

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE )  
ADMINISTRATION, )  
 )  
Petitioner, )  
 ) Case No. 12-3538  
vs. )  
 )  
L & B SOLUTIONS CARE, INC., )  
d/b/a L & B SOLUTIONS CARE II, )  
INC., )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

On January 3, 2013, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing by videoconference in Tallahassee and Lauderdale Lakes, Florida.

APPEARANCES

For Petitioner: Nelson E. Rodney  
Assistant General Counsel  
Agency for Health Care Administration  
8333 Northwest 53rd Street, Suite 300  
Miami, Florida 33166

Respondent: Julie Arrendell  
Qualified Representative  
13899 Biscayne Boulevard, Suite 101  
North Miami Beach, Florida 33181

STATEMENT OF THE ISSUES

The issues are whether Respondent, as the owner and operator of an assisted living facility (ALF), is guilty of

failing to correct seven deficiencies by a followup survey conducted on July 19, 2011, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On May 26, 2011, Petitioner's surveyor conducted a survey of Respondent's ALF and cited several deficiencies. On July 19, 2011, Petitioner's surveyor conducted a followup survey and found that Respondent had failed to correct eight of the deficiencies cited in the initial survey.

By Administrative Complaint dated January 27, 2012, Petitioner alleged eight counts, which are all alleged to be Class III violations, and seeks an administrative fine of \$1,000 per count. Renumbering the counts to reflect Petitioner's dismissal of Count 4 at the hearing, the counts are:

1. Respondent failed to maintain a written record of any significant changes for residents, in violation of Florida Administrative Code Rule 58A-5.0182(1)(e).
2. Respondent failed to have a doctor's order and signed consent form for half bed rails, in violation of Rule 58A-5.0182(6)(h).
3. Respondent failed to maintain a daily medication administration record for some residents, in violation of Rule 58A-5.0185(5)(b)
4. Respondent failed to ensure that employees obtain at least four hours of medication training prior to assuming specific responsibilities, in violation of

sections 429.256 and 429.52(5), Florida Statutes, and Rules 58A-5.0191(5) and 58A-5.024(2)(a)1.

5. Respondent failed to have a dated and planned menu, in violation of Rule 58A-5.020(2)(d).

6. Respondent failed to have an executed contract for certain residents, in violation of sections 429.24(1) and 429.24(5) and Rules 58A-5.024(3)(i) and 58A-5.025(1).

7. Respondent failed to submit the written comprehensive management plan for review and approval by the county emergency management agency, in violation of section 429.41(1)(b) and Rule 58A-5.026(2).

The Administrative Complaint alleges that Respondent operates a six-bed ALF at 567 Northeast 137th Street in Miami. The Administrative Complaint refers to an administrator; she is Leonie Nelson.

For the initial survey, Count 1 alleges that Respondent failed to maintain a written record of significant changes for Resident #1 and Resident #3. (Although it is not alleged in the Administrative Complaint, exhibits reveal that Resident #1 is L. M., and Resident #3 is M. A.) Count 1 alleges that Resident #1's health assessment showed that she had a stage III pressure ulcer on her buttock, but Respondent maintained no documentation showing when the ulcer appeared, the ulcer's size or progression, and care provided for the wound. Count 1 alleges that Respondent's medication observation records (MORs)

disclosed that Resident #1 was hospitalized from May 2-5, 2011, but Respondent maintained no documentation of the hospitalization. Count 1 alleges that Resident #3 was hospitalized on October 11, 2010, for vomiting, but Respondent maintained no documentation of the hospitalization.

For the followup survey, Count 1 alleges that Respondent maintained no documentation of one or more hospitalizations of Resident #1 during June and July.

For the initial survey, Count 2 alleges that Respondent failed to maintain a physician's order and signed consent for Resident #1, who was occupying a bed with one-half bed rails. For the followup survey, Count 2 alleges that Respondent failed to maintain signed consents for Resident #1 and Resident #3, who were occupying beds with one-half bed rails; Count 2 also alleges that Respondent failed to maintain a physician's order for Resident #3.

