

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE	)	
ADMINISTRATION,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case Nos. 00-1963
	)	00-1964
CASO, INC., d/b/a PARADISE MANOR,	)	00-1965
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Upon due notice, this cause came on for formal administrative hearing on November 28, 2000, at 210 North Palmetto Avenue, Daytona Beach, Florida, before the Honorable Stephen F. Dean, duly-assigned Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

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

For Respondent: Christal L. Caso, Administrator  
Paradise Manor  
2949 Carriage Drive  
Daytona Beach, Florida 32119

STATEMENT OF ISSUES

This order addresses three cases consolidated for hearing. The first case chronologically is DOAH Case No. 00-

1964, which arises from the pre-licensure inspection initiated as a result of Respondent's application for a certification to provide limited nursing services, and seeks to levy fines for repeated violations originally noted in the biennial inspection of September 10, 1999. The second case chronologically is DOAH Case No. 00-1963, which arises from the re-inspection of the pre-licensure inspection performed on February 21, 2000, and relates to fines for repeated violations of the rules. The third case chronologically is DOAH Case No. 00-1965, which is related to issuance of the Department's denial of certification to provided limited nursing services; however, it is based upon the same factual predicate as Case No. 00-1963.

The issues in each of the cases are as follows:

Case No. 00-1964: Should fines be levied against the Respondent as the result of an inspection which (1) was conducted without notice contrary to the letter concerning the inspection from the Department, and (2) in the absence of specific proof that the specific violation was repeated.

Case No. 00-1963: Should fines be levied against the Respondent for failure to correct violations identified in an inspection that was not noticed contrary to the information provided to the Respondent, and when the Respondent was not rendering any services to which the violation applied.

Case No. 00-1965: Should Respondent be denied a certification to provide limited nursing services based upon the violations discovered in the inspections of January 18, 2000 and February 21, 2000.

PRELIMINARY STATEMENT

These cases arose when Respondent applied for a license or certification to its existing adult living facility (ALF) license to provide limited nursing services at its ALF. The first case chronologically, as mentioned above, related to an unannounced pre-licensing inspection. The second case chronologically related to the re-inspection conducted approximately a month later. The third case relates to denial of the application to provide limited nursing services. The Respondent requested a formal hearing in each of the cases. The Department forwarded the requests to the Division of Administrative Hearings, where they were consolidated for hearing. The cases were set for hearing on August 1, 2000, by notice dated June 7, 2000; however, that hearing was continued upon the motion of the Petitioner until September 27, 2000. Thereafter, that hearing was continued upon the motion of the Respondent until November 28, 2000, when it was heard.

At formal hearing, the Petitioner called Robert Cunningham, Eleanor McKinnon, and Richard Dickson to testify and introduced three bound volumes of exhibits each labeled

with the case number to which the exhibits related. Some of the individual exhibits in these volumes are duplicated, but were retained for ease of reference. The owner and operator of the facility, Christal L. Caso testified and introduced two exhibits, Respondent's Exhibits 1 and 7. A Transcript was filed of the formal hearing on December 20, 2000. Both parties submitted Proposed Findings that were read and considered.

To facilitate consideration of the three cases, this order will discuss the facts applicable generally to the inspections involved. Thereafter, the findings of fact and conclusions of law specific to Case No. 00-1964 will be presented, followed by the findings of facts and conclusions of law in Case Nos. 00-1963 and 00-1965.

#### FINDINGS OF FACT

##### General Facts

1. The Department is the agency charged with the inspection, regulation, and licensure of adult living facilities.
2. The Respondent is an adult living facility owned and operated by Christal L. Caso.
3. On November 11, 1999, Mr. Robert Cunningham conducted a biennial inspection of Respondent's adult living facility (ALF). He identified a number of deficiencies that were

written up in a detailed inspection report. Mr. Cunningham identified copies of his report which were a part of the Petitioner's Bound Exhibits in Case Nos. 00-1964 and 00-1963. A re-inspection was conducted in December of 1999, and all of the deficiencies noted had been corrected.

4. The Administrative Complaint in Case No. 00-1964 alleges that on January 18, 2000, certain deficiencies found during Mr. Cunningham's inspection on November 11, 1999, were repeated. His inspection report and its findings will be referenced and discussed in conjunction with the consideration of the report for January 18, 2000; however, there are no issues involved directly with Mr. Cunningham's inspection or his report in any of the three pending cases.

