

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

STATE OF FLORIDA, AGENCY FOR)
HEALTH CARE ADMINISTRATION,)
)
Petitioner,)
)
vs.) Case No. 10-0496
)
ROBIN AUDIFREDD, d/b/a)
ST. FRANCIS PLACE, a/k/a)
FAMILY TIES ACLF, INC.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

An administrative hearing was conducted in this case on April 13 and 14, 2010, in Pensacola, Florida, before James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Shaddrick Haston, Esquire
2727 Mahan Drive, Building 3
Mail Station 3
Tallahassee, Florida 32308-5403

For Respondent: Mark L. Smith, Esquire
Law Office of Mark Lee Smith
224 East Garden Street, Suite 3
Pensacola, Florida 32303

STATEMENT OF THE ISSUES

Whether Respondent Robin Audifredd d/b/a St. Francis Place a/k/a Family Ties (Respondent) operated an assisted living

facility without a required license and, if so, what is the appropriate penalty.

PRELIMINARY STATEMENT

On December 17, 2009, the Agency for Health Care Administration (Agency) issued an amended^{1/} Administrative Complaint (Complaint) against Respondent alleging that Respondent was operating an assisted living facility (ALF) without a required license from the Agency and seeking administrative fines totaling \$115,000. Respondent timely requested an administrative hearing under chapter 120, Florida Statutes (2009). On February 1, 2010, the Agency referred the case to the Division of Administrative Hearings (DOAH).

At the administrative hearing held on April 13 and 14, 2010, the Agency presented the testimony of Norma Endress, who is a registered nurse employed by the Agency; Katherine Cone, who investigated Respondent's facility on behalf of the Florida Attorney General's Office on March 25, 2009; and Respondent. The Agency offered 17 exhibits which were received into evidence as Exhibits P-1 through P-17.

Respondent presented the testimony of two of her employees, Michelle Thompson and Kathleen Wentworth, and testified on her own behalf. Respondent offered five Exhibits, which were received into evidence as R-1 through R-5. The parties also

jointly introduced two Exhibits received into evidence as Joint Exhibits Jt-1 and Jt-2.

Following the evidentiary portion of the final hearing on April 14, 2010, the parties were given 30 days from the filing of the transcript within which to file their respective proposed recommended orders. The four-volume Transcript of these proceedings was filed May 13, 2010. The parties timely filed their respective Proposed Recommended Orders on Monday, June 14, 2010. Thereafter, on July 8, 2010, prior to the rendition of a recommended order, Respondent filed a Suggestion of Bankruptcy informing that Respondent had filed for protection under chapter 13 of the United States Bankruptcy Code.

In response to the undersigned's Order dated July 20, 2010, the parties advised that a recommended order should not be rendered in this case until the automatic stay imposed by the Bankruptcy Code was no longer in effect. Thereafter, the parties reported on a monthly basis that the automatic stay was still in effect, through February 2011. On March 17, 2011, Respondent's counsel filed a Notice of Removal of Stay indicating that the automatic stay was removed, effective March 16, 2011. Thereafter, in response to a subsequent Order Requiring Status Report, on March 22 and March 29, 2011, respectively, Respondent and the Agency informed that a recommended order could now be entered in this case.

The Proposed Recommended Orders filed by the parties on June 14, 2010, have been considered in rendering this Recommended Order.

FINDINGS OF FACT

1. Respondent is the sole owner of St. Francis Place. She has never done business as "Family Ties, ACLF, Inc." At all pertinent times, Respondent held a license from the Florida Department of Business and Professional Regulation to operate St. Francis Place as a boarding home.

2. Respondent's license to operate St. Francis Place as a boarding house allows up to 16 residents. Respondent provides non-transient housing for her residents.

3. During pertinent times, there were approximately 13 residents housed at St. Francis Place. Some residents of St. Francis Place have conditions such as alcoholism, dementia, schizophrenia, manic depression, memory loss, and head trauma. Most of the residents of St. Francis Place were placed by other agencies, such as the United States Veterans Administration (VA).

4. In addition to housing residents for pay, at the time of the hearing, Respondent was providing housing to three former homeless residents free of charge.

