

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE)
ADMINISTRATION,)
)
Petitioner,)
)
vs.) Case No. 99-4349
)
GENE A. GRIER, d/b/a EL-AMINS)
SHELTER & CARE CENTER,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, this matter was heard on April 27, 2000, in Jacksonville, Florida, before Donald R. Alexander, the assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Michael O. Mathis, Esquire
Agency for Health Care Administration
Building 3, Suite 3431
2727 Mahan Drive
Tallahassee, Florida 32308-5803

For Respondent: Gene A. Grier, pro se
El-Amins Shelter & Care Center
2035 Baldwin Street
Jacksonville, Florida 32209

STATEMENT OF THE ISSUE

The issue is whether Respondent should have a civil penalty in the amount of \$1,500.00 imposed for failing to timely correct five violations of administrative regulations, as alleged in the

Administrative Complaint filed by Petitioner on September 2, 1999.

PRELIMINARY STATEMENT

This matter began on September 2, 1999, when Petitioner, Agency for Health Care Administration, issued an Administrative Complaint charging that Respondent, Gene A. Grier, doing business as El-Amins Shelter & Care Center, a licensed assisted living facility, had failed to timely correct five violations of administrative rules discovered during the course of two inspections by Petitioner in June and August 1999. Because of these omissions, Petitioner intends to impose upon Respondent a civil penalty in the amount of \$1,500.00.

Respondent denied the allegations and requested a formal hearing under Section 120.569, Florida Statutes, to contest the charges. The matter was referred by Petitioner to the Division of Administrative Hearings on October 13, 1999, with a request that an Administrative Law Judge be assigned to conduct a formal hearing. By Notice of Hearing dated October 28, 1999, a final hearing was scheduled on December 20, 1999, in Jacksonville, Florida. At the request of Petitioner, the matter was rescheduled to April 27, 2000, at the same location.

At the final hearing, Petitioner presented the testimony of Robert A. Cunningham, a health facility evaluator II. Also, it offered Petitioner's Exhibits 1-8. All exhibits were received in evidence. Respondent testified in his own behalf and offered

Respondent's Exhibits 1, 2, 10, 13, 13A, 13B, 18, and 20-22, which were received in evidence.

The Transcript of the hearing was filed on May 12, 2000. The exhibits were retained by the court reporter pending the preparation of the Transcript; they were then forwarded to the agency. After numerous requests, the agency eventually filed the exhibits with the undersigned on June 6, 2000. Proposed Findings of Fact and Conclusions of Law were filed by Petitioner and Respondent on May 18 and June 5, 2000, respectively, and they have been considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

Based upon all of the evidence, the following findings of fact are determined:

1. When the events herein occurred, Respondent, Gene A. Grier (Respondent), was licensed to operate an assisted living facility (ALF) under the name of El-Amins Shelter & Care Center at 2035 Baldwin Street, Jacksonville, Florida. As an ALF, Respondent is subject to the regulatory jurisdiction of Petitioner, Agency for Health Care Administration (AHCA). Although the facility was licensed to handle up to 11 residents, Respondent had only 5 or 6 residents when the events occurred.
2. When it receives a complaint from a third party about a licensed facility, AHCA has the regulatory responsibility of conducting an inspection to ensure that the facility is complying

with certain standards embodied in Chapter 58A-5, Florida Administrative Code. If standards are not being met, depending on their nature and severity, the deficiencies are classified as Class I, II, and III violations, with Class III being the least serious violation. After the deficiencies are noted in a Summary of Deficiencies, the facility is given a time certain in which to correct those violations. If no correction is made, AHCA normally imposes a civil penalty upon the erring facility.

3. Respondent is charged with having failed to timely correct five Class III violations. That class of deficiency is one which the agency determines to have an indirect or potential relationship to the health, safety, or security of the nursing home residents.

4. On an undisclosed date, the Jacksonville office of the Human Rights Advocacy Committee (Committee), an independent organization which monitors residents in ALFs, filed a complaint against Respondent and certain other ALFs in the Jacksonville area alleging that the facilities were not in compliance with AHCA regulations in various respects. In response to that complaint, on June 25, 1999, an AHCA health facilities evaluator, Robert A. Cunningham (Cunningham), conducted an unannounced inspection of Respondent's facility.

5. During his inspection, Cunningham noted, among other things, that Respondent "did not ensure that there [was] at least one staff member on duty at all times who [had] certification in

an approved first-aid and CPR course"; that Respondent's menus were not "reviewed, signed, and dated by a Registered Dietician"; that Respondent's menus "were not dated and planned at least one week in advance for regular and therapeutic diets"; that the facility's "dry and canned foods were not dated"; and that "the interior and exterior of the buildings and grounds were not kept reasonably attractive" in various respects, including a "broken mirror in the hall and peeling ceilings." Each of these deficiencies contravened an agency rule and constituted a Class III violation.

6. After the inspection was completed, Respondent was given a copy of the Summary of Deficiencies and advised that the deficiencies must be corrected by July 25, 1999.

