

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR PERSONS WITH)
DISABILITIES,)
)
Petitioner,)
)
vs.) Case No. 09-6960
)
JIM TIN GROUP HOMES, OWNED AND)
OPERATED BY MILES HINES,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On November 19, 2010, a formal administrative hearing in this case was held in Gainesville, Florida, before Lawrence P. Stevenson, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Julie Waldman, Esquire
Jorge Maza, Qualified Representative
Agency for Persons with
Disabilities
1621 Northeast Waldo Road
Gainesville, Florida 32609

For Respondent: Christina Nieto Seifert, Esquire
Avera & Smith, LLP
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STATEMENT OF THE ISSUE

The issue in the case is whether Respondent should be subject to administrative penalties, including an administrative

fine not to exceed \$1,000.00, for failure to comply with the residential facility requirements of chapter 393, Florida Statutes, as alleged in the Administrative Complaint dated November 12, 2009.

PRELIMINARY STATEMENT

On November 12, 2009, Petitioner, the Agency for Persons with Disabilities (APD) filed a one-count Administrative Complaint against Respondent, Jim Tin Group Homes, owned and operated by Miles Hines. The Administrative Complaint alleged that on or about January 14, 2009, an adult resident of the group home operated by Respondent sexually abused another resident, who was a minor at the time, and that an abuse investigation was initiated by the Department of Children and Families (DCF) and was subsequently closed with verified indicators of inadequate supervision by Respondent. Based on these allegations, Respondent was charged with violating Florida Administrative Code Rule 65G-2.012(4) and section 393.13(3)(a) and (g), Florida Statutes, by failing to adequately supervise residents and sufficiently protect them from harm, neglect, and sexual abuse.

Respondent timely filed an Election of Rights whereby it disputed the material facts alleged in the Administrative Complaint and requested an evidentiary hearing. On December 21, 2009, APD forwarded Respondent's hearing request to the Division

of Administrative Hearings for the scheduling and conduct of a formal hearing.

The hearing was initially scheduled for April 23, 2010. Four continuances were granted before the hearing was held on November 19, 2010.

At the hearing, APD presented the testimony of DCF child protective investigator supervisor Cheryl Hollingsworth, and of APD Area 3 administrator Jim Smith. APD's Exhibit A, the investigative report of a "Child Institutional Investigation" conducted by DCF protective investigator Natalie Rella, was admitted for the limited purpose of showing the fact that DCF had "verified" Respondent's responsibility for abuse or neglect as required by section 393.0673(1)(b).

Respondent presented the testimony of Americo Rodrigues, a behavior analyst with Choice Behavior Services, LLC. Respondent offered no exhibits into evidence.

No transcript was filed at the Division of Administrative Hearings.

During the course of the hearing, it was discovered that Ms. Hollingsworth, DCF's supervisor of investigations at the Alachua County level, had recommended that DCF's Tallahassee headquarters revisit the circumstances of the case and change the classification from "verified" to "not substantiated," based on information she had learned subsequent to the investigation.

The parties agreed to continue the hearing pending APD's inquiry into the status of Ms. Hollingsworth's recommendation. APD was given until December 10, 2010, to ascertain the status of the matter. The parties agreed that if the classification remained "verified" after DCF's review, then the parties would file their proposed recommended orders on January 31, 2011.

In a status report filed on December 10, 2010, counsel for APD informed this tribunal that DCF had received Ms. Hollingsworth's recommendation, re-opened and reviewed the case, but declined to change the classification. The status report requested that the parties be directed to file their proposed recommended orders on January 31, 2011, as agreed at the hearing. By order dated January 4, 2011, the undersigned ordered the record closed and directed the parties to file their proposed recommended orders on January 31, 2011.

On January 26, 2011, Respondent filed an Unopposed Motion for Extension of Time to File Proposed Recommended Orders, which was granted by order dated January 27, 2011. In accordance with that order, each party timely filed a Proposed Recommended Order on February 10, 2011.