5. According to the Complaint, Respondent was operating St. Francis Place in a manner that required a license from the

Agency as an ALF because she was providing "personal services"^{2/} to one or more residents who were not related to Respondent.

6. A license from the Agency is not required for facilities that provide "personal services" to no more than two non-relative residents who do not receive optional state supplementation, if the owner or renter of the facility resides at the facility. See Conclusions of Law 65, infra.

7. According to Respondent, she did not need to be licensed as an ALF because she resided at St. Francis Place and only provided "personal services" to one non-relative resident, who was not receiving optional state supplementation.

8. There is no evidence that any resident of St. Francis Place was receiving optional state supplementation during the pertinent time period.

9. Respondent owns the building located at 1030 Jo Jo Road, Pensacola, Florida, from which she operates St. Francis Place.

10. Respondent also owns a home at 425 Belle Chase Way, Pensacola, Florida.

11. According to Respondent, she "resides" at both 1030 Jo Jo Road and at 425 Belle Chase Way, in Pensacola, Florida. Respondent testified that she actually spends more time at 1030 Jo Jo Road, where St. Francis Place is located.

12. Petitioner's employees provided testimonial evidence to the effect that Respondent spends a great deal of time at St. Francis Place. Their testimony supports a finding that Respondent spends three or four nights a week at St. Francis Place.

13. Despite the evidence showing that Respondent spends a lot of her time at St. Francis Place, it is found that Respondent's residence is 425 Belle Chase Way, Pensacola, Florida, rather than 1030 Jo Jo Road, based upon the following findings which are supported by clear and convincing evidence:

a. Respondent claims homestead exemption at 425 Belle Chase Way.

b. Respondent receives her phone bill at 425 Belle Chase Way address.

c. In 2009, Respondent's address was listed as 425 Belle Chase Way on the title listing Respondent as a co-owner of her mother's motor vehicle.

d. Respondent had no regular room at St. Francis Place. Rather, she either slept on a couch near the main entrance or on a couch in a back room. Although Respondent would also occasionally sleep in a room set aside for residents when there was a vacancy, Respondent had no regular room at St. Francis Place to sleep or keep her clothes.

e. In February of 2009, Respondent's attorney in Respondent's divorce proceedings listed Respondent's address as 425 Belle Chase Way.

f. Prior to February 2010, the Florida Department of Motor Vehicles and Public Safety (DMV) listed Respondent's address as 425 Belle Chase Way.

g. On February 13, 2010, the DMV issued Respondent a duplicate driver's license indicating that her address was 425 Belle Chase Way.

h. By the time of the final hearing, the address listed on Respondent's Florida driver's license had been changed to 1030 Jo Jo Road. The change of address from 425 Belle Chase Way to 1030 Jo Jo Road was made on April 8, 2010, just five days prior to the final hearing.

i. Despite the recent change, Respondent testified that she did not know what address was listed on her driver's license. That testimony was not credible. Neither was Respondent's testimony that she "resided" at St. Francis Place.

14. The phone number and address for St. Francis Place is listed in the Pensacola area 2009 AT&T Real Yellow Pages (Yellow Pages) under the heading "Assisted Living." At the final hearing, Respondent explained that she never authorized the listing and has contacted Yellow Pages and asked them to remove the listing. Respondent's testimony in that regard is undisputed, and it is found that Respondent did not authorize St. Francis Place to be listed in the Yellow Pages under the heading "Assisted Living."

15. On March 25, 2009, a site visit of St. Francis Place was conducted by the Medicaid Fraud Unit of the Florida Attorney General's Office. The next day, on March 26, 2009, the Agency for Health Care Administration conducted a survey of St. Francis Place.

16. The undisputed testimony clearly showed that, when the site visit and survey were conducted, there was one resident, identified as "G. T.," who was totally contracted and required assistance with daily living such as bathing, dressing, feeding, and taking medications. Respondent admits, and it is found, that Respondent and her employees provided "personal services" to G. T. within the meaning of applicable ALF licensing laws.

17. G. T. is a resident who has had multiple sclerosis for many years. Respondent has known G. T. for over 16 years.

18. G. T. had been a resident of St. Francis Place since it first opened its doors approximately six years prior to the date of the final hearing.

