

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE)
ADMINISTRATION,)
)
Petitioner,)
) Case No. 02-3405
vs.)
)
DELTA HEALTH GROUP, d/b/a)
ROSEWOOD MANOR,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Harry L. Hooper, Administrative Law Judge, Division of Administrative Hearings, on October 24-25, 2002, in Pensacola, Florida.

APPEARANCES

For Petitioner: Lori Desnick, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Building 3
Mail Stop 3
Tallahassee, Florida 32308

For Respondent: R. Davis Thomas, Jr., Esquire
Qualified Representative
Broad and Cassel
215 South Monroe Street, Suite 400
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

Whether Respondent violated Section 400.23, Florida Statutes, and Rule 59A-4.1288, Florida Administrative Code, by

failing to ensure that the facility's environment remained as free of accident hazards as possible.

PRELIMINARY STATEMENT

Petitioner (AHCA) filed an Administrative Complaint against Respondent Delta Health Group doing business as Rosewood Manor (Rosewood), which sought to impose a \$2,500 fine against Rosewood based upon an alleged, Class II violation of Title 42 Code of Federal Regulations, Section 483.25(h)(1), which is incorporated into Rule 59A-4.1288, Florida Administrative Code. Title 42 Code of Federal Regulations, Section 483.25(h)(1) requires that nursing homes be as free of accident hazards as possible. The event precipitating the allegation in the Administrative Complaint was identified in a survey of Rosewood conducted on September 11, 2001.

Respondent timely filed a Petition challenging the allegations of the Administrative Complaint and the validity of the proposed fine asserted by AHCA. The Petition was thereafter referred by AHCA to the Division of Administrative Hearings.

The Administrative Law Judge consolidated Rosewood's Petition with three other related Petitions filed by AHCA. All four Petitions were scheduled for a two-day hearing in Pensacola beginning October 25, 2002.

Four days prior to the hearing, Rosewood filed a Motion to Dismiss AHCA's Administrative Complaint in this case on the

grounds that it was barred by the doctrine of res judicata. Because Rosewood filed the Motion within four days of the scheduled hearing, AHCA's counsel did not have an opportunity to respond to it prior to hearing. The Administrative Law Judge agreed to proceed with the evidentiary hearing in all of the underlying cases, but withheld any ruling on the Motion to Dismiss to allow AHCA's counsel to file a response thereto.

At the hearing, AHCA presented the testimony of Marcia Steele, RN; Judith Brown, RN; Sandra Corcoran, RN; and Judith Salpeter, RN. Nurse Steel and Nurse Salpeter were both recognized as experts in nursing practices and procedures. Nurse Brown was recognized as an expert on pressure sores. AHCA had 14 exhibits admitted into evidence. Rosewood called one witness, Howard Thomas Hulsey, RN, and had seven exhibits admitted into evidence.

A Transcript was filed on November 12, 2002.

On October 28, 2002, AHCA filed its Response to Rosewood's Motion to Dismiss. The Administrative Law Judge held a hearing on that Motion on October 31, 2002. On November 7, 2002, the Administrative Law Judge issued a Recommended Order granting Rosewood's request and suggesting to AHCA that the Administrative Complaint should be dismissed based on Petitioner's unlawful splitting of claims against Rosewood.

On April 9, 2003, AHCA entered a Final Order rejecting the conclusion of law of the Administrative Law Judge in his November 7, 2002, Recommended Order, which recommended that AHCA's Administrative Complaint be dismissed. The Final Order further remanded the case to the Division of Administrative Hearings so that the Administrative Law Judge could conduct further proceedings in accordance with the instructions contained in the Final Order.

Because the facts surrounding the complaint were fully elucidated at the October 2002 hearing, the parties agreed that the taking of further evidence was not required. Subsequent to a case management conference, the parties agreed to submit Proposed Recommended Orders in this case on May 20, 2003. Both parties timely submitted Proposed Recommended Orders. Subsequently, Respondent filed a Motion to Strike Portions of Petitioner's Proposed Recommended Order. Because the parties agreed that the end-date for communication to the Administrative Law Judge would be May 20, 2003, the matters contained in the Motion were not considered. The Proposed Recommended Orders submitted on May 20, 2003 were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. AHCA is the state agency responsible for licensure and enforcement of all applicable statutes and rules governing

nursing homes in Florida pursuant to Sections 400.021 and 400.23(7), Florida Statutes.

2. Rosewood is a skilled nursing facility located at 3107 North H Street, Pensacola, Florida, holding AHCA license no. SNF1482096.

3. AHCA conducted a survey of Rosewood on September 11, 2001. Resident 1 was considered during the survey. He suffered from dementia, congestive heart failure, and epilepsy. He had a history of psychiatric problems and was cognitively impaired. He was known by the staff to engage in aggressive behavior. Resident 1 was a "wanderer," which, in nursing home jargon, is a person who moves about randomly and who must constantly be watched.