For the initial survey, Count 3 alleges that Respondent failed to maintain a daily MOR for Resident #1, Resident #2, and Resident #3. (Resident #2 is M. G., also identified as M. E. G.) As to Resident #1, Count 3 alleges that the MOR states that, even though Resident #1 was in the hospital on May 4, a staffperson initialed the self-administration of three medications for that date: Labetalol HCL 200 mg, Simvastatin 20 mg, and Metformin HCL 850 mg. Count 3 alleges that Resident #1

was prescribed Valacyclovir 500 mg, but the medication was not documented on her MOR. As to Resident #2, Count 3 alleges that her MOR did not have the correct times for the self-administration of Lexapro 10 mg, ferrous sulfate 325 mg, Lorazepam .5 mg, Carvedilol 3/125 mg, and Simvastatin 20 mg, and the MOR did not match the medication instructions on the bingo card, which is a card bearing dates and attached pills. As to Resident #3, Count 3 alleges that her MOR omitted the afternoon self-administration of acetaminophen. A staffperson allegedly initialed self-administrations of this medication on May 23 and 24, even though the pills were still in the bingo cards. A staffperson also allegedly initialed the self-administration of morphine 15 mg for May 1-26, but the morphine was not at the ALF during that period of time.

For the followup survey, as to Resident #2, Count 3 alleges that a staffperson failed to initial the MOR, by 11:00 a.m. on July 19 for the morning self-administration of Carvedilol. As to Resident #3, Count 3 alleges that a staffperson initialed self-administrations of Risperidone and Tramadol--both at noon on July 13, even though both of these medications were still in the bingo card for that date. Count 3 alleges that no staffperson initialed the self-administration of artificial tears from July 1-19.

For the initial survey, Count 4 (the first of the renumbered counts, so this appears as Count 5 in the Administrative Complaint) alleges that Respondent failed to ensure that Staff #3, Staff #4, and Staff #5 obtained a minimum of four hours' medication training prior to assuming responsibilities for which this training is required. (Although it is not alleged in the Administrative Complaint, Petitioner exhibit page 54 reveals that Staff #3 is Marie Dossons, Staff #4 is James Fils Aime, and Staff #5 is Pierre Bozor; the name of "James" is hardly legible on the exhibit, but Ms. Nelson testified as to his first name at the hearing. (Tr. 77)) Count 4 alleges that Staff #3 is a caretaker hired on October 14, 2000, Staff #4 is the manager hired on August 10, 2009, and Staff #5 is a caretaker whose date of hire is not alleged. Count 4 alleges that each of these staffpersons had completed only two hours of medication training. Count 4 alleges that Respondent's records reveal that Staff #3 was assisting residents with self-administration, as she initialed the MOR, and alleges that Ms. Nelson admitted that all staffpersons assist with the self-administration of medications.

For the followup survey, Count 4 alleges that Respondent failed to ensure that Staff #5 and Staff #7 obtained a minimum of four hours' medication training prior to assuming responsibilities for which this training is required. (Staff #7

is Inel Callwood.) Count 4 alleges that Staff #5 had completed only two hours of medication training and Staff #7--a manager hired on June 21, 2011--had no documentation of any medication training.

For the initial survey, Count 5 alleges that Respondent failed to have a dated and planned menu posted at least one week in advance. For the followup survey, Count 5 alleges that Respondent failed to have a dated and planned menu posted at least one week in advance.

For the initial survey, Count 6 alleges that Respondent failed to maintain executed contracts for Resident #1 and Resident #3. Count 6 alleges that Resident #1 was admitted on September 15, 2010, and her contract was not dated or signed. Count 6 alleges that Resident #3 was admitted on March 25, 2010, and her contract contained only the first page and thus was not signed.

For the followup survey, Count 6 alleges that Respondent failed to maintain an executed contract for Resident #3, whose file allegedly continued to contain only the first page of her contract.

For the initial survey, Count 7 alleges that Respondent had not submitted its written comprehensive management plan for review and approval by the county emergency management agency. For the followup survey, Count 7 alleges that Respondent had not

submitted its written comprehensive management plan for review and approval by the county emergency management agency, although Ms. Nelson alleged stated that she had sent it to the local agency for approval.

At the start of the hearing, Petitioner requested that the Administrative Law Judge take official notice of a final order in Agency for Health Care Administration v. L & B Solutions Care II, Inc., AHCA Case No. 2011010629 (Final Order). The Final Order adopted a recommended order that was issued after an informal hearing on violations arising out of surveys conducted on July 19, 2011, and September 7, 2011. As noted above, July 19 was the date of the followup survey in the present case. Petitioner asked for official notice to relieve itself of the burden of proving those violations that were proven to exist in AHCA Case No. 2011010629. After explaining this to the Qualified Representative, the Administrative Law Judge invited argument. After hearing argument, the Administrative Law Judge granted the request for official notice.

