

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE)
ADMINISTRATION,)
)
Petitioner,) Case No. 09-3523
)
vs.)
)
WEST BROWARD REFERRAL AND)
NURSES AGENCY, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on September 4, 2009, by video teleconference with connecting sites in Lauderdale Lakes and Tallahassee, Florida, before Errol H. Powell, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Nelson E. Rodney, Esquire
Agency for Health Care Administration
Spokane Building, Suite 103
8350 Northwest 52nd Terrace
Miami, Florida 33166

For Respondent: Lawrence R. Metsch, Esquire
Metsch & Metsch, P.A.
Aventura Corporate Center
20801 Biscayne Boulevard, Suite 307
Aventura, Florida 33180-1423

STATEMENT OF THE ISSUE

The issue for determination is whether Petitioner should impose a fine upon Respondent as set forth by the Notice of Intent to Impose Fine dated March 9, 2009.

PRELIMINARY STATEMENT

By Notice of Intent to Impose Fine dated March 9, 2009, the Agency for Health Care Administration (AHCA) notified West Broward Referral and Nurses Agency, Inc. (West Broward) that it (AHCA) was imposing a fine of \$5,000, pursuant to Section 400.474(6)(f), Florida Statutes, against West Broward for failing to submit the home health agency quarterly report within 15 days after the quarter ending September 30, 2008. West Broward disputed the allegations of fact and requested a hearing. This matter was referred to the Division of Administrative Hearings on June 29, 2009.

At the hearing, AHCA presented the testimony of four witnesses and entered no exhibits into evidence.¹ West Broward presented the testimony of one witness and entered three exhibits (Respondent's Exhibits numbered 1 through 3) into evidence.²

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the filing of the transcript. The Transcript, consisting of one volume, was filed on September 18, 2009. The parties timely filed their post-hearing

submissions, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. At all times material hereto, West Broward was licensed as a home health agency, having been issued license number 21289096.

2. At all times material hereto, West Broward was located at 4534 North University Drive, Lauderdale, Florida 33351.

3. By Notice of Intent to Impose Fine dated March 9, 2009, AHCA notified West Broward that it (AHCA) was imposing a fine of \$5,000, pursuant to Section 400.474(6)(f), Florida Statutes, against West Broward for failing to submit the home health agency quarterly report within 15 days after the quarter ending September 30, 2008.

4. Section 400.474, Florida Statutes (2008), provides in pertinent part:

(6) The agency [AHCA] may deny, revoke, or suspend the license of a home health agency and shall impose a fine of \$ 5,000 against a home health agency that:

* * *

(f) Fails to submit to the agency, within 15 days after the end of each calendar quarter, a written report that includes the following data based on data as it existed on the last day of the quarter:

1. The number of insulin-dependent diabetic patients receiving insulin-injection services from the home health agency;
2. The number of patients receiving both home health services from the home health agency and hospice services;
3. The number of patients receiving home health services from that home health agency; and
4. The names and license numbers of nurses whose primary job responsibility is to provide home health services to patients and who received remuneration from the home health agency in excess of \$ 25,000 during the calendar quarter.

5. The first quarterly report, which was for the period from July 1 to September 30, 2008, was required by AHCA to be e-mailed to it (AHCA). Even though some first quarterly reports were sent by fax or next-day delivery, not e-mailed, those quarterly reports were also accepted by AHCA.

6. The first quarterly report form for West Broward reflects, among other things, that the period of time of the quarterly report was "Quarter July 1 to September 30, 2008" and that it was to be e-mailed to AHCA at homehealth@ahca.myflorida.com by 5 p.m. on Wednesday, October 15, 2008 to avoid a \$5,000 fine.³ No dispute exists that the e-mail address is correct.

7. West Broward's health care consultant, Laurie Ramos, testified at hearing. She prepared West Broward's first Quarterly Report, which indicates that, on September 30, 2008:

(a) no insulin-dependent diabetic patients were receiving insulin

injection services from West Broward; (b) no patients were receiving home health services from West Broward and licensed hospice services; (c) six patients were receiving home health services from West Broward; and (d) no professional nurses (RNs or LPNs), whose primary job responsibility was to provide home health services to patients, received remuneration from West Broward in excess of \$25,000 between July 1, 2008 and September 30, 2008.

8. Ms. Ramos testified that she e-mailed the first Quarterly Report to AHCA on October 14, 2008, from her computer. She further testified that, even though her computer had the capability, she did not set her computer to receive a message when the e-mail was read by the recipient, and that, therefore, she had no return message that the e-mail, containing the Quarterly Report, was read by AHCA.