19. The Agency was aware that G. T. was a resident of St. Francis Place and was receiving personal services prior to the March 2009, site visit and survey. There is no indication, however, that the Agency took any action prior to March 2009, to alert Respondent that she was considered to be operating an ALF without a license.

20. Katherine Cone and Norma Endress were members of the teams who conducted the site visit and survey of Respondent's St. Francis Place facility on March 25 and March 26, 2009, respectively.

21. During her visit on March 25, 2009, Ms. Cone believed that resident G. T. was not receiving proper care and arranged

for her transport to a local hospital. G. T. was treated and released back to St. Francis Place. According to Ms. Endress, who saw G. T. the very next day, she observed no demonstrated harm to any resident at St. Francis Place. The evidence is insufficient to conclude that G. T. was harmed while a residing at St. Francis Place.^{3/}

22. After the site visit and survey, both Ms. Cone and Ms. Endress believed that, in addition to the personal services provided to G. T., there was evidence that staff at St. Francis Place was providing personal services in the form of assistance in administering medications or filling pill organizers for other residents. The evidence presented at the final hearing, however, was insufficient to show, clearly and convincingly, that personal services were rendered to other residents. The insufficient evidence included:

- a. Photographs and the surveyors' recollections of pill reminder or pill organizer boxes that looked as though they were full of medications;
- b. Photographs and the surveyors' recollections of medication containers stored in a centrally located medication cart with wheels;
- c. Photographs and Ms. Cone's recollection of documents in folders above the medication cart containing information related to transportation and outside services for residents such as pharmacies and transportation companies.

d. Ms. Cone's testimony that one of Respondent's employees, Kathleen Wentworth, told her at the time of the site visit that she maintained pill organizers with medications for several residents, and that Ms. Wentworth had signed a statement to the effect that staff at St. Francis Place administered medications to residents.

e. Ms. Endress' testimony that one of the residents told her that staff at St. Francis Place had filled his pill reminder box.

23. The evidence was insufficient because it was not further supported. Respondent and her testifying employees explained, and other evidence indicated, that the medication cart remained unlocked and was accessible so that residents could retrieve their own medications. There was no testimony from a St. Francis Place resident, employee or Respondent, or anyone else with actual knowledge, indicating that either Respondent or her employees ever assisted any resident other than G. T., with their medications.

24. As far as Ms. Cone's hearsay recollection of what Ms. Wentworth told her, Ms. Wentworth testified at the hearing that the conversation did not occur.

25. In addition, while Ms. Cone remembered a written statement signed by Ms. Wentworth, no such document was entered into evidence.

26. Finally, photographs and Ms. Cone's recollection of folders with documents about services available from other

vendors, such as pharmacies or transportation providers, did not show that Respondent was providing personal services to her residents.

27. According to Ms. Endress, prior to leaving St. Francis Place after the site visit on March 26, 2009, she informed Respondent that Respondent was operating without the requisite ALF license, and that Respondent would be hearing from the Agency within 10 days.

28. In contrast, Respondent testified that one of the Agency's employees, Ms. Klug, told her that she could "care for two people without an ALF license," and that Ms. Endress had given her similar assurances.

29. Consistent with Ms. Endress's recollection, the Agency sent a letter to Respondent dated March 27, 2009, which informed Respondent that the Agency "considers you to be operating as an Assisted Living Facility (ALF) without being licensed." Considering that letter, together with the recollection of Ms. Endress, and the comparative credibility of the witnesses testifying on this point, it is found that, while one or more Agency employees informed Respondent that there was an exception to the AFL license requirements, Ms. Endress informed Respondent on March 26, 2009, that Respondent needed an ALF license, and that Respondent would be hearing from the Agency within ten days.

30. The Agency's letter mailed to Respondent on March 27, 2009, stated in its entirety:

Dear Ms. Audiffred,

You are hereby notified that the Agency for Health Care Administration considers you to be operating as an Assisted Living Facility (ALF) without being licensed. Based on Section 429.14(1)(m), Florida Statutes (Fla. Stat.), it is unlawful to own, operate, or maintain an assisted living facility without obtaining a license under Chapter 429, Part I, F.S.