7. On August 11, 1999, or approximately six weeks after the first inspection, Cunningham conducted a second inspection of Respondent's facility. While some of the violations had been remediated, Cunningham noted that none of the deficiencies cited in paragraph 5 had been corrected. At hearing, Respondent admitted that except for the violations pertaining to dated canned goods and a broken mirror, to which he takes "strong exception," the remaining violations were uncorrected. Therefore, the allegations pertaining to the remaining violations have been established. As to the two violations which Respondent has denied, the more persuasive evidence supports a finding that they were also uncorrected as of August 11, 1999.

8. Even so, Respondent contended that he was only given one follow-up inspection, while two other ALFs, one in Jacksonville and the other in Hilliard, were given at least two follow-up inspections in which to correct violations discovered during their initial inspection. According to Respondent, he "got the treatment" from the inspector, while the others did not, and his facility was labeled a "hell hole." At the same time, Respondent suggested that if he had been given additional time like the others, he would have eventually corrected the deficiencies.

9. While it is true that two other facilities were given more than one follow-up visit, the number of follow-up visits is a discretionary matter on the part of the evaluator, depending on the nature and severity of the violations and other circumstances. Here, there was no abuse of discretion shown on the part of the inspector, and Respondent presented no compelling reason why he was unable to correct the violations within the six-week period between the first and second inspections, or why he needed more than a normal period of time to correct a particular violation. It is noteworthy that both of the facilities which were given two follow-up inspections were also fined.

10. Respondent further contended that the Committee which filed the complaint was biased against him and unjustly singled him out. Even if this is true, however, AHCA is legally required to investigate all complaints, even if anonymous and no matter

what their underlying motivation, to determine if the allegations are true. This is because ALFs are entrusted with the care of elderly persons and require special oversight by AHCA. In this case, the evidence shows that Respondent was not singled out, and that the Committee triggered inspections of several other area ALFs.

11. While one of the two deficiencies alleged by the Committee to be present in Respondent's facility was later determined to be unfounded, one was substantiated, and during the inspection, the evaluator found a number of other violations at the facility. The fact that the Committee also filed complaints against Respondent with the Department of Children and Family Services, City Code Enforcement Board, and County Health Department regarding alleged violations is of no concern here.

12. At hearing, Respondent also contended that he was denied due process because the Committee failed to honor its own procedural rules (regarding notice and the use of a check list) and it has no expertise in operating an ALF. However, AHCA (and not the Committee) is the agency which has regulatory jurisdiction over Respondent's facility, and there is no evidence that AHCA's inspections failed to comport with the law. Therefore, the concerns about the Committee have no relevance here.

13. Respondent further contended that the Committee's complaint, and the inspector's evaluation, were based on a 1999

version of administrative rules, even though the rules did not become effective until after the recommendation for sanctions was made. The evidence shows, however, that the evaluator used the then-effective 1995 version of rules, and the later-adopted rules were never considered nor used during the inspection.

14. According to Respondent, he has been licensed for 27 years, first by the Department of Health and Rehabilitative Services, and then AHCA. This was not contradicted. There is no evidence that he has ever violated any rules prior to this proceeding. Finally, there is no evidence that the residents were placed in jeopardy by the violations not being corrected by August 11, 1999. These circumstances should be taken into account when determining the amount of a civil penalty to be imposed upon Respondent.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties hereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes.

16. Because Respondent is subject to the imposition of an administrative fine, Petitioner bears the burden of proving by clear and convincing evidence that the allegations in the Administrative Complaint are true. See, e.g., Osborne Stern & Co. v. Dep't of Banking and Finance, 670 So. 2d 932, 935 (Fla. 1996).

17. By clear and convincing evidence, Petitioner has established that Respondent violated Rules 58A-5.019(5)(f), 58A-5.020(1)(e), (h), and (i), and 58A-5.022(1)(b), Florida Administrative Code, as charged in the Administrative Complaint. Therefore, Respondent is guilty of five Class III violations.

18. In reaching this conclusion, the undersigned has considered Respondent's arguments that his facility was unfairly treated in relation to two other facilities, that the Committee was biased against him, and that he was given insufficient time in which to correct the violations. For the reasons set forth in the Findings of Fact, each of these contentions is found to be without merit.

19. In its Proposed Recommended Order, Petitioner seeks to impose a \$300.00 penalty for each Class III violation, or a total of \$1,500.00. The source of authority for those penalties is found in Section 400.419(3)(c), Florida Statutes (1997). This provision authorizes AHCA to impose "a civil penalty of not less than \$100 nor more than \$500 for each [uncorrected Class III] violation." Because the statute contains a range of penalties, this implies that the amount of the fine to be imposed depends on the facts of each case and any mitigating or aggravating circumstances that may be present.

20. Given the mitigating circumstances outlined in paragraph 14, an administrative fine in the amount of \$150.00 for

each Class III violation is appropriate, or a total fine of \$750.00.

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 determining that the charges in the Administrative Complaint have been sustained, and that Respondent should have a \$750.00 civil penalty imposed.

DONE AND ENTERED this 12th day of June, 2000, in Tallahassee, Leon County, Florida.

DONALD R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of June, 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.