5. The Respondent applied for an additional certification to provide limited nursing services (LNS) at its facility.

6. This application was duly processed and the Respondent was notified by letter, dated January 13, 2000, from the Department's Tallahassee office that the facility must notify the Department within 21 days that it was ready for an operational survey (inspection), and that an announced inspection would be scheduled within several weeks.

7. On January 18, 2000, Ms. Eleanor McKinnon, an inspector with the Department, arrived unannounced at the

facility to conduct the pre-licensure inspection. Ms. Caso was not present at the facility at the time Ms. McKinnon arrived. When Ms. Caso arrived at the ALF, she advised Ms. McKinnon that she was not prepared and her inspection was inconsistent with the information Caso had received. Ms. McKinnon continued the inspection citing a policy that their inspections were unannounced.

8. The letter Ms. Caso received from the Department's Tallahassee office was termed, at hearing, inconsistent with agency procedure by personnel attached to the local office. It was clear Ms. Caso received and relied upon the information contained in the letter, and she had no reason to believe that it was not an accurate statement of how inspections would proceed.

9. Ms. McKinnon prepared a detailed inspection report that was identified as an exhibit in all of the bound volumes. She did not have a clear recollection of the specific findings at the time of the hearing.

10. The inspection reports identify specific areas of operations by alphanumeric designators termed "Tags." These tags relate to a specific area of concern in an inspection such as storage of drugs, medical records, or safety. The tags are listed in a separate column on the inspection reports, and specific violations will be identified and

discussed in this order by reference to specific tags as they were at hearing.

Licensure Inspection, January 18, 2000

Findings of Fact Specific to Case No. 00-1964

11. Although the Department's letter of January 13, 2000, said that the Respondent should notify the Department when it was ready for inspection, the Department has the right to inspect at any time for compliance with the rules.

12. Regarding Tag A401, the first violation alleged to have been repeated, the inspection report for November states that "Three of five residents did not have a Health Assessment on file." The January inspection report states, "Review of two resident records revealed that one of the two residents had no health assessment on their medical record."

13. Ms. Caso testified regarding individual records. These records she kept at her office at her house off the ALF's premises. She was willing to retrieve these records; however, the inspector maintained that they were required to be maintained on site.

14. Regarding the second alleged repeated violation, the November inspection report states, "Medications for Resident No. 3 which were discontinued in August were still in the centrally stored medicine closet." The January inspection report stated at Tag A612, "Tour of the medication room on the

day of the survey revealed that medications from residents who the administrator said had been gone for over two years were still in the medication closet." This is alleged in the Administrative Complaint to have violated Rule 58A-5.0182(6)(d), Florida Administrative Code. The Petitioner included in its exhibit a copy of the cited rule.

15. Regarding the third alleged repeated violation, the January report states that over-the-counter medication was maintained in the medicine storage area without the name of the individual for whom it was prescribed being on it. This was alleged to be a violation of Rule 58A-5.0182(6)(f), Florida Administrative Code.

16. A review of the current rules indicates that Rule 58A-5.0182(6)(d) and (f) do not address the substance of the alleged violation, and that the last amendment to the rule occurred in October 17, 1999. This provision had been repealed before the first inspection.

Conclusions of Law for Case No. 00-1964

17. The Division of Administrative Hearings has jurisdiction over the subject matter and parties in this and the other consolidated cases.

18. This case seeks to fine the Respondent for violations allegedly violated in the original inspection of November 11, 1999, and repeated on the inspection of January



18, 2000. The Department can conduct a compliance inspection at any time. However, to consider such an inspection a pre-licensing inspection is contrary to the letter regarding the inspection procedures sent to the Respondent by the Department's Tallahassee office. I conclude that, although findings may be considered for general enforcement purposes and fines potentially levied for violations, they cannot be considered a pre-licensing inspection. The practical effect of this is that a general violation applicable to an ALF can be cited and considered; however, fines cannot be levied for those matters related to LNS because the Respondent was not licensed or engaged in rendering LNS. In addition, the Respondent is not subject for fines for violation of those portions of the rules applicable only to providing LNS because the Respondent was entitled to request an announced inspection pursuant to the Department's letter.