During the hearing, Petitioner called one witness and offered into evidence six exhibits: Petitioner Exhibits 1-2 and 4-7. Respondent called one witness and offered into evidence three exhibits: Respondent Exhibits 1-3. All exhibits were admitted. Following the hearing, the Administrative Law Judge redacted the Social Security numbers of 13 residents disclosed



on Petitioner exhibits, pages 70-71, and the full names of residents that were contained on almost every page of the Qualified Representative's voluminous filing of exhibits on December 18, 2012.

The court reporter filed the transcript on January 17, 2013. Petitioner filed a proposed recommended order on January 28, 2013.

Following the hearing, the Administrative Law Judge found a reference to Petitioner's Form 3020 in Petitioner exhibits pages 75-76. The Administrative Law Judge has taken official notice of this form as it appears on Petitioner's website at:

[http://ahca.myflorida.com/MCHQ/WebDmHelp/pdfs/Web DM 3020 Form.pdf](http://ahca.myflorida.com/MCHQ/WebDmHelp/pdfs/Web_DM_3020_Form.pdf). This is a form "Statement of Deficiencies and Plan of Corrections" for violations of state statutes and rules. The form contains five columns: a "prefix tag," a "summary statement of deficiencies," another prefix tag, a "plan of correction," and a "complete date." This Recommended Order refers to this form, below, as a deficiency report.

#### FINDINGS OF FACT

1. At all material times, Respondent has owned and operated an ALF at 567 Northeast 137th Street. On May 26, 2011, Petitioner's surveyor conducted a survey of the ALF in connection with the renewal of Respondent's license. On July 19, 2011, Petitioner's surveyor conducted a followup survey

of the ALF to determine whether Respondent had corrected the deficiencies cited in the initial survey.

2. At the conclusion of the May 26 survey, the surveyor conducted an exit conference with Ms. Nelson. The surveyor obtained Ms. Nelson's signature to a form explanatory letter that states:

The purpose of this letter is to explain the process now that the survey has been completed.

During the exit conference, you . . . were advised of the deficiencies and were requested to write them down. At this time we also established time frames for the correction of each deficiency.

You will receive a written report from our office of this survey. **The time to correct, however, starts from today, the day of the survey.**

. . . It is required that each deficiency be corrected by the date established.

If a deficiency is not corrected within the required time frame, **the facility may be assessed an Administrative Fine by the Central Office in Tallahassee. . . .**

Additional time may be granted to correct specific deficiencies if a written request is received prior to the original date of correction. This written request must identify the deficiency, by tag number (refer to the deficiency report), to be extended . . . .

When the written result of this visit is received, your copy of the report must be made available to the public and residents

or participants according to the specific program requirements. . . .

3. Petitioner's surveyor did not mention a deficiency report in her testimony, nor do any of the exhibits refer to or include a deficiency report. Petitioner did not refer to a deficiency report in its proposed recommended order or Administrative Complaint. The surveyor's handwritten notes for the initial survey do not include tag numbers, but her notes for the followup survey supply what appear to be tag numbers for the deficiencies. (Petitioner exhibits, pages 44-46 and 52-53.) Perhaps Petitioner generated a deficiency report after the initial survey, but there is absolutely no indication in the record that it did so or, even if it did, that it provided the deficiency report to Respondent. Interestingly, Petitioner exhibits pages 75-76 are fax cover sheets, both dated August 2, 2011, referencing an attached Form 3020, which is a deficiency report, but Petitioner exhibits omit similar cover sheets for the initial survey.

4. Although the Administrative Complaint identifies the deficiencies for which Petitioner's surveyor cited Respondent, this pleading obviously was not available to Respondent prior to expiration of the time frames for corrections. Also, absent a copy of the deficiency report, Respondent could not obtain an extension of time to make corrections, as this request had to

include the tag numbers that are included in the deficiency report, nor could Respondent comply with the directive to post the report at the facility.

5. But the most serious problems arising from Petitioner's failure to provide Respondent with a deficiency report are that Ms. Nelson would not have known exactly what to correct (unless she is a very good notetaker) and would not have known the deadlines for correcting the deficiencies. Given the number and level of detail of the allegedly uncorrected deficiencies, it is impossible to favor Petitioner with the inference that, at the end of the initial survey, its surveyor accurately communicated all of the cited deficiencies and all of the corrective time frames, and Ms. Nelson accurately captured all of this information.

