

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE)
ADMINISTRATION,)
)
Petitioner,)
)
vs.) Case No: 00-5079
)
MARCED, INC., d/b/a QUEEN OF)
ANGELS,)
)
Respondent.)
_____)

RECOMMENDED ORDER

A formal hearing was conducted in this case on March 5, 2001, in Jacksonville, Florida, before the Division of Administrative Hearings, by its designated Administrative Law Judge, Suzanne F. Hood.

APPEARANCES

For Petitioner: Michael O. Mathis, Esquire
Agency for Healthcare Administration
2727 Mahan Drive
Fort Knox Building Three, Suite 3431
Tallahassee, Florida 32308-5403

For Respondent: Marcela Perry, Administrator
Queen of Angels
Post Office Box 1430
Orange Park, Florida 32073

STATEMENT OF THE ISSUES

The issues are whether Respondent, an assisted living facility, failed to timely correct eight class III deficiencies, and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On or about November 17, 2000, Petitioner Agency for Health Care Administration (Petitioner) issued an Administrative Complaint against Respondent Marced, Inc., d/b/a Queen of Angels (Respondent). Said complaint alleged that Respondent had violated Sections 400.419, 400.4256, 400.4275, and 400.452, Florida Statutes, and Rules 58A-5.023, 58A-5.024, 58A-5.181, 58A-5.019 and 58A-5.0191, Florida Administrative Code. Specifically, the complaint alleged that Respondent was subject to an administrative fine in the amount of \$2,200, due to its failure to timely correct eight class III deficiencies.

Respondent requested a formal hearing by letter dated December 11, 2000. Petitioner referred the case to the Division of Administrative Hearings on December 15, 2000.

A Notice of Hearing dated January 9, 2001, scheduled the case for hearing on March 5, 2001. At the hearing, Petitioner presented the testimony of two witnesses and offered nine exhibits which were accepted as evidence. Respondent presented the testimony of four witnesses and offered one exhibit, which was accepted as evidence.

The court reporter filed the Transcript of the proceeding on March 16, 2001. Petitioner filed its Proposed Recommended Order on March 21, 2001. Respondent did not file proposed findings of fact and conclusions of law.

FINDINGS OF FACT

1. Petitioner is the agency charged with the duty to license and regulate assisted living facilities (ALFs).

2. Respondent is licensed to operate as an ALF in Orange Park, Florida. At the time of the hearing, five residents lived in Respondent's facility.

3. On September 6, 2000, Petitioner conducted a biennial licensure survey at Respondent's place of business. During the survey, Petitioner cited Respondent for five class IV deficiencies and 18 class III deficiencies.

4. The class III deficiencies included the following:

- (a) A-308, the residents' files did not contain a written informed consent, concerning unlicensed staff who would be assisting residents with the self-administration of medication;
- (b) A-513, staff had not received a minimum of one hour in-service training, relative to the reporting of major incidents and facility emergency procedures, within 30 days of employment;
- (c) A-514, staff members had not received a minimum of one hour in-service training, relative to resident rights in an ALF and recognizing and reporting resident abuse, neglect, and

exploitation, within 30 days of employment; (d) A-515, staff members had not received three hours of in-service training, relative to resident behavior and needs and providing assistance with activities of daily living, within 30 days of employment; (e) A-1002, the carpet in room No. 3 was stained; (f) A-1101, not all staff members had documentation from a health care provider stating they were free from the signs and symptoms of communicable disease; (g) A-1103, facility staff did not have documentation on file that they were free from tuberculosis on an annual basis; (h) A-1106, unlicensed staff who were providing assistance with self-administered medications had not received the minimum four hours of training.

5. By letter dated September 15, 2000, Petitioner advised Respondent that it was required to correct the above-referenced deficiencies on or before October 6, 2000.

6. On October 5, 2000, a volunteer registered nurse provided Respondent's staff with four hours of in-service training relative to medication administration. The nurse was not approved by Petitioner to provide the training. She did not provide instruction from an approved curriculum. Respondent did not document the training session as to date, names of employees attending, or curriculum content.