Section 429.02(6), Fla. Stat., defines an ALF as "any building or buildings, section or distinct part of a building, private home, boarding home, home for the aged, or other residential facility, whether operated for profit or not, which undertakes through its ownership or management to provide housing, meals, and one or more personal services for a period exceeding 24 hours to one or more adults who are not relatives of the owner or administrator." The statute provides an exemption from licensure for not more than 2 adults who do not receive optional state supplementation (OSS) when the person who provides the housing, meals and personal services owns or rents the home and resides therein. This exception can be found in Section 420.04(2)(d), Fla. Stat.

Based on evidence of unlicensed activity, the Agency intends to proceed with all available legal action, including bringing injunctive proceedings against you in a court of competent jurisdiction, to insure that you immediately cease and desist from offering these services. Further, Section 429.19(7), Fla. Stat., provides that "any unlicensed facility that continues to operate after agency notification is subject to a \$1,000 fine per day". [sic]

If you believe you are not operating as an ALF in violation of law as described, you may submit in writing any information which would demonstrate that to the Agency **within 24 hours of receipt of this notice**. Any information you wish to have considered by the Agency must be actually received within 24 hours of your receipt of this Notice of Violation. If you have any questions, you may reach me at 850-922-8822.

31. The letter was signed by Barbara Alford, R.N., B.S.N., Field Office Manager, and was copied to Alberta Granger, Assisted Living Unit Manager, and to the Regional Attorney.

32. The fines set forth in the Complaint are premised upon penalties accruing at the rate of \$1,000 per day from the day after the Agency's March 27, 2009, letter to Respondent, through July 21, 2009, when the Agency found that G. T. was still residing at Respondent's facility.

33. According to paragraph 13 of the Complaint, "pursuant to § 408.812, Fla. Stat. (2009), the Agency notified the Respondent by certified mail that the facility was in violation of Florida Law on March 27, 2009."

34. The Agency's March 27, 2009, letter, however, does not refer to section 408.812, contains a number of wrong citations to the law, and is equivocal on the issue of whether the Agency was actually requiring Respondent to cease and desist.

35. The law in effect in March 2009 when the letter was written was the 2008 version of Florida Statutes, not the 2009 version referenced in the Complaint.^{4/}

36. The first paragraph of the March 27, 2009, letter refers to section 429.14(1)(m), Florida Statutes, for the proposition that "it is unlawful to own, operate, or maintain an assisted living facility without obtaining a license. . . ." There is, however, no section 429.14(1)(m) in either the 2008 or 2009 version of section 429.14.

37. The next statutory reference in the letter is in the second paragraph which refers to section 429.02(6) for the definition of ALF. Both the 2008 and 2009 versions of section 429.02(6), however, define "chemical restraint," not ALF.

38. Although, further down in the second paragraph, the letter correctly refers to section 429.04(2)(d), for the exception where no license is required; the third paragraph of the letter erroneously refers to section 429.19(7) for the quote "any unlicensed facility that continues to operate after agency notification is subject to a \$1,000 fine per day." That language does not appear in either the 2008 or 2009 version of section 429.19, and has not appeared in chapter 429 since 2006. In fact, instead of providing for a \$1,000 per day fine, section 429.19(7), Florida Statutes (2008), in effect on the date of the letter, provides:

In addition to any administrative fines imposed, the agency may assess a survey fee, equal to the lesser of one half of the facility's biennial license and bed fee or \$500, to cover the cost of conducting initial complaint investigations that result in the finding of a violation that was the subject of the complaint or monitoring visits conducted under s. 429.28(3)(c) to verify the correction of the violations.

39. A provision for the imposition of a \$1,000 per day fine from the date of notice does not appear in either the 2008 or 2009 versions of chapter 429. Rather, the authority to impose a \$1,000 per day fine for operating an ALF without a license which was in effect in March 2009, when the letter was written is found in section 408.812(4), Florida Statutes (2008), which provides that "[a]ny person or entity that fails to cease operation after agency notification may be fined \$1,000 for each day of noncompliance."