4. On the morning of August 28, 2001, Resident 1 wandered, unnoticed by staff, into the bio-hazard storage room, which was unlocked and unguarded. Access to the room, which is usually maintained in a locked condition, may have been possible because a broom or rake handle had been placed or had fallen in such a way that the door remained in an open position.

5. While in the bio-hazard storage room, Resident 1 succeeded in opening a Sharp's container that was used for the storage of used hypodermic needles. Resident 1 obtained some of the needles stored in the Sharp's container and suffered numerous self-inflicted puncture wounds to his body as a result.

6. These wounds might have resulted in Resident 1's contracting a variety of diseases. However, because he died soon after this incident, of other causes, it was never determined if he actually contracted any diseases as a result of the needle punctures.

7. Rosewood had a standing procedure that required staff to keep the door locked to the bio-hazard storage area. The procedure required that the key be kept in a place where residents could not gain access to it. Moreover, the door was self-closing and self-locking.

8. That these procedures were inadequate, or not always followed, was demonstrated by the fact that Resident 1 gained access to the room. It is concluded, therefore, that Rosewood failed to ensure that the nursing home premises was as free of accident hazards as possible.

CONCLUSIONS OF LAW

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

10. Pursuant to Section 400.102(1)(d), Florida Statutes, AHCA is empowered to take action against entities it licenses should those entities violate a provision of Part II of Chapter 400, Florida Statutes.

11. AHCA, the party seeking to prove the affirmative of the issue, has the burden of proof. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981) and Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977).

12. AHCA seeks to impose a civil penalty on Respondent, pursuant to Section 400.23(8)(b), Florida Statutes, in the form of a fine in the amount of \$2,500 because of a Class II violation. The imposition of an administrative fine or civil penalty is punitive and penal in nature. Therefore, AHCA must prove its case by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern & Company, 680 So. 2d 932, 935 (Fla. 1996).

13. Pursuant to Section 400.23, Florida Statutes, and Rule 59A-4.1288, Florida Administrative Code, nursing homes of the category addressed herein are to follow certification rules and regulations found in Title 42, Code of Federal Regulations, Section 483.

14. Title 42, Code of Federal Regulations, Section 483.25(h)(1), provides as follows:

483.25 Quality of care.

Each resident must receive and the facility must provide the necessary care and services to attain or maintain the highest

practicable physical, mental, and psychosocial well being, in accordance with the comprehensive assessment and plan of care.

* * *

(h) Accidents. The facility must ensure that--

- (1) The resident environment remains as free of accident hazards as is possible; and
- (2) Each resident receives adequate supervision and assistance devices to prevent accidents.

15. With regard to Title 42, Code of Federal Regulations, Section 483.25(h)(1), AHCA has published a State Operations Manual that elucidates with specificity what constitutes an "accident hazard." That manual states in part:

Accident hazards area defined as physical features in a NF (nursing facility) environment that can endanger a resident's safety, including but not limited to:

physical restraints
poorly maintained resident equipment
bathing facilities that do not have
 nonslip surfaces
hazards (e.g., electrical appliances
 with frayed wires, cleaning supplies
 easily accessible to cognitively
 impaired residents, wet floors that
 are not obviously labeled and to
 which access is not blocked)
Handrails not securely fixed to the
 wall, difficult to grasp, and/or with
 sharp edges/splinters; and
Water temperature in hand sinks or bath
 tubs which can scald or harm
 residents.

16. A room used as a bio-hazard storage area clearly is a physical feature that can endanger a resident's safety. Accordingly, Rosewood failed to comply with the requirements of Title 42, Code of Federal Regulations, Section 483, and thus failed to comply with the requirements of Section 400.23(8)(b), Florida Statutes.

17. Section 400.121(10), Florida Statutes, provides as follows:

400.121 Denial, suspension, revocation of license; moratorium on admissions; administrative fines; procedure; order to increase staffing.--

* * *

(10) In addition to any other sanction imposed under this part, in any final order that imposes sanctions, the agency may assess costs related to the investigation and prosecution of the case. Payment of agency costs shall be deposited into the Health Care Trust Fund.

18. AHCA alleged and proved a violation of Section 400.23(8)(b), Florida Statutes, and proved that the violation was a Class II deficiency that permits a fine of \$2,500. Having proved the allegations of the complaint, means that AHCA may require Rosewood to pay the costs related to the investigation and prosecution of the case pursuant to Section 400.121(10), Florida Statutes.

RECOMMENDATION

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

RECOMMENDED:

That a final order be entered which:

- (1) finds Rosewood to have committed a Class II isolated deficiency;
- (2) assesses a fine of \$2,500; and
- (3) assesses costs in an amount that reflects the actual costs of investigation and prosecution.

DONE AND ENTERED this 6th day of June, 2003, in
Tallahassee, Leon County, Florida.

HARRY L. HOOPER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of June, 2003.

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.