7. On October 18, 2000, Petitioner conducted a follow-up survey to determine whether Respondent had corrected the

previously cited deficiencies. The eight class III deficiencies listed above in paragraph four had not been corrected.

8. By letter dated October 25, 2000, Petitioner advised Respondent that it might be subject to administrative fine for failure to correct the deficiencies. The letter also requested Respondent to file a correction plan.

9. Respondent could not remove the bleach stain in room No. 3's carpet. Respondent attempted unsuccessfully to dye the stained carpet an even color. Respondent bought tiles to replace the carpet on or about November 25, 2000.

10. By the time that Petitioner conducted its second follow-up survey, Respondent had corrected the eight remaining class III deficiencies.

11. During the hearing, Respondent did not contest the factual basis of the cited deficiencies. Instead, Respondent attempted to present evidence in mitigation. According to Respondent, it was experiencing a transition in management in the fall of 2000; therefore, it could not meet the correction deadline. Respondent's new manager/caregiver testified that she did not have sufficient funds to timely secure the required documentation relative to the status of her health. Finally, Respondent presented testimony that it could not afford to pay an administrative fine.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this case. Sections 120.569 and 120.57(1), Florida Statutes.

13. Respondent admits that it had class III deficiencies, which were not corrected in a timely manner. Petitioner based these deficiencies and the proposed administrative fine on the statutes and rules set forth below.

14. Section 400.419, Florida Statutes, provides as follows, in pertinent part:

(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.

(4) Each day of continuing violation after the date fixed for termination of the violation, as ordered by the agency, constitutes an additional, separate, and distinct violation.

(5) Any action taken to correct a violation shall be documented in writing by the owner or administrator of the facility and verified through followup [sic] visits by agency personnel. The agency may impose a fine and, in the case of an owner-operated facility, revoke or deny a facility's license when a facility administrator fraudulently misrepresents action taken to correct a violation.

(6) For fines that are upheld following administrative or judicial review, the violator shall pay the fine, plus interest at the rate as specified in s. 55.03, for each day beyond the date set by the agency for payment of the fine.

15. Section 400.4256, Florida Statutes, provides as follows in relevant part:

(1) For the purposes of this section, the term:

(a) "Informed consent" means advising the resident, or the resident's surrogate, guardian, or attorney in fact, that an assisted living facility is not required to have a licensed nurse on staff, that the resident may be receiving assistance with self-administration of medication from an unlicensed person, and that such assistance, if provided by an unlicensed person, will or will not be overseen by a licensed nurse.

(b) "Unlicensed person" means an individual not currently licensed to practice nursing or medicine who is employed by or under contract to an assisted living facility and who has received training with respect to assisting with the self-administration of medication in an assisted living facility as provided under s. 400.452 prior to providing such assistance as described in this section.

16. Section 400.4275, Florida Statutes, provides as follows in relevant part:

(2) The administrator or owner of a facility shall maintain personnel records for each staff member which contain, at a minimum . . . documentation of compliance with all training requirements of this part or applicable rule

* * *

(4) The department may by rule clarify terms, establish requirements for . . . personnel procedures . . . and specify documentation as necessary to implement the requirements of this section.

17. Section 400.452, Florida Statutes, states as follows in pertinent part:

(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 education 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, person with mental illness, and persons with developmental disabilities and how to meet those needs.

* * *

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

* * *

(5) Staff involved with the management of medications and assisting with the self-administration of medications under s. 400.4256 must complete a minimum of 4 hours of training pursuant to a curriculum developed by the department and provided by a registered nurse, licensed pharmacist, or department staff.

(6) Other facility staff shall participate in training relevant to their job duties as specified by rule of the department.

* * *

(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.

18. Rule 58A-5.0181, Florida Administrative Code, provides as follows in relevant part:

(1) ADMISSION CRITERIA. An individual must meet the following minimum criteria in order to be admitted to a facility holding a standard, limited nursing or limited mental health license.