19. The Administrative Complaint of Case No. 00-1964 cites Rule 58A-5.0191(3)(a), Florida Administrative Code, as having been violated presumably a reference to Tag A401 relating to admission standards. Specifically, the cited fault related to health assessments. Rule 58A-5.0191(2)(a), Florida Administrative Code, provides as follows:

- (2) HEALTH ASSESSMENT.
- (a) Within 60 days prior to the residents admission to a facility but no later than 30 days after admission, the individual

shall be examined by a physician or advanced registered nurse practitioner who shall provide the administrator with a medical examination report, or a copy of the report, which addresses the following:

1. The physical and mental status of the resident, including the identification of any health-related problems and functional limitations;
2. An evaluation of whether the individual will require supervision or assistance with the activities of daily living;
3. Any nursing or therapy services required by the individual;
4. Any special diet required by the individual;
5. A list of current medications prescribed, and whether the individual will require any assistance with the administration of medication;
6. Whether the individual has signs or symptoms of a communicable disease which is likely to be transmitted to other residents or staff;
7. A statement that in the opinion of the examining physician or ARNP, on the day the examination is conducted, the individual's needs can be met in an assisted living facility; and
8. The date of the examination, and the name, signature, address, phone number, and license number of the examining physician or ARNP. The medical examination may be conducted by a currently licensed physician or ARNP from another state.

20. The Administrator testified that health assessments were maintained for the residents, but were maintained at her office in her home. The inspector took the position that these assessments had to be maintained on-site; however, there is nothing in the rule upon which to base that conclusion. The rule provides that the physician or advanced registered

nurse practitioner will provide the administrator with a copy of the assessment. The inspector did not permit the administrator time to retrieve the assessment for her inspection. In the absence of an inspection of the records, it cannot be determined whether the 30 days' grace period was applicable.

21. I conclude that a health assessment does not have to be kept on site pursuant to Rule 58A-5.0181(2)(b), Florida Administrative Code. The Inspector should have given the Respondent time to retrieve the records. Then a determination could have been made whether the appropriate information was contained in the records. There is no violation and no basis for levying a fine.

22. The alleged violations of Rule 58-5.182(6)(d) and (f), Florida Administrative Code, cannot be a basis for fines or denial of the license because the rule was repealed before the biennial inspection, the pre-licensure inspection, or the re-inspection.

Findings of Fact Case Nos. 00-1963 and 00-1965

23. Ms. McKinnon conducted a re-inspection of the ALF on February 21, 2000. This inspection was the basis for levying fines for alleged repeated violations, and for denying licensure. Therefore, these factual allegations will be discussed together.

24. Ms. McKinnon's report of inspection is contained in the bound volumes pertaining to Case Nos. 00-1963 and 00-1965.

25. The first tag number is N201, and the Rule alleged to have been violated is Rule 58A-5.031(2)(d), Florida Administrative Code. In the inspection report of January 18, 2000, the inspector made the following observation: "Review of the facility records and interview with the administrator revealed that no log had been prepared for the admission residents to receive limited nursing services."

26. At the time of the inspection, the facility was not licensed to provide limited nursing services. Such services were not being rendered.

27. This log is nothing more than a piece of paper upon which a chronological record of services is kept. This record is not required to be kept until services are rendered under the provisions of the rule.

28. The next tag number of the next violation is N205 on the inspection report of January 18, 2000. Tag N205 alleges violation of Rule 58A-5.0131(2)(ff), Florida administrative Code, because, "Review of the facility records and interview with the administrator revealed that there was no documented information on what services would be provided under limited nursing or who would provide the services."

29. The next tag at issue is N302. It cites a violation of Rule 58A-5.031(2)(a), Florida Administrative Code, and states,

Interview with the administrator and review of facility documentation revealed that no provision had been made to have currently licensed nurse in the facility to perform limited nursing services, nor was there a contract with a RN or MD to supervise the services provided.

Again, the rule cited in the complaint is wrong. Rule 58A-5.031(2)(d), provides that the facility must have a contract for nursing services. It was explained at hearing that there was no contract present for a nurse to supervise Ms. Caso, and no contract with Ms. Caso during the first inspection.

