

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE)
ADMINISTRATION,)
)
Petitioner,)
)
vs.) Case No. 04-3848
)
CORAL TERRACE RETIREMENT)
HOME, INC., d/b/a CORAL)
TERRACE RETIREMENT HOME,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on September 15-16, 2005, via video teleconference at sites in Miami and Tallahassee, Florida, before Florence Snyder Rivas, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Nelson E. Rodney, Esquire
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For Respondent: Judd Aronowitz, Esquire
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STATEMENT OF THE ISSUE

Whether Petitioner, the Agency for Health Care

Administration (AHCA or Petitioner), proved by clear and convincing evidence that Respondent committed the violations alleged in the Second Amended Administrative Complaint, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Second Amended Administrative Complaint dated April 25, 2005 (the "Complaint"), AHCA notified Respondent, Coral Terrace Retirement Home Inc., d/b/a/ Coral Terrace Retirement Home (Respondent or Coral Terrace), of its intent to impose an administrative fine of \$1,000 for each of three alleged Class II violations. Pursuant to Section 400.414(1)(e), Florida Statutes (2005), upon a finding of three Class II violations, the licensee's license may be revoked. AHCA sought to revoke Coral Terrace's license upon a finding of the three alleged Class II violations.

Respondent timely requested an administrative hearing to contest the proposed action(s).

The identity of the witnesses and exhibits and attendant rulings are set forth in the two-volume transcript of hearing filed on September 15, 2005.

The parties requested and were granted, for good cause shown, enlargements of time to December 13, 2005, to file Proposed Recommended Orders, which have been duly considered.

References to statutes are to the Florida Statutes (2004). References to rules are to the Florida Administrative Code (2004).

FINDINGS OF FACT

1. AHCA is the state agency responsible for licensing and regulating assisted living facilities in Florida.

Respondent is

a licensed assisted living facility (ALF) located in Miami, Florida.

2. On July 12 and 19, 2004, AHCA conducted a survey of Coral Terrace and formulated allegations of the three violations, each of which AHCA alleges constituted a Class II violation, giving rise to this proceeding.

3. Count One of the Complaint alleges that Coral Terrace failed to ensure that residents were not restrained by full-bed rails; Count Two of the Complaint alleges that Coral Terrace failed to ensure that residents were free from abuse and neglect; Count Three of the Complaint alleges that Coral Terrace failed to ensure that residents were able to transfer, with assistance, in order to meet admission and retention criteria. The law and relevant factual underpinnings of each Count will be discussed separately.

COUNT I

4. Count I alleges that Coral Terrace violated Rule 58A-5.0182(6)(h), which states, in its entirety:

(h) Pursuant to section 400.441, Florida Statutes, the use of physical restraints shall be limited to half-bed rails, and only upon the written order of the resident's physician, who shall review the order biannually, and the consent of the resident or the resident's representative. Any device, including half-bed rails, which the resident chooses to use and can remove or avoid without assistance shall not be considered a physical restraint.

5. The rule is enacted pursuant to Section 400.441(1)(k), Florida Statutes, which states, in pertinent part (leaving out language subsequent to this portion, pertaining only to "the use of chemical restraints"):

(k) The use of physical or chemical restraints. The use of physical restraints is limited to half-bed rails as prescribed and documented by the resident's physician with the consent of the resident or, if applicable, the resident's representative or designee or the resident's surrogate, guardian, or attorney in fact.

6. AHCA surveyors found full side bed rails in 11 rooms, with residents in some of them. AHCA alleged that this violated Rule 58A-5.0182(6)(h).

7. The evidence established that Coral Terrace uses adjustable bed rails that may be attached to each of the facility's beds for occasions when their use is appropriate.

For example, terminally ill residents who have been placed on hospice may require a full bed rail.

8. Based on the language of the rule, Respondent argues that AHCA was required to disprove that the residents were in the beds with full rails by choice. In other words, if a resident was in a bed with a full rail by choice, this particular resident's occupation of the bed with the full rail would not violate the rule. This defense fails because in order for a full-bed rail to be used voluntarily, the resident would have to not only choose to be in a bed with a full rail, but would also have to be able to "remove or avoid" the bed rail "without assistance." While it might be possible for an ALF resident to "remove or avoid" a half-bed rail "without assistance" by climbing out of the bed via the half of the bed where there is no rail, an ALF resident with a full-bed rail would require the assistance of someone on the floor to remove the bed rail in order to exit the bed.

