situation with S.W., (3) Respondent was attempting to license the San Juan facility, (4) the length of time the Ingleside facility was in violation was not established, and (5) no prior similar sanctions were clearly proven. The proposed sanction of \$1000 should not be imposed. A reasonable fine under all the circumstances at Ingleside is \$500.00.

RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, it is RECOMMENDED:

1. That the Agency for Health Care Administration enter a final order finding Respondent guilty of operating an unlicensed

facility and imposing an administrative fine in the amount of \$1,000 in DOAH Case No. 99-2748; and

2. That the Agency for Health Care Administration enter a final order finding Respondent guilty of exceeding her licensed capacity at Ingleside Retirement Home, and imposing an administrative fine in the amount of \$500.00 in DOAH Case No. 99-2755.

DONE AND ENTERED this 7th day of January, 2000, in Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of January, 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.