40. Although the Complaint, served approximately 9 months after the letter, refers to section 408.812, the letter does not even mention chapter 408. In addition, the actual language of section 408.812(4) differs from the quote in the letter from an old version of section 429.19(7) that was no longer in effect.

41. Aside from being inaccurate on the law, the letter does not explain why the Agency "considers" Respondent to be operating an ALF without a license, or what aspects of

Respondent's operations required her to need a license beyond her license to operate a boarding house.

42. Even though the letter fails to describe which aspects of Respondent's operations violate the law, and does not set forth the referenced "evidence of unlicensed activity," the letter advises Respondent that she may submit information to the Agency within 24 hours to demonstrate that she is "not operating an ALF in violation of law as described."

43. Additionally, although suggesting that the Agency intends to proceed with legal action to insure that Respondent "cease[s] and desist[s] from offering these services," the letter does not identify which services or tell Respondent to stop operations.

44. In addition to giving Respondent time to provide the Agency with information that she is not in violation of the law, the letter advises Respondent of the exception to the requirement of a license for not more than 2 adults "when the person who provides the housing, meals and personal services owns or rents the home and resides therein."

45. While it has been found that Respondent did not actually reside at St. Francis Place, it is further found that Respondent believed that she could care for two patients without an ALF license as mentioned in the letter.

46. Respondent received the Agency's March 27, 2009, letter on or about April 1, 2009.

47. Within 24 hours after receiving the letter, Respondent sent the Agency an undated written response addressed "To Whom it May Concern."

48. Respondent's written response mentioned that she had discussed with Ms. Endress, the one resident that they "give care to" and that Ms. Endress had advised, "Well legally you can take care of two people without a license."

49. Respondent's written response further reported that a representative from the VA had suggested to several of Respondent's residents that they should move out.

50. Respondent's written response also advised that a number of visits and surveys of St. Francis Place had been conducted in March 2009, by various agencies, including the VA, the Medicaid Fraud Unit from the Florida Attorney General's Office, the Florida Department of Children and Families, and the Agency.

51. The last paragraph of Respondent's written response states:

St. Francis Place is a liscenced [sic] non-transient rooming house and the arrangements provided by our business is stated below. The renters residing at St. Francis Place are responsible for their own medications, laundry, and living quarters. As a non-transient rooming house and being

in operation for the past six years, we have always encouraged our renters to maintain their own independence. Six of the thirteen renters have their own Florida drivers liscence [sic]. Several of the renters attend school or maintain employment. Several renters perform odd jobs for pay at St. Francis Place, such as yard work, sweeping porches, or taking out trash etc.

Monthly Rent includes:

1. three meals a day
2. accessible laundry room
3. transportation upon request
4. utilities
5. garbage service
6. use of telephone
7. cable.

52. On July 21, 2009, surveyors from the Agency once again visited St. Francis Place and observed that G. T. was still residing there and receiving personal services.

53. Sometime after July 21, 2009, the Florida Department of Children and Families moved G. T. from St. Francis Place to a facility known as the "Villas" in an Alzheimer's lock-down unit.

54. The Agency never sought an injunction to force Respondent to cease operating St. Francis Place.

55. There is no evidence that the Agency suggested to Respondent corrective measures or actions that she could take to comply with the law.

CONCLUSIONS OF LAW

56. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. See §§ 120.569, 120.57(1), Florida Statutes (2010).

57. The Agency is designated as the state agency responsible for licensure of ALFs and enforcement of all applicable federal regulations, state statutes, and rules governing ALFs pursuant to the chapter 429, part I, Florida Statutes, and Florida Administrative Code Rule 58A-5.

58. Petitioner, as the party asserting the affirmative in this proceeding, has the burden of proof. See, e.g., Balino v. Dep't of Health & Rehabilitative Servs., 348 So. 2d 349 (Fla. 1st DCA 1977). Because the Petitioner is seeking to prove violations of a statute and impose administrative fines or other penalties, it has the burden to prove the allegations in the complaint by clear and convincing evidence. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

59. Clear and convincing evidence:

requires that 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 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.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005), quoting Slomowitz v. Walker, 429 So. 797, 800 (Fla. 4th DCA 1983).