9. Next, Respondent argues that the evidence fails to prove whether the "hospice exception" applied to any or all of the persons who were observed in full-rail beds at the time of the survey. A hospice patient is exempt from the general bed rail rule pursuant to Section 400.609(3), Florida Statutes, which provides that hospice

care and services, to the extent

practicable and compatible with the needs and preferences of the patient, may be provided by the hospice care team to a patient living in an assisted living facility. . . . A resident or patient living in an assisted living facility . . . or other facility subject to state licensing who has been admitted to a hospice program shall be considered a hospice patient, and the hospice program shall be responsible for coordinating and ensuring the delivery of hospice care and services to such person pursuant to the standards and requirements of this part and rules adopted under this part.

10. The parties concurred that under this provision, the hospice rules, regulations, standards and requirements supplanted the general assisted living facility rules, regulations, standards and requirements – including the bed-rail rule – for a hospice patient living in an ALF.

11. Pursuant to the statute, Rule 58A-5.0181(4)(c) states that a “terminally ill resident who no longer meets the criteria for continued residency may continue to reside in the facility if . . . the resident qualifies for, is admitted to, and consents to the services of a licensed hospice which coordinates and ensures the provision of any additional care and services that may be needed; [and] Continued residency is agreeable to the resident and the facility.”

12. In support of Count I, Petitioner offered the testimony of AHCA surveyor Alfonso Martin (Martin). Martin

testified that on July 19, 2004, he observed full-bed rails on 13 beds. Although Martin remembered that one or more of these beds was occupied, he could not remember and had no notes on how many were occupied. To the extent a patient or patients were in bed with full-bed rails, Martin could not identify any such patient(s) and has no knowledge regarding their medical condition or status or whether any or all of them were hospice patients.

13. Moreover, even if a violation were proven with respect to Count I, the violation would not be a Class II violation because there was no persuasive evidence that the bed rails observed by Martin constituted a threat to the physical or emotional safety of any resident.

14. AHCA's counsel conceded that it was the Agency's burden to prove that a specific patient observed in a full-rail bed during the survey was not a hospice patient, yet AHCA offered no such proof. There was evidence that of 21 or 22 patients in the facility on July 19, 2004, five of them were in hospice. For all the evidence showed, it is possible that all the persons observed by AHCA in full-rail beds during the survey were persons who were lawfully and appropriately in full-rail beds under the supervision of hospice. Therefore,

AHCA failed to prove the violation alleged in Count I by clear and convincing evidence.

COUNT II

15. Count II alleges that on July 19, 2004, the facility administrator, Alberto Rodriguez (Rodriguez), violated Section 400.428(1), Florida Statutes.¹ This citation refers to the opening paragraphs of the "Resident bill of rights," and states, in pertinent part:

(1) No resident of a facility shall be deprived of any civil or legal rights, benefits, or privileges guaranteed by law, the Constitution of the State of Florida, or the Constitution of the United States as a resident of a facility. Every resident of a facility shall have the right to: (a) Live in a safe and decent living environment, free from abuse and neglect. (b) Be treated with consideration and respect and with due recognition of personal dignity, individuality, and the need for privacy.

16. AHCA attempted to show that Rodriguez committed "abuse" of a patient as prohibited by the resident bill of rights. Respondent argues that Section 400.428(1) is not the appropriate statutory vehicle for a charge of abuse, but concurs that abuse of an ALF resident would be a violation of some other statute. Under the following analysis, it makes no difference which source of authority is applicable under the circumstances.

17. In the instance of the alleged "abuse," Rodriguez was required by surveyors to demonstrate that M.T., an elderly resident who spoke only Spanish, could transfer with assistance from her wheelchair to her bed. At least six people were present, including a Metro-Dade police officer assigned to investigate the possibility of "criminal violations" underway at Respondent's facility. As the survey team, members of Respondent's staff, and the police officer crowded around M.T.'s wheelchair in her small room, the administrator attempted to comply with the surveyors' demand that he demonstrate that M.T. could transfer.

18. Rodriguez is fluent in Spanish, and M.T. spoke only Spanish. Therefore, Rodriguez spoke in Spanish to M.T. when he asked her to stand up. M.T. did not transfer on Rodriguez's request. Continuing to press M.T. to stand, Rodriguez became agitated and raised his voice.