30. Ms. Caso testified regarding this. She did not originally believe she was required to have a contract with herself, and, at the time of the second inspection, had a contract drawn with the nurse who was going to be the supervisor; however, the woman was seriously ill and had not been able to sign the contract. At the time of this inspection, the facility was not providing services and could not legally do so until licensed.

31. Tag A401 of the February report cites a violation of Rule 58A-5.0181(3)(a)1, Florida Administrative Code, and states, "Resident No. 5 was admitted on January 31, 1999, and there was no dated health assessment on his record."

Conclusions of Law for Case Numbers 00-1963 and 00-1965

32. Again, the Division of Administrative Hearings has jurisdiction over the parties and the subject matter of the cases. The various tags will be discussed in reverse order.

33. Regarding Tag A401 of the February report citing Respondent for failing to have a dated health assessment for a resident, the proper citation of the rule alleged to have been violated is 58A-5.0181(2), Florida Administrative Code. As stated above, subparagraph (a) of paragraph (2) provides that the physician or advanced registered nurse practitioner shall provide the administrator with a medical examination report no later than 30 days after admission. In this instance, the reports were on-site and were inspected. However, this is not a repeat violation because there is no rule that requires these reports to be maintained on-site (the previously cited violation), and the records were not inspected on the previous visit. Therefore, this was the first time this violation was discovered.

34. Regarding the violation regarding the absence of a signed contract by the supervising nurse (Tag 302), the facility was not licensed to provide LNS, and there were no services being rendered at the time. Therefore, there is no basis for a fine. In so far as this violation relates to the

denial of licensure, Rule 58A-5.031(2), Florida Administrative Code, provides:

(b) In accordance with rule 58A-5.019, the facility must employ sufficient and qualified staff to meet the needs of residents requiring limited nursing services based on the number of such residents and the type of nursing service to be provided.

\* \* \*

(d) Facilities licensed to provide limited nursing services must employ or contract with a nurse(s) who shall be available to provide such services as needed by residents. The facility shall maintain documentation of the qualifications of nurses providing limited nursing services in the facility's personnel files.

35. While the absence of the contract is a reason not to issue a license, under the circumstances in this case, it would have been more appropriate for the inspectors to note the discrepancy, and permit the Respondent to send them a copy of the contract when it was signed. It is not a basis for levying a fine.

36. Regarding the alleged violation for failing to maintain a policy for how services will be rendered (Tag N205), first, there is no Rule 58A-5.0131(2)(ff), Florida Administrative Code, as cited by the Agency. Rule 58A-5.0131, Florida Administrative Code, contains various definitions, none of which relate to the alleged violation cited in the inspection report. A review of Rule 58A-5.031, Florida

Administrative Code, which deals with the providing of limited nursing services, starts off by stating that a facility must be licensed before it can provide these services. From the description of the violation cited and the testimony of the witnesses, this apparently relates to the absence of a policy setting forth what services will be provided. There is no requirement in Rule 58A-5.031, Florida Administrative Code, for such a policy. The only provision of this rule remotely related to a requirement for some policy and procedure provides:

(e) The facility must ensure that nursing services are conducted and supervised in accordance with Chapter 464, F.S., and the prevailing standard of practice in the nursing community.

The rule does not mandate how the facility will ensure this. In sum, there is no rule that requires such a policy be on site.

37. Regarding the alleged violation of Rule 58A-5.031(2)(d), Florida Administrative Code, by failing to maintain a log of nursing services rendered (Tag N201), there was no requirement to maintain the log in the absence of performing the services.

#### RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is



RECOMMENDED:

That the Department dismiss the complaints in Case Nos. 00-1963 and 00-1964.

That the Department not license the Respondent with regard to Case No. 00-1965, but permit the Respondent to re-file for the subject license without jeopardy due to any of the inspections which have been the subject of Case Nos. 00-1963 and 00-1964.

DONE AND ENTERED this 9th day of February, 2001, in Tallahassee, Leon County, Florida.

---

STEPHEN F. DEAN  
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) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 9th day of February, 2001.

COPIES FURNISHED:

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

Christal L. Caso, Administrator  
Paradise Manor  
2949 Carriage Drive  
Daytona Beach, Florida 32119

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

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

Ruben J. King-Shaw, Jr., Director  
Agency for Health Care Administration  
2727 Mahan Drive  
Building 3, Suite 3116  
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.