6. As noted in the Conclusions of Law, section 408.811(4), Florida Statutes, provides for a corrective time frame of 30 days, unless Petitioner provides a longer or shorter time frame. The only mention at the hearing of any time frame for correction was the testimony of Petitioner's surveyor, who stated that she gave Respondent 30 days to apply for approval of an emergency management plan. The surveyor did not testify that a 30-day time frame applied to all deficiencies, as she easily might have done, if she had set the same time frame for all of the deficiencies; she testified that a 30-day time frame applied

specifically to the requirement of submitting an emergency management plan.

7. Even if the surveyor had testified that she had given Respondent 30 days to correct all of the cited deficiencies, this deadline could not reasonably have expired before Petitioner provided Respondent the deficiency report. The form letter warns that the corrective time frame begins from the date of the completion of the initial survey, but the form letter assumes that Petitioner will issue the deficiency report a few days later. Here, though, the corrective time frames expired before Respondent received the deficiency report, without which, as noted above, she could not even have applied for an extension of any of the corrective time frames.

8. As discussed in the Conclusions of Law, the failure of Petitioner to prove that it provided Respondent with a deficiency report, including a detailed citation of individual deficiencies and a clear time frame for their correction, necessitates the dismissal of the Administrative Complaint. The following findings are provided in case these Conclusions of Law are ultimately not sustained.

9. By May 26, 2011, Resident #1 had undergone a significant change while at the ALF because she had developed a stage 3 pressure wound or ulcer, her activities of daily living (ADLs) had declined, and she had been hospitalized earlier in

May. However, Respondent failed to keep written records detailing any changes in the pressure wound, discussing any decline in ADLs, or explaining the reason for the recent hospitalization.

10. By July 19, 2011, Resident #1 had been rehospitalized, but Respondent's records did not disclose why.

11. On May 26, the bed rails were halfway up on Resident #1's bed. However, Respondent did not have an authorizing order from a physician or consent signed by the resident or her representative.

12. On July 19, the bed rails were halfway up on the bed of Resident #3. However, Respondent did not have an authorizing order from a physician or consent signed by the resident or her representative. This finding is consistent with Count Two of the Final Order.

13. On May 26, the surveyor examined the MOR for Resident #1. The allegations concerning Resident #1's MOR for the initial survey are impossible to assess because the MOR that Petitioner introduced into evidence is illegible as to critical entries. The allegations concerning Resident #2's MOR for the initial survey are unproved except for the misadministration of Simvastatin, which was to be administered once at bedtime; the initialed MOR reveals that staff observed the self-administration of this medication once in the morning and once

in the evening for the entire month of May. Petitioner's failure to produce the bingo card instructions, in order to prove some conflict between them and the reprinted prescription shown for each drug on the MOR, precludes a finding of a conflict, or a finding that observing the self-administration of drugs in accordance with the reprinted prescriptions shown on the MOR was in any way incorrect. The allegations concerning Resident #3 for the initial survey are impossible to assess because Petitioner neglected to produce a copy of her MOR.

14. On July 19, the initialed MOR for Resident #2 reveals that, by 11:35 a.m. on July 19, no staffperson had initialed the morning self-administration of Carvedilol; the morning self-administration, which was due at 8:00 a.m., should have been completed and initialed well before 11:35 a.m. As for Resident #3, Petitioner failed to prove that a staffperson initialed for observing the self-administration of Risperidone and Tramadol for noon on July 13; the indication on the MOR was that Resident #3 was not present at that time. Two staffpersons had different ways of indicating the absence of the resident, and the surveyor did not understand the manner by which one staffperson indicated absence--i.e., by initialing and then circling the initial. (Additionally, the surveyor's marks on the exhibit sometimes obscures the marking on the MOR placed by staffpersons.) However, Resident #3's MOR discloses no administrations of

artificial tears in July, even though her medication was available at the ALF. These two findings are consistent with Count One of the Final Order.

15. On May 26, Staff #3, Staff #4, and Staff #5 did not have the four hours of training required to qualify to observe the self-administration of medications. Petitioner proved that Staff #3 was hired on October 14, 2000, and Staff #4 was hired on August 10, 2009. Petitioner proved only that Staff #3 observed the self-administration of medication. The MORs for the initial survey cover nearly the entire month of May, and they bear only the initials "K" and "M"; "K" appears to be Staff #2, whose name is Kermite Jerome, and "M" appears to be Staff #3.