9. Ms. Ramos did not send the first Quarterly Report by any other method of delivery, only e-mail.

10. Ms. Ramos did not contact anyone at AHCA to verify that the first Quarterly Report was received.

11. Ms. Ramos' computer crashed approximately nine months subsequent to the due date of the first Quarterly Report. At her request, the company, which was repairing her computer and recovering data, searched Ms. Ramos' hard drive for an e-mail message from her regarding the first Quarterly Report. The

company provided Ms. Ramos with a document showing an e-mail message, dated October 14, 2008, at 11:34 a.m., regarding West Broward's Quarterly Report, to the e-mail address designated for AHCA to receive quarterly reports. The company's document was forwarded to AHCA. From the company's document, AHCA's information technology experts were unable to verify that Ms. Ramos had e-mailed the first Quarterly Report.

12. According to AHCA's information technology expert, due to the technological aspect of e-mails, a very small statistical number of e-mails that are sent are not received.

13. Additionally, AHCA requested Ms. Ramos to forward to it an electronic version of the e-mail. With an electronic version of an e-mail, documentation of the date and time of an e-mail could be ascertained by AHCA's information technology expert. No electronic version of the e-mail was provided, and, therefore, no documentation of the date and time of Ms. Ramos' e-mail could be ascertained by AHCA.

14. Ms. Ramos testimony is found to be credible. A finding of fact is made that she sent the first Quarterly Report to AHCA on October 14, 2008, by e-mail.

15. AHCA maintains that it never received West Broward's e-mailed first Quarterly Report. AHCA has no record of receiving the e-mailed first Quarterly Report. The evidence demonstrates that AHCA did not receive the e-mailed first Quarterly Report.

16. AHCA interprets the term "submit," in Section 400.474(6)(f), Florida Statutes (2008), to mean that the quarterly report must be "received" by it.

17. AHCA determined that, beyond the date of October 15, 2008, there was no opportunity available to West Broward to correct or cure the absence of AHCA's receipt of the first Quarterly Report. Furthermore, AHCA determined that it had no choice, pursuant to Section 400.474(6)(f), Florida Statutes (2008), but to impose a \$5,000 fine.

CONCLUSIONS OF LAW

18. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2009).

19. The ultimate burden of proof is on AHCA to establish by clear and convincing evidence that West Broward violated Section 400.474(6)(f), Florida Statutes (2008), as alleged in the Notice of Intent to Impose Fine dated March 9, 2009. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); § 120.57(1)(j), Fla. Stat.

20. "If the meaning of the statute is clear then [this Administrative Law Judge's] task goes no further than applying the plain language of the statute. However, when a statutory

term is subject to varying interpretations and that statute has been interpreted by the executive agency charged with enforcing the statute [this Administrative Law Judge] follows a deferential principle of statutory construction: An agency's interpretation of the statute that it is charged with enforcing is entitled to great deference. See BellSouth Telecommunications, Inc. v. Johnson, 708 So. 2d 594, 596 (Fla. 1998). [This Administrative Law Judge] will not depart from the contemporaneous construction of a statute by a state agency charged with its enforcement unless the construction is 'clearly unauthorized or erroneous.' (citation omitted)." GTC, Inc. v. Edgar, 967 So. 2d 781, 785 (Fla. 2007).

21. AHCA is the agency charged with enforcing Section 400.474(6)(f), Florida Statutes (2008). Section 400.474, Florida Statutes, was amended in 2008 to add Subsection (6)(b), effective July 1, 2008, and, therefore, AHCA's interpretation of Section 400.474(6)(b), Florida Statutes (2008), is a matter of first impression. See GTC, Inc. at 785.

22. AHCA and West Broward disagree as to the meaning of the term "submit" in Section 400.474(6)(f), Florida Statutes (2008). AHCA interprets "submit" to mean "sent and received"; whereas, West Broward interprets "submit" to mean only "sent." Because the term "submit" is not defined by the statutory provision and is subject to differing interpretations, the statute is ambiguous

and, thus, statutory interpretation is appropriate. See GTC, Inc. at 787.

23. Black's Law Dictionary, Revised Fourth Edition (1968) defines "submit" as, "To commit to the discretion of another . . . to present for determination" The American Heritage College Dictionary, Fourth Edition (2004) defines "submit" as, ". . . to commit (something) to the consideration or judgment of another. . . ." In order for the something to be committed to someone by another for determination, consideration or judgment, the something must be sent. Further, in order for a determination, consideration or judgment to be made of the something sent, the something must be received.