FINDINGS OF FACT

1. APD is the state agency charged with the licensing and regulation of foster care facilities, group home facilities, and

residential habilitation pursuant to section 20.197 and chapter 393, Florida Statutes (2009).

2. At all times relevant to this proceeding, Respondent held one group home facility license issued by APD for a residence at 12629 Southwest Archer Lane, Archer, Florida 32618. The group home is owned and operated by Miles Hines.

3. C.H. is a child client of APD who has been diagnosed with moderate mental retardation and bipolar disorder. C.H. has a history of attention deficit hyperactivity disorder, post-traumatic stress disorder, and depression.

4. At all times relevant to this proceeding, C.H. was a resident at the Jim Tin Group Home.

5. M.K. is an adult client of APD who has been diagnosed with, among other conditions, mental retardation.

6. At all times relevant to this proceeding, M.K. was a resident at the Jim Tin Group Home.

7. APD alleged that M.K. sexually abused C.H. at the Jim Tin Group Home on or about January 14, 2009.

8. APD produced no direct evidence in support of the allegation. APD relied solely on the written investigative report of a "Child Institutional Investigation" conducted by DCF protective investigator Natalie Rella between January 14 and March 11, 2009. Ms. Rella's report was reviewed and approved by her supervisor, Cheryl Hollingsworth.

9. Ms. Rella did not testify at the hearing. None of the persons interviewed by Ms. Rella testified at the hearing.

10. Ms. Hollingsworth testified that she did not personally participate in any of the interviews that formed the basis of Ms. Rella's report, nor did she independently investigate the abuse report that triggered the investigation.

11. Ms. Hollingsworth relied entirely on Ms. Rella's report and Ms. Rella's conclusion that there were verified findings of inadequate supervision by Mr. Hines.

12. Ms. Rella's report stated that its findings were based on an interview with M.K., an interview of C.H. conducted by the Child Advocacy Center, and her review of prior reports.

13. No transcript or other account of the substance of the interviews was entered into evidence.

14. The "narrative" portion of Ms. Rella's report stated as follows:

[C.H.] is intellectual disabled [sic].
[C.H.] is high functioning but he has a lot of problems. On the night of 01/14/09, a resident tried to grab [C.H.'s] hand and put it between his legs. The resident told [C.H.] to suck his penis. [C.H.] did not but he told the supervisor who said, "I did not see it happen so there is nothing they can do." [C.H.] has spoken with the staff in the past about the resident's behavior. In the past, the other resident has tried to sexually aggress upon [C.H.]. The advances happened for a while but they stopped. The

sexual advances have picked back up in the last couple of weeks. [C.H.] is frightened and scared of the resident.

15. Ms. Rella's report contained a "prior reports" section describing previous investigations involving the same residents. One of these incidents involved a report by C.H. that he had been raped by two men and that another man had sucked C.H.'s penis while the child was at a DJJ facility. This claim was determined to be not substantiated. There were cameras in the room where the assaults were alleged to have occurred. The cameras proved that the assaults never took place.

16. Americo Rodrigues is a certified behavior analyst with Choice Behavior Services, LLC in Gainesville. He has been C.H.'s behavior analyst since 2008 and visits C.H. weekly at the Jim Tin Group Home. Mr. Rodrigues testified that among C.H.'s behavioral problems is a propensity for making false allegations against other residents. C.H. is also very suggestible and easily led to agree with what someone tells him. Mr. Rodrigues stated that he is working with C.H. on these problems, but that they have proven relatively intractable.

17. Mr. Rodrigues had no firsthand knowledge of the events alleged to have occurred at Jim Tin Group Home on January 14, 2009. Mr. Rodrigues testified that his impressions of the group home were that the accommodations and food seemed appropriate, and that facility staff appeared to be ensuring that the

residents' activities of daily living were adequately maintained.

18. During cross-examination, Ms. Hollingsworth conceded that C.H. changed his story during the course of the investigation. C.H. recanted his allegation and denied that he and M.K. ever engaged sexually.