19. The Complaint alleges that M.T. cried out, "I can't stand! I can't stand!" However, Rodriguez credibly testified that she actually said, "No quiero! No quiero!" which means, "I don't want to! I don't want to!"

20. Count II is based solely on AHCA's contention that Rodriguez's conduct in this exchange was an "abuse" of M.T. Surveyors and the police officer directed Rodriguez to cease

insisting that M.T. stand and transfer. The evidence clearly and convincingly establishes that the resident was quickly overwhelmed and upset, and unable to assist in the transfer at that moment.

21. Not only did Petitioner fail to prove the basic "abuse" allegation of Count II by clear and convincing evidence, but under Petitioner's evidence, it appeared more probable that M.T.'s emotional distress was caused by the unexpected presence of a large number of strangers, who were crowded into her room, upset with one another, and speaking in two languages, rather than any action taken by the administrator at the request of AHCA surveyors and under their supervision.

22. Therefore, the Petitioner failed to prove Count II by clear and convincing evidence.

COUNT III

23. Rule 58A-5.0181(4) states that the criteria for continued residency are the same as the criteria for admission, including the requirement that an individual be able "to transfer, with assistance from staff if necessary."

Rule 58A-5.0131(5) defines Assistance with Transfer as:

providing verbal or physical cuing or physical assistance or both while the resident moves between bed and a standing position or between bed and chair or wheelchair.

24. Count III alleges that Coral Terrace failed to ensure that residents were able to transfer, with assistance, in order to meet admission and retention criteria, a violation of Rule 58A-5.0181(1)(d).

25. On July 19, 2004, two residents, H.C. and Z.E., were unable to transfer, even with assistance. On the evidence presented, there is no question about this.

26. However the Respondent defends on the basis of Section 400.426(9), Florida Statutes, which requires that, when AHCA finds a resident of an ALF "appears to need care beyond that which the facility is licensed to provide," AHCA must notify the facility and allow the facility 30 days to relocate the resident.

27. In addition, the Respondent points to Rule 58A-5.0181(4)(a), which allows that a resident may be temporarily bedridden for up to seven days; and Rule 58A-5.0181(5), which provides that, when a patient no longer meets the admission criteria, the facility has at least 30 days, and perhaps 45 days, to cause the resident's transfer. Finally, the Respondent points out the aforementioned "hospice exception."

See § 400.426(1), Fla. Stat. (2005).

28. While proving that H.C. and Z.E. were unable to transfer, even with assistance, on one day in July, the

Petitioner offered inadequate evidence as to whether either or both of them were in a temporary status, on that day, that would have defined their inability to transfer as not being a violation of Rule 58A-5.0181(1)(d). AHCA therefore failed to prove, by clear and convincing evidence, that the inability of H.C. and Z.E. to "transfer with assistance" on July 19, 2004, was a violation of the Florida Administrative Code subject to sanctions.

29. In sum, Petitioner has failed to prove the material allegations of any of the three counts of the Complaint.

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this case pursuant to Section 120.569(1), Florida Statutes, (2005).

31. The burden of proof in this proceeding to demonstrate that the fines or revocation are justified falls upon the Petitioner. The standard of proof for the imposition of a fine is clear and convincing evidence. Dep't. of Banking and Finance v. Osborne Stern and Co., 679 So. 2d 932, 935 (Fla. 1996).

32. Section 400.419(2)(b), Florida Statutes, states:

Class "II" 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 directly threaten the physical

or emotional health, safety, or security of the facility residents, other than class I violations. The agency shall impose an administrative fine for a cited class II violation in an amount not less than \$1,000 and not exceeding \$5,000 for each violation. A fine shall be levied notwithstanding the correction of the violation.

RECOMMENDATION

Based upon the foregoing, it is hereby recommended that AHCA enter its final order dismissing the Complaint.

DONE AND ENTERED this 21st day of March, 2006, in Tallahassee, Leon County, Florida.

Florence Snyder Rivas

FLORENCE SNYDER RIVAS
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of March, 2006.

ENDNOTE

1/ The Complaint at paragraphs 11-12 made these allegations against Mr. Rodriguez. Also within Count II of the Complaint, at paragraph 13, other, unrelated allegations were made against the Respondent. At trial, AHCA abandoned and withdrew the allegations of paragraph 13.

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.