60. Section 429.02(5), Florida Statutes, defines an ALF as:

any building or buildings, section or distinct part of a building, private home, boarding home, home for the aged, or other residential facility, whether operated for profit or not, which undertakes through its ownership or management to provide housing, meals, and one or more personal services for a period exceeding 24 hours to one or more adults who are not relatives of the owner or administrator.

61. "'Personal services' means direct physical assistance with or supervision of the activities of daily living and the self-administration of medication and other similar services which the department may define by rule. 'Personal services' shall not be construed to mean the provision of medical, nursing, dental, or mental health services." § 429.02(16), Fla. Stat.

62. Assistance with the self-administration of medication includes "taking the medication, in its previously dispensed, properly labeled container, from where it is stored, and bringing it to the resident . . . ; in the presence of the resident, reading the label, opening the container, removing a prescribed amount of medication from the container, and closing the container . . . ; [and] placing an oral dosage in the

resident's hand or placing the dosage in another container and helping the resident by lifting the container to his or her mouth." § 429.256(3)(a)-(c), Fla. Stat.

63. The clear and convincing evidence demonstrated, and Respondent admits, that Respondent and her employees provided "personal services" to G. T. within the meaning of applicable ALF licensing laws. See Finding of Fact 16, supra.

64. Under Florida law, ALFs are required to be licensed by the Agency unless specifically exempted. § 429.04, Fla. Stat.

65. In this case, Respondent argues that she qualifies for the exemption from licensure found in section 429.04(d), which provides:

Any person who provides housing, meals, and one or more personal services on a 24-hour basis in the person's own home to not more than two adults who do not receive optimal state supplementation. The person who provides the housing, meals, and personal services must own or rent the home and reside therein.

66. At the final hearing, Respondent asserted that she qualifies for the exemption because she resides at St. Francis Place located at 1030 Jo Jo Road, Pensacola, Florida, and only provides personal care for one resident who does not receive optimal state supplementation

67. In fact, during the final hearing, Respondent asserted that she had more than one residence.

68. Chapter 429 does not define the term "reside" as used in the above-quoted exemption found in section 428.04(d).

Florida case law, however, provides guidance. As noted in Walker v. Harris, 398 So. 2d 955, 957-58 (Fla. 4th DCA 1981):

In Herron v. Passailaigue, 92 Fla. 818, 110 So. [**8] 539, 543 (1926), the court stated:

The rule is well settled that the terms "residence," "residing," or equivalent terms, when used in statutes, or actions, or suits relating to taxation, right of suffrage, divorce, limitations of actions, and the like, are used in the sense of "legal residence"; that is to say, the place of domicile or permanent abode, as distinguished from temporary residence.

A person may have several temporary local residences, but can have only one legal residence. A legal residence, or domicile, is the place where a person has fixed an abode with the present intention of making it their permanent home. Minick v. Minick, 111 Fla. 469, 149 So. 483 (1933). In Bloomfield v. City of St. Petersburg Beach, 82 So.2d 364 (Fla. 1955), a case strikingly similar to the one at bar, the court held:

[W]here a good faith intention is coupled with an actual removal evidenced by positive overt acts, then the change of residence is accomplished and becomes effective. This is so because legal residence consists of the concurrence of both fact and intention. The bona fides of the intention is a highly significant factor. *Id.* at 368.

69. As noted in the Findings of Fact, above, it is found that Respondent did not reside at St. Francis Place. Further, considering the concept of legal residence in the case law quoted above, it is further concluded that Respondent did not "reside" at St. Francis place within the meaning of section 429.04(d), and does not qualify for the exemption from licensure found in that section.

70. Respondent did not assert or prove entitlement to any other exemption from the licensure requirements for ALF found in chapter 429. Therefore, it is found that Respondent should have been licensed as an ALF when she and her staff provided personal services to resident G. T. while she was residing at St. Francis Place.

71. It is further found, however, that the Agency failed to demonstrate by clear and convincing evidence that it is entitled to impose an administrative fine in the amount of \$115,000 against Respondent because the Agency's notice to Respondent was defective.

