

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE)
ADMINISTRATION,)
)
Petitioner,)
)
vs.) Case No. 00-3836
)
RODRIGUEZ LOVING CARE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on December 21, 2000, by video teleconference at locations in Fort Lauderdale and Tallahassee, Florida, before Claude B. Arrington, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Alba M. Rodriguez, Esquire
Agency for Health Care Administration
8355 Northwest 53rd Street, 1st Floor
Miami, Florida 33166

For Respondent: Gladys Rodriguez, Owner
Rodriguez Loving Care
4008 Southwest 23rd Street
Hollywood, Florida 33023

STATEMENT OF THE ISSUE

Whether Respondent, a licensed assisted living facility (ALF), committed the offenses alleged in the Administrative Complaint and, if so, the penalties that should be imposed.

PRELIMINARY STATEMENT

Gladys Rodriguez (Ms. Rodriguez) is an owner and administrator of Respondent ALF. On August 24, 2000, Petitioner filed an Administrative Complaint alleging certain facts based on a survey conducted April 11, 2000, and on a follow-up survey conducted June 27, 2000. Based on those factual allegations, Petitioner alleged that Respondent failed to timely correct certain deficiencies and proposed to assess an administrative fine against Respondent in the amount of \$1,000 for each violation. Respondent timely requested a formal administrative hearing, the matter was referred to the Division of Administrative Hearings, and this proceeding followed.

At the final hearing, Petitioner presented the testimony of Ms. Rodriguez, Maryanne Clancey, Leonard Meerow, and George Tokesky. Ms. Clancey and Mr. Meerow are the employees of Petitioner who conducted the two surveys at issue in this proceeding. Mr. Tokesky, an employee of the Department of Elder Affairs, is responsible for the administration of the core training program for ALF administrators in Broward County,

Florida. Petitioner offered four exhibits, each of which was accepted into evidence.

Ms. Rodriguez testified on behalf of Respondent, but presented no other testimony and no exhibits.

At the final hearing, the undersigned granted Petitioner's motion to amend the Administrative Complaint for the following purposes: to correct a typographical error, to delete an erroneous Rule citation, and to correct a Rule citation that had been renumbered. 1/

A Transcript of the proceedings was filed on January 29, 2001. Each party filed a Proposed Recommended Order, which has been duly considered by the undersigned in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is a licensing and regulatory agency of the State of Florida charged with the responsibility and duty to regulate ALFs licensed pursuant to Chapter 400, Florida Statutes.

2. At all times pertinent to this proceeding Ms. Rodriguez was an owner and administrator of Respondent, an ALF licensed by Petitioner. Respondent operates in Broward County, Florida.

3. At all times pertinent to this proceeding, ALF administrators were required to receive core training administered by the Florida Department of Elder Affairs. At the

time she took the core training, Ms. Rodriguez was not required to pass a final examination. Section 400.452(2), Florida Statutes, provides, in part, that effective July 1, 1997, all persons taking the core training must pass a competency examination to be administered by the Department of Elderly Affairs.

4. Effective April 20, 1998, Rule 58A-5.0191(1)(e), Florida Administrative Code, provides that any ALF administrator who did not attend mandatory periodic training updates must retake core training and must pass the competency examination.

5. In 1998 and 1999, Ms. Rodriguez failed to attend mandatory training updates.

6. On April 11, 2000, Maryanne Clancey conducted a survey of Respondent's facility. Ms. Clancey cited two Class III deficiencies that are pertinent to this proceeding. The first deficiency was Ms. Rodriguez's failure to attend mandatory core training updates. That failure justified the first Class III deficiency cited by Ms. Clancey.

7. The second deficiency was the Respondent's failure to maintain an accurate up-to-date Medication Observation Record (MOR), which is required for each resident of an ALF. Ms. Clancey's determination that Respondent's MOR was inaccurate was based on the records for a resident of the ALF who will be referred to as Resident 1. Resident 1's record reflected that

he had received certain prescribed medications at 9:00 a.m. on the morning of April 11, 2000. There was a conflict in the evidence as to whether Resident 1 was available to take his medicine at 9:00 a.m. on April 11, 2000. Ms. Clancey testified that she had been told by staff that Resident 1 was in the hospital that morning. Ms. Rodriguez testified Resident 1 had gone to the hospital during the early morning hours on April 11, 2000, but that Resident 1 had returned from the hospital by 9:00 a.m. that day. There was no other evidence as to whether Resident 1 had or had not taken his prescribed medicine that day. Based on the conflict between equally credible testimony, it cannot be determined that Resident 1 was not at the facility at 9:00 a.m. on April 11, 2000, as alleged by Petitioner, and it cannot be concluded that Resident 1 did not take his or her prescribed medicine that day. The alleged Class III deficiency pertaining to medical records should not be sustained based on the allegation that Resident 1 could not have taken his prescribed medicine as reflected on the MOR.