19. Ms. Hollingsworth testified that Ms. Rella had failed to conduct a site visit of the group home, that she never interviewed C.H.'s support coordinator or counselor, and that she never interviewed Mr. Hines. Ms. Rella spoke to no one who had dealt with C.H. over an extended period of time or who could provide perspective as to the child's historic patterns of behavior.

20. Ms. Hollingsworth testified that, based on what she knew now, her recommendation would be to find that the allegations made by C.H. were "not substantiated." In fact, she had made a request to DCF headquarters in Tallahassee to change the conclusion in Ms. Rella's report.

21. Jim Smith, APD's Area 3 administrator, testified that APD filed its complaint against Respondent in complete reliance on DCF's finding of a verified incident of inadequate supervision. APD does not conduct its own investigations and does not review DCF's reports for accuracy. Had DCF found that the allegations against Respondent were "not substantiated," APD

would not have filed the Administrative Complaint that initiated this proceeding.

22. The DCF investigative report is a hearsay document. It was admitted into evidence for the limited purpose of supplementing Ms. Hollingsworth's testimony that DCF had in fact "verified" the abuse complaint. APD argued that the report should be admitted for all purposes under the business records exception set forth in section 90.803(6), Florida Statutes. This argument is unavailing because C.H., the main source of information for the report, showed a lack of trustworthiness.

23. APD has not demonstrated by clear and convincing evidence that Respondent failed to adequately supervise residents and sufficiently protect them from harm, neglect, and sexual abuse.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2010).

25. License revocation and discipline proceedings are penal in nature. The burden of proof on APD in this proceeding was to demonstrate the truthfulness of the allegations in the Administrative Complaint by clear and convincing evidence.

Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987);

Coke v. Dep't of Child. & Fam. Servs., 704 So. 2d 726 (Fla. 5th DCA 1998).

26. The "clear and convincing" standard requires:

[T]hat the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

27. No direct witnesses testified as to the events of January 14, 2009. Even the investigator who prepared the DCF report did not testify at the hearing.

28. APD argues that the DCF report should be admitted for all purposes pursuant to the business records exception in section 90.803(6). However, paragraph (a) of the cited provision states that business records qualify for the exception "unless the sources of information or other circumstances show lack of trustworthiness." See Sunshine Chevrolet Oldsmobile v. Unemplmt App. Comm'n, 910 So. 2d 948, 950 (Fla. 2d DCA 2005). The evidence presented at the hearing established that C.H. was the chief source of information for the DCF report, and that C.H. was not a trustworthy source as regards allegations of sexual misconduct.

29. APD advances an alternative argument for imposing a fine on Respondent despite the lack of evidence. APD states that it is not an investigatory agency, and lacks either the authority or the resources to independently investigate allegations of abuse or neglect. APD relies on DCF to investigate abuse or neglect allegations in group homes for persons with developmental disabilities. Once DCF has verified findings of abuse or neglect against an APD group home licensee, APD has a "ministerial duty" to impose a fine on that licensee pursuant to section 393.0673(1). Under this theory, once DCF presented APD with a "verified" report against Jim Tin Group Homes, APD had no choice but to impose a fine.

30. Section 393.0673(1), provides as follows, in relevant part:

(1) The agency may revoke or suspend a license or impose an administrative fine, not to exceed \$1,000 per violation per day, if:

* * *

(b) The Department of Children and Family Services has verified that the licensee is responsible for the abuse, neglect, or abandonment of a child or the abuse, neglect, or exploitation of a vulnerable adult.

31. The quoted portion of the statute makes clear that APD may impose an administrative fine after DCF has verified that the licensee is responsible for the alleged violations. The

statute does not require APD to impose a fine as a "ministerial duty." The statute certainly does not require APD to ignore evidence produced at a de novo hearing that the "verified" finding of inadequate supervision was based on a deficient investigation subsequently disavowed by the DCF supervisor who initially approved it.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Agency for Persons with Disabilities enter a final order dismissing the Administrative Complaint.

DONE AND ENTERED this 14th day of April, 2011, in Tallahassee, Leon County, Florida.



LAWRENCE P. STEVENSON
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Filed with the Clerk of the
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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.