72. The Complaint asserts a fine under section 408.812(4), Florida Statutes, which provides: "Any person or entity that fails to cease operation after agency notification may be fined \$1,000 each day of noncompliance."

73. Section 408.812(4) does not specify the requirements of "agency notification" that triggers the \$1,000 per day fine. The Agency, in its Proposed Recommended Order, however, states, "[p]ursuant to section 408.812, the Agency was required to give the facility notice to cease and desist" While the Agency argues that such notice was provided, it is found that the notice was lacking because the Agency letter did not unequivocally state that Respondent should cease and desist, nor did it explain which aspects of Respondent's operations violated the law. See Findings of Fact 41-43, supra.

74. Moreover, the Agency's March 27, 2009, letter to Respondent asserts a fine under a statutory provision in chapter 429 that was no longer in effect, whereas the Complaint asserts a fine under chapter 408. See Findings of Fact 33-40, supra. In contrast to section 408.812 asserted in the Complaint, the provisions of section 429.19, under which the Agency provided notice, requires the Agency to "make a reasonable attempt to discuss each violation and recommended corrective action with the owner or administrator of the facility, prior to written notification." § 429.19(8), Fla. Stat. There is no evidence that Respondent was afforded an opportunity for corrective action.

75. Although the Agency's March 27, 2009, letter was not the actual charging document, the Complaint is dependent upon

that letter to trigger the \$1,000 a day fine sought in this case. See Finding of Fact 32, supra. To allow the Agency to collect a fine under a law other than the law for which it provided notice would offend the basic principles of due process. Cf. Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992) ("This is basic due process of law and means that not only must the proof at trial or hearing be that conduct charged in the accusatorial document, but also that the conduct proved must legally fall within the statute or rule claimed to have been violated.").

76. Further, while under section 408.812(2), the Florida Legislature has stated that unlicensed activity constitutes harm that materially affects the health, safety, and welfare of clients, the evidence was insufficient to clearly show that G. T. was harmed by Respondent's unlicensed activity.

77. Finally, G. T. is no longer residing at St. Francis Place, and there is no evidence that Respondent is presently in violation of the ALF licensing statutes.

78. It is concluded that the Agency demonstrated by clear and convincing evidence that Respondent provided personal services to G. T. without the requisite ALF license. It is further found that the Agency proved that Respondent's actions in providing those personal services constituted unlicensed activity prohibited by section 408.812. It is also concluded,

as a matter of law, that Respondent did not receive proper notice for the accrual of the \$1,000 per day fine sought under section 408.812(4), and that the imposition of an administrative fine under the specific facts and circumstances of this case would not be appropriate.

RECOMMENDATION

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

RECOMMENDED that the Agency for Health Care Administration issue a final order finding that Respondent Robin Audifredd d/b/a St. Francis Place^{5/} operated an assisted living facility without a license in violation of section 408.812, but imposing no administrative fine or penalty.

DONE AND ENTERED this 6th day of May, 2011, in Tallahassee, Leon County, Florida.



JAMES H. PETERSON, III
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 6th day of May, 2011.

ENDNOTES

^{1/} The original complaint was only filed against Family Ties ACLF, Inc., and was subsequently amended to add Robin Audiffred, d/b/a St. Francis Place as a party after Respondent filed a motion to dismiss asserting, "Robin Audiffred, owner of a business known as St. Francis Place, is in no way affiliated with Family Ties ACLF, Inc., and has never done business as Family Ties ACLF, Inc."

^{2/} "Personal services" is defined in section 429.02(16), Florida Statutes. See quote and discussion of that section under Conclusions of Law.

^{3/} Photographs taken of G. T. on March 25, 2009, suggest that she had been neglected. The testimony of Ms. Endress and others who cared for G. T., as well as the fact that G. T. was released back to St. Francis Place, suggests otherwise.

^{4/} Unless otherwise indicated, the undersigned's references to the Florida Statutes are to the 2008 version.

^{5/} The final order should not name "Family Ties" or "Family Ties ACLF, Inc." See Finding of Fact 1, supra.

COPIES FURNISHED:

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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.