16. On July 19, Staff #5 and Staff #7 did not have the four hours of training required to qualify to observe the self-administration of medications. Petitioner did not prove a hire date for Staff #7, who was newly hired. Petitioner did not prove that either Staff #5 or Staff #7 observed the self-administration of medication. The MOR's for the followup survey cover nearly three weeks of July, and they bear only the initials "K" and "L"; the "L" is Ms. Nelson.

17. On May 26, Respondent did not have a dated and planned menu posted at least one week in advance. On July 19,



Respondent did not have a dated and planned menu posted at least one week in advance.

18. On May 26, Respondent did not maintain a dated, signed contract for Resident #1, nor a signed contract for Resident #3. On July 19, Respondent did not maintain a signed contract for Resident #3.

19. On May 26, Respondent had not submitted a written comprehensive management plan for review and approval by the county emergency management agency. On July 19, Respondent had not submitted a written comprehensive management plan for review and approval by the county emergency management agency. This finding as to July 19 is consistent with Count 3 of the Final Order.

#### CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction. §§ 120.569 and 120.57(1), Fla. Stat.

21. Section 429.14(1)(e) provides for discipline of a licensee, including by the imposition of an administrative fine, for five or more Class III deficiencies cited in a single survey that have not been corrected within the times specified. Section 408.811(4) provides that a deficiency must be corrected within 30 days of when the provider is notified of the inspection results, "unless an alternative time frame is required or approved by the agency." Section 429.19(2)(c)

authorizes the imposition of a fine of \$500-\$1000 per offense for every Class III deficiency.

22. Florida Administrative Code Rule 58A-5.033(1) authorizes the inspection of ALFs. Rule 58A-5.033(3)(a) requires Respondent, within ten days of an inspection, to issue a deficiency statement setting forth, for each deficiency, a description of the deficiency, a citation to the statute or rule violated, a time frame for the correction of the deficiency, a request for a plan of correction, and a disclosure of the administrative penalty if the deficiency is not corrected within the applicable time frame.

23. For Count 1, rule 58A-5.0182(1)(e) requires an ALF to maintain:

A written record, updated as needed, of any significant changes as defined in subsection 58A-5.0131(33), F.A.C., any illnesses which resulted in medical attention, major incidents, changes in the method of medication administration, or other changes which resulted in the provision of additional services.

24. For Count 2, rule 58A-5.0182(6)(h) provides:

Pursuant to Section 429.41, F.S., 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. . . .

25. For Count 3, rule 58A-5.0185(5) (b) states:

The facility shall maintain a daily medication observation record (MOR) for each resident who receives assistance with self-administration of medications or medication administration. A MOR must include . . . the name, strength, and directions for use of each medication; and a chart for recording each time the medication is taken, any missed dosages, refusals to take medication as prescribed, or medication errors. The MOR must be immediately updated each time the medication is offered or administered.

26. For Count 4, section 429.52(5) requires:

Staff involved with the management of medications and assisting with the self-administration of medications under s. 429.256 must complete a minimum of 4 additional hours of training provided by a registered nurse, licensed pharmacist, or department staff. . . .

27. For Count 5, rule 58A-5.020(2) (d) states:

Menus to be served shall be dated and planned at least one week in advance for both regular and therapeutic diets. . . . Planned menus shall be conspicuously posted or easily available to residents. . . .

28. For Count 6, section 429.24(1) requires an executed contract for each resident.

29. For Count 7, rule 58A-5.026(2) requires an ALF to submit its written comprehensive emergency management plan to the county emergency management agency for review and approval.

30. Petitioner must prove the material allegations by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 679 So. 2d 932 (Fla. 1996).

31. Although Petitioner would otherwise have proved all of the alleged deficiencies except those in Count 4, Petitioner has failed to prove that it has satisfied the conditions precedent to the occurrence of these deficiencies: i.e., the issuance of a deficiency report and establishment of time frames within which Respondent was required to correct the deficiencies cited in the initial survey.

RECOMMENDATION

It is

RECOMMENDED that the Agency for Health Care Administration enter a final order dismissing the Administrative Complaint.

DONE AND ENTERED this 6th day of February, 2013, in Tallahassee, Leon County, Florida.



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ROBERT E. MEALE  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 6th day of February, 2013.

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.