

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DAYSPRING VILLAGE, INC.,

Petitioner,

vs.

Case No. 16-3681RP

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.

_____ /

FINAL ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.56(2), 120.569, and 120.57(1) Florida Statutes (2016),^{1/} on August 4 and 9, 2016, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Shaddrick Haston, Esquire
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Tallahassee, Florida 32308

For Respondent: Richard Joseph Saliba, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
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STATEMENT OF THE ISSUES

The issue in this matter is whether Respondent's proposed Florida Administrative Code Rule 59A-36.001 constitutes an invalid exercise of delegated legislative authority. Before that

issue may be reached, however, it is necessary to determine whether Petitioner has standing to challenge the proposed rule.

PRELIMINARY STATEMENT

On June 28, 2016, Petitioner, Dayspring Village, Inc. ("Petitioner"), filed with the Division of Administrative Hearings ("DOAH") a Petition Challenging the Validity of Rule 59A-36.001, F.A.C. Petitioner filed its petition pursuant to section 120.56(2) and challenges proposed rule 59A-36.001 ("rule 59A-36.001") of the Agency for Health Care Administration ("AHCA").

Following a pre-hearing conference, the parties agreed to a final hearing date of August 4, 2016. On August 2, 2016, due to an unanticipated conflict, Petitioner moved to bifurcate (i.e., continue) the final hearing should it not be completed in one day. The final hearing was held on August 4, 2016, but was not completed on that date. The parties agreed to resume the hearing on August 9, 2016, on which date the final hearing was concluded.

Prior to the final hearing, AHCA filed a Motion to Dismiss on the Basis of Collateral Estoppel, a Motion to Dismiss, and a Motion for Summary Final Order. The undersigned denied all three motions. During the hearing, AHCA filed an additional Motion to Dismiss alleging that Petitioner lacked standing to initiate this proposed rule challenge. The undersigned reserved ruling and addresses the issue of standing in this Final Order.

Petitioner presented the testimony of Doug Adkins, its owner and chief administrator. Petitioner's Exhibits 1 through 4 were admitted into evidence. AHCA presented the testimony of Catherine Anne Avery. AHCA's composite Exhibit 1 was admitted into evidence.^{2/}

A court reporter recorded the final hearing. A three-volume Transcript of the final hearing was filed with DOAH on August 29, 2016. At the close of the hearing, the undersigned advised the parties that they could submit post-hearing submittals or proposed final orders within ten days following DOAH's receipt of the hearing transcript. Both parties filed Proposed Final Orders which were duly considered in preparing this Final Order.^{3/}

FINDINGS OF FACT

1. AHCA is the state agency responsible for the licensure of assisted living facilities ("ALFs") in the State of Florida. See Ch. 429, Part I; and Ch. 408, Part II, Fla. Stat. As part of its responsibilities, AHCA serves as the enforcement arm for the licensed activity and operation of ALFs. See gen., Chs. 408 and 429, Fla. Stat.; Fla. Admin. Code R. 58A-5 and 59A-35.

2. Petitioner is currently licensed by AHCA to operate an ALF in Hilliard, Florida. Accordingly, Petitioner falls under AHCA's jurisdiction and is required to adhere to all rules promulgated by AHCA, as well as the Department of Elder Affairs, pertaining to ALFs. See §§ 408.802(13) and 429.01(2), Fla. Stat.

3. Section 429.28, Florida Statutes, is the "resident bill of rights" for ALFs. The resident bill of rights provides that no resident of an ALF "shall be deprived of any civil or legal rights, benefits, or privileges guaranteed by law, the Constitution of the State of Florida, or the Constitution of the United States as a resident of a facility." Section 429.28 enumerates 12 specific rights for ALF residents.

4. In its 2015 legislative session, the Florida Legislature amended section 429.28(3)(a), which states (as amended):

[AHCA] shall conduct a survey to determine general compliance with facility standards and compliance with residents' rights as a prerequisite to initial licensure or licensure renewal. [AHCA] shall adopt rules for uniform standards and criteria that will be used to determine compliance with facility standards and compliance with residents' rights.

5. Thereafter, AHCA drafted rule 59A-36.001 entitled, "Standards and Criteria for Determining Resident Rights."^{4/} AHCA published the proposed rule in Volume 42, No. 50, March 14, 2016, of the Florida Administrative Register. On June 8, 2016, AHCA published a Notice of Change/Withdrawal amending several sections of the proposed rule.

6. AHCA's stated purpose and effect of rule 59A-36.001 is to "create a new rule chapter regarding residents' rights in assisted living facilities licensed by the Agency. Section 429.28 directs the Agency to adopt rules for uniform standards

and compliance with residents' rights." Rule 59A-36.001

specifically provides, in pertinent part^{5/}:

59A-36.001, Standards and Criteria for
Determining Compliance with Facility
Standards and Resident Rights

(1) DEFINITIONS.

In addition to the terms defined in Section 429.02, F.S., and Rule 58A-5.0131, F.A.C., the following definitions are applicable in this rule chapter.

(a) "Core Survey Task" means tasks conducted by Agency survey staff that focus on core areas of regulations.

(b) "Timely Manner" means as soon as possible, but not to exceed 24 hours of Agency staff having requested materials.

7. Rule 59A-36.001(2) is entitled "SURVEY PROCESS FOR RESIDENT RIGHTS" and provides, in pertinent part:

The following core survey tasks shall be utilized during survey activities in order to determine the facility's compliance with resident rights pursuant to 429.28, F.S. and 58A-5.0182, F.A.C.

