

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BAYOU SHORES SNF, LLC, d/b/a
REHABILITATION CENTER OF ST.
PETE,

Petitioner,

vs.

Case No. 16-0687RU

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.

_____ /

SUMMARY FINAL ORDER

On February 18, 2016, Respondent, Agency for Health Care Administration, filed a Motion for Summary Final Order pursuant to section 120.57(1)(h), Florida Statutes (2015).^{1/}

APPEARANCES

For Petitioner: Julie Gallagher, Esquire
Grossman Furlow & Bayó, LLC
2022-2 Raymond Diehl Road
Tallahassee, Florida 32308

For Respondent: Richard Joseph Saliba, Esquire
Agency for Health Care Administration
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STATEMENT OF THE ISSUE

The issue in this case is whether statements contained in Respondent's letter dated March 4, 2008, an attachment thereto,^{2/} and comments made during a hearing on January 5 through 8, and

February 22, 2016, constitute a rule as defined by section 120.52(16).

PRELIMINARY STATEMENT

On February 9, 2016, Bayou Shores SNF, LLC, d/b/a Rehabilitation Center of St. Pete (Bayou Shores), filed a Petition to Determine Invalidity of Agency Statements (Petition). In the Petition, Bayou Shores asserted that the Agency for Health Care Administration (AHCA) is the "regulatory authority responsible for licensure of nursing homes and enforcement of applicable federal regulations, state statutes, and state rules governing skilled nursing facilities pursuant to the Omnibus Reconciliation Act of 1986, Title IV, Subtitle C (as amended), chapters 400, Part II, and 408, Part II, Florida Statute[s], and chapter 59A-4, F.A.C." Bayou Shores further asserted that the Department of Children and Families is the state agency charged with regulating nursing home facilities in Florida, and with enforcement of chapter 415, Florida Statutes. Bayou Shores asserted that under section 415.101, the intent of the chapter was "to provide for the detection and correction of abuse, neglect, and exploitation through social services and criminal investigations and to establish a program of protective services for all vulnerable adults in need of them." Bayou Shores also alleged that a March 4, 2008, letter attempted to "resolve some of the questions that have arisen about abuse and

neglect.” Bayou Shores asserted that statements made by an AHCA witness during an administrative hearing involving Bayou Shores constituted an unpromulgated rule. Bayou Shores requested a “Final Order be entered determining that the agency statement described in” the Petition constituted an unpromulgated rule.

AHCA responded to the Petition by filing a Motion to Dismiss Petition to Determine Invalidity of Agency Statements on February 12, 2016,^{3/} and on February 18, 2016, AHCA filed its Motion for Summary Final Order. Bayou Shores has not filed a Response to the Motion for Summary Final Order, and the time in which to file a response has expired.

Having reviewed the Petition (including the exhibits), AHCA’s motion (including the exhibits) and the record, it has been determined that there are no genuine issues as to any material fact, and this matter is decided on the written submissions.

FINDINGS OF FACT

Based on the entire record of this proceeding, the following facts are undisputed and found to be true:

1. Bayou Shores is a skilled licensed nursing home located in Saint Petersburg, Florida.

2. On January 5 through 8 and February 22, 2016, a hearing was held regarding consolidated DOAH Case Nos. 15-0619 and 15-5469. Original DOAH Case No. 15-0619 involved AHCA’s

January 15, 2015, Notice of Intent to Deny Renewal Application pursuant to sections 400.121(1) and (3), Florida Statutes.^{4/}

Original DOAH Case No. 15-5469 involved an eight-count Administrative Complaint.

3. During the consolidated hearing, one of AHCA's witnesses testified about the state requirements as related to abuse reporting. The pertinent recitation by AHCA's witness follows:

Q. [S]o without regard to policies, is there another requirement that any allegation of abuse be reported to AHCA?

A. Okay, There are requirements that allegations of abuse have to be reported to the state agency. I know it is in federal law and I'd be glad to look and see where it might be in the state law.

Q. Well -

A. State requirements.

Q. But you don't know off hand what they are.

A. Offhand, no.

4. Bayou Shores provided other statements by the witness in an attempt to demonstrate her statements constituted a rule of AHCA. The witness testified as to her understanding of the obligations imposed; however, taken in total, the witness's understanding did not establish an agency rule.

5. On March 4, 2008, AHCA issued a letter with an attachment to administrators,^{5/} which provided in part, the following:

In an attempt to resolve some of the questions that have arisen about abuse and neglect and the understanding and reporting of resident to resident altercations, the Centers for Medicare and Medicaid Services (CMS) has clarified this issue in a release about accidents and supervision. Please refer to CMS Ref: S&C-07-25. As this clarification impacts the Federal Immediate/5-Day Reporting System, we are taking this opportunity to redistribute definitions, guidance for a thorough investigation, and the suggested reporting form with instructions for its completion.

6. The March 4 letter was an attempt by AHCA to clarify federal CMS issues relating to reporting abuse requirements. It does not establish an agency rule, nor does it provide a statement that amounts to a rule.

7. The Petition does not provide the text of a statement or a description of the statement sufficient to show that the statement constitutes a rule. See Aloha Utilities, Inc. v. Public Serv. Comm'n, 723 So. 2d 919 (Fla. 1st DCA 1999).

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. § 120.56, Fla. Stat.

9. Section 120.52(16), Florida Statutes, defines a rule as follows:

"Rule" means each agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule. The term also includes the amendment or repeal of a rule. The term does not include:

(a) Internal management memoranda which do not affect either the private interests of any person or any plan or procedure important to the public and which have no application outside the agency issuing the memorandum.

(b) Legal memoranda or opinions issued to an agency by the Attorney General or agency legal opinions prior to their use in connection with an agency action.

(c) The preparation or modification of:

1. Agency budgets.

2. Statements, memoranda, or instructions to state agencies issued by the Chief Financial Officer or Comptroller as chief fiscal officer of the state and relating or pertaining to claims for payment submitted by state agencies to the Chief Financial Officer or Comptroller.

3. Contractual provisions reached as a result of collective bargaining.

4. Memoranda issued by the Executive Office of the Governor relating to information resources management.

10. Section 120.56(4), Florida Statutes, provides in pertinent part:

(a) Any person substantially affected by an agency statement may seek an administrative

determination that the statement violates s. 120.54(1)(a). The petition shall include the text of the statement or a description of the statement and shall state with particularity facts sufficient to show that the statement constitutes a rule under s. 120.52 and that the agency has not adopted the statement by the rulemaking procedure provided by s. 120.54.

11. The testimony by the AHCA witness during the consolidated hearing does not constitute an agency statement, much less an agency rule. The March 4 letter provides information regarding federal reporting requirements and is not an agency rule.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition to Determine Invalidity of Agency Statements is dismissed.

DONE AND ORDERED this 30th day of March, 2016, in Tallahassee, Leon County, Florida.



LYNNE A. QUIMBY-PENNOCK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of March, 2016.

ENDNOTES

^{1/} All references to the Florida Statutes are to the 2015 version, unless otherwise noted.

^{2/} A portion of the attachment to the March 8, 2008, letter contains:

What Must Be Reported:

A. The facility must ensure that ALL allegations of abuse, neglect, injuries of unknown origin, and exploitation/misappropriation of resident property are reported immediately to the administrator of the facility, the Agency for Health Care Administration, the Department of Children and Families, the Florida Abuse Hotline, and to other officials in accordance with state law.

^{3/} Resolved by Order dated March 3, 2016.

^{4/} These citations were later corrected to section 408.815, Florida Statutes.

^{5/} It appears there was at least one more page or attachment to the letter; however, only one page was presented.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.