* * *

(e) Be capable of taking his/her own medication with assistance from staff if necessary.

1. If the individual needs assistance with self-administration the facility must inform the resident of professional qualifications of facility staff who will be providing this assistance, and if unlicensed staff will be providing such assistance, obtain the resident's or the resident's surrogate, guardian, or attorney-in-fact's written informed consent to provide such assistance as required under s. 400.4256, F.S.

2. The facility may accept a resident who requires the administration of medication, if the facility has a nurse to provide this service, or the resident or the resident's legal representative, designee, surrogate, guardian, or attorney-in-fact contracts with a licensed third party to provide this service to the resident.

19. Rule 58A-5.019, Florida Administrative Code, states as follows in relevant part:

(2) STAFF.

(a) Newly hired staff shall have 30 days to submit a statement from a health care provider, based on an examination conducted within the last six months, that the person does not have any signs or symptoms of a communicable disease including tuberculosis. . . .

* * *

(c) All staff must comply with the training requirements of Rule 58A-5.0191.

20. Rule 58A-5.0191, Florida Administrative Code, provides as follows in relevant part:

(2) STAFF IN-SERVICE TRAINING. Each facility must provide the following in-service training to facility staff.

* * *

(b) Staff who provide direct care to residents must receive a minimum of 1 hour in-service training within 30 days of employment that covers the following subjects:

1. Reporting major accidents.
2. Facility emergency procedures including chain-of command and staff roles relating to emergency evacuation.

(c) Staff who provide direct care to residents, who have not taken the core training program, shall receive a minimum of 1 hour in-service training within 30 days of employment that covers the following subjects:

1. Resident rights in an assisted living facility.
2. Recognizing and reporting resident abuse, neglect, and exploitation.

(d) Staff who provide direct care to residents, other than nurses, CNAs, or home health aides trained in accordance with Rule 59A-8.0095, must receive 3 hours of in-

service training within 30 days of employment that covers the following subjects:

1. Resident behavior and needs.
2. Providing assistance with activities of daily living.

* * *

(5) ASSISTANCE WITH SELF-ADMINISTERED MEDICATION and MEDICATION MANAGEMENT. Unlicensed persons who will be providing assistance with self-administered medication described in Rule 58A-5.0185 must receive a minimum of 4 hours of training prior to assuming this responsibility. Courses provided in fulfillment of this requirement must meet the following criteria:

(a) Training must cover state law and rule requirements with respect to the supervision, assistance, administration, and management of medications in assisted living facilities; procedures and techniques for assisting the resident with self-administration of medication . . . Training shall include demonstrations of proper techniques and provide opportunities for hands-on learning through practice exercises.

(b) The training must be provided by a registered nurse, licensed pharmacist, or department staff who shall issue a training certificate to a trainee who demonstrates an ability to:

1. Understand a prescription label;
2. Provide assistance with self-administration in accordance with s. 400.4256, F.S., and Rule 58A-5.0185

* * *

(10) TRAINING PROVIDER AND CURRICULUM APPROVAL; TRAINING DOCUMENTATION.

(a) All persons seeking to provide training which must be approved by the department under this rule shall submit their qualification to provide training and

proposed course curriculums to the department prior to training. Upon receipt of approval from the department, the training provider may identify the training program as "approved by the Florida Department of Elder Affairs for purposes of meeting the training requirement of s. 400.4178 or 400.452, F.S. and Rule 58A-5.0191." . . .

* * *

(e) Except as otherwise noted, any training required by this rule shall be documented in the facility's personnel files which documentation shall include the title of the training program, course content, date of attendance, the training provider's name and the training provider's credential's, and number of hours of training. . . .

21. Rule 58A-5.023, Florida Administrative Code, provides as follows in pertinent part:

(1) GENERAL REQUIREMENTS.