24. AHCA cites to a case that was before the Division of Administrative Hearings in support of its position that "submit" means "sent and received": Weaver vs. Department of Management Services, Division of State Employees' Insurance, DOAH Case No. 93-5571 (Recommended Order, February 16, 1994). AHCA's reliance upon Weaver, supra, is not persuasive. In Weaver, the administrative law judge interpreted in pari materia two provisions, on two different sides, of the document in question to determine the meaning of "submission" of the document to the agency: one provision, on one side, of the document indicated where to "submit" the document (naming the agency) and the time-period for "submitting" the document to the agency; and the other

provision, on the other side, of the document indicated that the same document was required to be "received" by the same agency and indicated the same time-period for the document to be "received" by the same agency. The administrative law judge determined that, based upon the two provisions interpreted in pari materia, "submit" meant "sent and received." In the instant case, no provisions are provided to be interpreted in pari materia.

25. In Section 400.474(6)(f), Florida Statutes (2008), the Florida Legislature provided permissive and mandatory penalties for AHCA, the agency charged with enforcing the statutory provision. The permissive penalty relates to a home health agency's license and provides AHCA the discretion to deny, revoke, or suspend a home health agency's license. However, the mandatory penalty involves a monetary fine and does not provide AHCA with discretion, but mandates AHCA to impose a \$5,000 fine against a home health agency. The mandating of a \$5,000 fine, without any discretion whatsoever, is a severe penalty.

26. Furthermore, the Florida Legislature did not mandate the mode of delivery for the quarterly report. AHCA dictated the mode of delivery, i.e., e-mail, for the first quarterly report in its communications to the home health agencies. However, even though AHCA did not communicate to the home health agencies that it would accept other modes of delivery, it did accept the first

quarterly report through other modes of delivery, e.g., fax and next-day delivery.

27. This Administrative Law Judge is persuaded that a departure from AHCA's interpretation of "submit," i.e., "sent and received," is warranted and that AHCA's interpretation is not a reasonable construction and is clearly erroneous. See GTC, Inc. at 785. AHCA chose the mode of delivery, i.e., e-mail, for the first quarterly report for the period July 1 through September 30, 2008 from home health agencies, the mode of delivery was not mandated by the Legislature; AHCA was aware that a very small statistical percentage of e-mails may not be received by it; and, contrary to the mode of delivery that AHCA had chosen, AHCA accepted the first quarterly report from home health agencies by other modes of delivery, e.g., fax and next-day delivery, without communicating to the home health agencies that the other modes of delivery were acceptable. Furthermore, a mandated, severe penalty is imposed for the failure to submit a quarterly report.

28. Hence, under the circumstances presented in the instant case, to interpret "submit" to mean "sent and received," is clearly erroneous. Id. The reasonable interpretation of "submit" is "sent."

29. Having determined the interpretation of the term "submit," this Administrative Law Judge must now determine

whether a fine of \$5,000 should be imposed against West Broward. This Administrative Law Judge is further persuaded that, to avoid the imposition of a \$5,000 fine, a home health agency must demonstrate that its quarterly report was sent and that it was sent timely. In the instant case, West Broward demonstrated that its first Quarterly Report was sent to AHCA and was sent timely.

30. Hence, the evidence demonstrates that West Broward timely submitted the first quarterly report for the period July 1 through September 30, 2008.

RECOMMENDATION

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

RECOMMENDED that the Agency for Health Care Administration enter a final order dismissing the Notice of Intent to Impose Fine against West Broward Referral and Nurses Agency, Inc.

DONE AND ENTERED this 19th day of January, 2010, in Tallahassee, Leon County, Florida.

Errol H. Powell

ERROL H. POWELL
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 19th day of January, 2010.

ENDNOTES

^{1/} The parties agreed that Petitioner's pre-marked exhibits would be used as Respondent's exhibits. Specifically, Petitioner's pre-marked Exhibit No. 4 would be Respondent's Exhibit No. 1; Petitioner's pre-marked Exhibit No. 3 would be Respondent's Exhibit No. 2; and Petitioner's pre-marked Exhibit No. 2 would be Respondent's Exhibit No. 3.

^{2/} Id.

^{3/} West Broward's Quarterly Report was admitted into evidence.

COPIES FURNISHED:

Nelson E. Rodney, Esquire
Agency for Health Care Administration
Spokane Building, Suite 103
8350 Northwest 52nd Terrace
Miami, Florida 33166

Lawrence R. Metsch, Esquire
Metsch & Metsch, P.A.
Aventura Corporate Center
20801 Biscayne Boulevard, Suite 307
Aventura, Florida 33180-1423

Richard J. Shoop, Clerk
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308

Justin Senior, General Counsel
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308

Thomas W. Arnold, Secretary
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
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.