8. The Class III deficiency pertaining to the medical records did not depend alone on the allegation that Resident 1 could not have taken his prescribed medicine on April 11, 2000. Ms. Clancey also observed that Resident 1's MOR for the month of March 2000 reflected that Resident 1 had received Cyprohepatadine three times a day for the entire month. There

was no indication that Resident 1 had been administered Prozac. Ms. Clancey determined from Resident 1's pharmacist that Resident 1's physician had discontinued Cyprohepatadine on March 28 and had ordered Prozac on March 15. Ms. Rodriguez admitted that Resident 1's medical records failed to reflect those changes. The inaccuracies in Resident 1's MOR justified the second Class III deficiency cited by Ms. Clancey.

9. Respondent was ordered to correct both Class III deficiencies by May 10, 2000.

10. George Tokesky is the ALF Program Manager for the Department of Elder Affairs in Broward County, Florida. Ms. Rodriguez contacted Mr. Tokesky after Ms. Clancey's visit to determine what she needed to do about the core training. Mr. Tokesky explained to her that she would have to retake the core training program and pass the competency examination.

11. Ms. Rodriguez took the core training program from June 6 to June 13, 2000, but she failed the competency examination. As of the final hearing, Ms. Rodriguez had not passed the competency examination.

12. On June 27, 2000, Leonard Meerow conducted a follow-up visit at Respondent's facility to determine whether the facility had corrected the Class III deficiencies that Ms. Clancey had cited.

13. The first Class III deficiency cited by Ms. Clancey pertaining to Ms. Rodriguez's core training had not been corrected.

14. Mr. Meerow observed continued Class III deficiencies pertaining to medical records during the follow-up visit. Specifically, MOR records for three residents reflected that each resident had been administered his or her hour of sleep medication. The entries had been made before 4:00 p.m. Ms. Rodriguez admitted that these entries were incorrect. The second Class III deficiency cited by Ms. Clancey pertaining to medical records had not been corrected.

CONCLUSIONS OF LAW

15. The Division of Administrative Hearings has jurisdiction of the parties to and the subject of this proceeding. Section 120.57(1), Florida Statutes.

16. Petitioner has the burden of proving by clear and convincing evidence the allegations against Respondent. See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112 (Fla. 1st DCA 1989); and Inquiry Concerning a Judge, 645 So. 2d 398 (Fla. 1994).

17. Section 400.419, Florida Statutes, authorizes Petitioner to impose administrative fines against an ALF if it

violates a statute or rule regulating its operation and provides, in pertinent part, as follows:

(1) Each violation of this part and adopted rules shall be classified according to the nature of the violation and the gravity of its probable effect on facility residents. The agency shall indicate the classification on the written notice of the violation as follows:

* * *

(c) Class "III" violations are those conditions or occurrences related to the operation and maintenance of a facility or to the personal care of residents which the agency determines indirectly or potentially threaten the physical or emotional health, safety, or security of facility residents, other than class I or class II violations. A class III violation is subject to an administrative fine of not less than \$100 and not exceeding \$1,000 for each violation. A citation for a class III violation shall specify the time within which the violation is required to be corrected. If a class III violation is corrected within the time specified, no fine may be imposed, unless it is a repeated offense.

* * *

(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. . . .

18. Section 400.452, Florida Statutes, provides, in pertinent part, the following core educational requirements and continuing education requirements for administrators of ALFs:

(1) The department shall provide, or cause to be provided, training and educational programs for the administrators and other assisted living facility staff to better enable them to appropriately respond to the needs of residents, to maintain resident care and facility standards, and to meet licensure requirements.

(2) The department shall also establish a core educational requirement to be used in these programs. Successful completion of the core educational requirement must include successful completion of a competency test. Programs must be provided by the department or by a provider approved by the department at least quarterly. The core educational requirement must cover at least the following topics:

(a) State law and rules relating to assisted living facilities.

(b) Resident rights and identifying and reporting abuse, neglect, and exploitation.

(c) Special needs of elderly persons, persons with mental illness, and persons with developmental disabilities and how to meet those needs.

(d) Nutrition and food service, including acceptable sanitation practices for preparing, storing, and serving food.

(e) Medication management, recordkeeping, and proper techniques for assisting residents with self-administered medication.

(f) Firesafety requirements, including fire evacuation drill procedures and other emergency procedures.

(g) Care of persons with Alzheimer's disease and related disorders.

(3) Such a program must be available at least quarterly in each planning and service area of the department. The competency test must be developed by the department in conjunction with the agency and providers. A new facility administrator must complete the core educational requirement including the competency test within 3 months after being employed as an administrator. Failure to complete a core educational requirement specified in this subsection is a violation of this part and subjects the violator to an administrative fine as prescribed in s. 400.419. Administrators licensed in accordance with chapter 468, part II, are exempt from this requirement. Other licensed professionals may be exempted, as determined by the department by rule.