* * *

(b) The facility's physical structure, including the . . . floors . . . shall be structurally sound and in good repair. Peeling paint or wallpaper, missing ceiling or floor tiles, or torn carpeting shall be repaired or replaced. . . .

22. Rule 58A-5.024, Florida Administrative Code, provides as follows in pertinent part:

(2) STAFF RECORDS.

(a) Personnel for each staff member shall contain, at a minimum, a copy of the original employment application with references furnished and verification of freedom from communicable disease including tuberculosis. . . .

(3) RESIDENT RECORDS. Resident records shall be maintained on the premises and include:

* * *

(g) For facilities which will have unlicensed staff assisting the resident with the self-administration of medication, a copy of the written informed consent described in Rule 58A-5.0181 if such consent is not included in the resident's contract.

23. Petitioner gave Respondent two citations for violating Rules 58A-5.019 and 58A-5.024(2)(a), Florida Administrative Code. The first citation involved Respondent's failure to document that its staff was free of communicable diseases (A-1101). The second citation involved Respondent's failure to document that its staff was free of tuberculosis, as a specific communicable disease (A-1103). Petitioner needs separate citations in some cases because an ALF might provide documentation that a staff member was free of communicable diseases without including tuberculosis as one of those communicable diseases. However, in the instant case, Respondent provided no documentation regarding the staff member's health status. Therefore, only one citation for violation of Rules 58A-5.019 and 58A-5.024(2)(a), Florida Administrative Code, is appropriate.

24. Respondent's correction of the deficiencies before the second follow-up survey is the only mitigating factor worthy of

consideration here. See Section 400.419(3), Florida Statutes. Even then, the corrections were untimely.

25. Some of the cited deficiencies could have resulted in serious physical or emotional harm to Respondent's residents. See Section 400.419(3), Florida Statutes. Accordingly, an administrative fine in the amount of \$300 for each of the following six deficiencies is appropriate: (a) failure to document the informed consent of residents in violation of Rules 58A-5.0181 and 58A-5.024(3)(g), Florida Administrative Code; (b) failure to provide documentation that staff was free of communicable diseases, including tuberculosis, in violation of Rules 58A-5.019 and 58A-5.024(2)(a), Florida Administrative Code; (c) failure to provide and/or document staff training relative to major incidents and facility emergency procedures in violation of Rule 58A-5.0191, Florida Administrative Code; (d) failure to provide and/or document staff training relative to resident rights, including recognizing and reporting abuse, neglect, and exploitation in violation of Rule 58A-5.0191, Florida Administrative Code; (e) failure to provide and/or document staff training relative to resident behavior and providing assistance with the activities of daily living in violation of Rule 58A-5.0191, Florida Administrative Code; and (f) failure to provide and/or document staff training relative

to providing assistance with self-administration of medication in violation of Rule 58A-5.0191, Florida Administrative Code.

26. There is no evidence that the bleach stain on the carpet of room No. 3 created a potential harm to Respondent's residents. However, Rule 58A-5.023, Florida Administrative Code, requires an ALF facility to be maintained in good repair. That rule specifically references missing floor tiles and torn carpeting. It is reasonable to conclude that the rule also requires repair or replacement of carpet that has been irreparably damaged by bleach in the cleaning process. Accordingly, an administrative fine in the amount of \$100 is appropriate here where Respondent failed to replace the stained carpet in a timely manner.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED:

That Petitioner enter a final order fining Respondent \$1,900 for seven class III violations of Chapter 58A-5, Florida Administrative Code, plus interest as specified in Section 400.419(6), Florida Statutes.

DONE AND ENTERED this 29th day of March, 2001, in
Tallahassee, Leon County, Florida.

SUZANNE F. HOOD
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 29th day of March, 2001.

COPIES FURNISHED:

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

Marcela Perry, Administrator
Queen of Angels
Post Office Box 1430
Orange Park, Florida 32073

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

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

Ruben J. King-Shaw, Jr., Director
Agency for Health
Care Administration
2727 Mahan Drive
Fort Knox 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.