(4) Administrators are required to participate in continuing education for a minimum of 12 contact hours every 2 years.

* * *

(9) The department shall adopt rules to establish training programs, standards and curriculum for training, staff training requirements, procedures for approving training programs, and training fees.

19. Rule 58A-5.0191, Florida Administrative Code, pertains, in part, as follows to core training for administrators of ALFs:

(1)(a) The assisted living facility core training program established by the department pursuant to s. 400.452, F.S., shall be a minimum of 26 hours plus a competency examination.

(b) Administrators and managers, must complete the assisted living facility core training program within 3 months from the date of becoming a facility administrator or manager. Administrators who attended core training prior to July 1, 1997, and managers who attended core training program prior to April 20, 1998, shall not be required to

take the competency test. Administrators licensed as nursing home administrators in accordance with Part II of Chapter 468, F.S., are exempt from this requirement.

(c) Administrators and managers shall participate in 12 hours of continuing education in topics related to assisted living every 2 years as provided under s. 400.452, F.S.

(d) Administrators and managers shall, in addition, attend update training for any portion of core training that has been revised as a result of new legislation, rule amendment, or updated materials. Update training received under this paragraph can count towards the 12 hours of continuing education required by s. 400.452, F.S., and this subsection.

(e) A newly hired administrator or manager who previously completed core training and has maintained update and continuing education requirements, shall not be required to retake core training. An administrator or manager who previously completed core training but has not maintained the continuing education requirements and attended update training will be considered a new administrator and must retake core training.

20. Petitioner established by clear and convincing evidence that Ms. Rodriguez, an owner and administrator of the Respondent ALF, was required by Rule 58A-5.0191(1)(e), Florida Administrative Code, to retake the core training program and to pass the competency examination due to her failure to attend mandatory training updates. Ms. Rodriguez continued to serve as an administrator of the Respondent ALF despite having failed to pass the competency test, which established that Respondent failed to timely correct a Class III deficiency.

21. Rule 58A-5.0185(5)(b), Florida Administrative Code, requires an ALF to maintain medical records, in pertinent part, as follows:

(b) For residents who receive assistance with self-administration or medication administration, the facility shall maintain a daily up-to-date, medication observation record (MOR) for each resident. A MOR must include the name of the resident and any known allergies the resident may have; the name of the resident's health care provider, the health care provider's telephone number; the name of each medication prescribed, its strength, and directions for use; and a chart for recording each time the medication is taken, any missed dosages, refusals to take medication as prescribed, or medication errors. The MOR must be immediately updated each time the medication is offered or administered.

22. Petitioner established by clear and convincing evidence that Respondent's failure to accurately maintain medical records is a Class III deficiency. Petitioner also established that Respondent failed to timely correct this Class III deficiency.

23. The failure of an ALF administrator to keep abreast of developments that may have a direct impact on the operation of the facility is properly viewed as being a serious violation that justifies the imposition of the maximum administrative fine permitted by statute.

24. Likewise, the failure of an ALF to maintain accurate, up-to-date medical records is viewed as a serious violation that

justifies the imposition of the maximum administrative fine permitted by statute.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner enter a final order finding Respondent failed to timely correct two Class III deficiencies. Petitioner should assess an administrative fine against Respondent in the amount of \$1,000 per violation.

DONE AND ENTERED this 21st day of February, 2001, in Tallahassee, Leon County, Florida.

CLAUDE B. ARRINGTON
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 21st day of February, 2001.

ENDNOTE

^{1/} The Administrative Complaint was amended to reflect that there were two class III deficiencies, not three; the citation to Rule 58A-5.0191(2)(c), Florida Administrative Code, was stricken; and the citation to Rule 58A-5.0182(6)(c), Florida Administrative Code, was changed to Rule 58A-5.0185(5)(b), Florida Administrative Code, due to its having been renumbered.

COPIES FURNISHED:

Alba M. Rodriguez, Esquire
Agency for Health Care Administration
8355 Northwest 53rd Street, 1st Floor
Miami, Florida 33166

Gladys Rodriguez, Owner
Rodriguez Loving Care
4008 Southwest 23rd Street
Hollywood, Florida 33023

Sam Power, Agency Clerk
Agency for Health Care Administration
Fort Knox Building 3, Suite 3431
2727 Mahan Drive
Tallahassee, Florida 32308-5403

Julie Gallagher, General Counsel
Agency for Health Care Administration
Fort Knox Building 3, Suite 3431
2727 Mahan Drive
Tallahassee, Florida 32308-5403

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.