1. The surveyor(s) conducts a tour of the facility to determine if the residents' health, safety, and welfare are maintained. The tour includes observations and assessments of the following:

Thereafter, rule 59A-36.001(2), in subsections 1 and 2, lists approximately 35 "standards and criteria" a surveyor is to use to determine whether the "residents' health, safety, and welfare" are maintained by the ALF. In addition to the general reference to section 429.28 and Florida Administrative Code Rule 58A-

5.0182, approximately 18 of the enumerated "standards and criteria" refer to section 429.14(6) or a specific provision from chapter 58A-5.

8. Catherine Anne Avery testified on AHCA's behalf. Ms. Avery is the manager for the Assisted Living Unit at AHCA. She was the lead developer and drafter of rule 59A-36.001.

9. Ms. Avery explained that, as a prerequisite to initial licensure or licensure renewal of ALFs, AHCA is responsible for surveying (inspecting) ALFs to determine compliance with facility standards and residents' rights. Pursuant to the Legislature's directive in section 429.28(3)(a), AHCA created rule 59A-36.001 to standardize the survey process for all AHCA surveyors across the state. Ms. Avery drafted the proposed rule to ensure that surveyors use uniform criteria when determining whether an ALF has generally complied with required facility standards and resident care standards and rights.

10. According to Ms. Avery, AHCA created rule 59A-36.001 solely and exclusively to educate AHCA surveyors on how to conduct ALF surveys. Rule 59A-36.001 is not intended to be used by ALFs or providers. Rule 59A-36.001 essentially creates a checklist of the "core" statutory and administrative rule standards. AHCA intends for every surveyor to use the standards and criteria outlined in rule 59A-36.001 during each survey.

11. Ms. Avery relayed that a survey requires a surveyor to tour the ALF facility; observe ALF operations and services;

interact with ALF staff and residents; and interview ALF employees and residents. During the survey, the surveyor is attentive for any possible violations of Florida law. If the surveyor finds evidence of a violation, the surveyor is to refer to the pertinent statutory authority and related administrative rules. After reviewing the applicable statutes and rules, if the surveyor determines that the ALF has committed a violation, the surveyor may issue a Statement of Deficiency to the ALF.

12. Ms. Avery testified that each "standard and criteria" listed in rule 59A-36.001 is based on existing statutory and rule authority. Ms. Avery explained that rule 59A-36.001 does not impose any requirements on an ALF or include any criteria that is not already set forth in Florida statutes or other agency rules. Similarly, the proposed rule does not create new standards or criteria with which Petitioner is required to comply.

13. Therefore, because ALFs must comply with the existing statutes and administrative rules listed in rule 59A-36.001, Ms. Avery testified that the proposed rule will not affect Petitioner. Ms. Avery expressed that AHCA will not cite rule 59A-36.001 to impose administrative penalties on Petitioner (or any other ALF). Any deficiency a surveyor might identify during a survey is encompassed within other applicable rules or statutory authority.^{6/} Accordingly, Petitioner cannot be sanctioned by AHCA under rule 59A-36.001 for failure to comply with "facility standards" or "residents' rights."

14. Ms. Avery conceded that rule 59A-36.001 does not record every statute or rule provision pertaining to "facility standards" and "residents' rights." She explained that, in compiling one list of uniform standards and criteria, AHCA could not practically include every factor that might impact an ALF resident's safety and well-being. Ms. Avery did not believe it was possible to delineate every area of concern or condition that affects the "legal rights, benefits, or privileges" of ALF residents. Instead, AHCA fashioned rule 59A-36.001 to reference only the "core survey tasks." These tasks focus on the core area of regulations that are designed to protect the health, safety, and welfare of ALF residents. In setting down uniform standards into one rule, AHCA wanted to focus its surveyors on those areas that are most important and have the highest impact on residents' rights.

15. At the final hearing, Petitioner elicited testimony from Ms. Avery that AHCA surveyors may utilize other resources during surveys that are not incorporated into rule 59A-36.001. These resources include the Aspen Regulation Set ("Aspen Reg Set") and the Assisted Living Resource Manual ("Resource Manual"). These two documents provide a surveyor with lists of AHCA protocols, statutory references, and various investigative forms that offer guidance on how a surveyor is to conduct a survey or gather evidence to assess an ALF's compliance with governing law. The Aspen Reg Set contains a list of pertinent

statutes and administrative rules a surveyor may use to assign deficiencies. The Resource Manual contains an interview worksheet that a surveyor may use while questioning facility staff, residents, or residents' family members.

16. Ms. Avery explained that rule 59A-36.001 was not designed to directly replace the Aspen Reg Set or the Resource Manual. Instead, all these resources combine to provide a "toolbox" for the surveyor to use to determine compliance. The Aspen Reg Set and the Resource Manual are merely tools the surveyor may employ at his or her discretion. No surveyor is required to use the documents during a survey. In addition, Ms. Avery explained that the statutes and administrative rules cited in the Aspen Reg Set or the Resource Manual consist of the same law that AHCA listed in rule 59A-36.001.

17. Ms. Avery also testified that section 429.28 authorizes AHCA surveyors to refer to recognized "community standards" during ALF surveys. Section 429.28(1)(j) specifically states:

Every resident of a facility shall have the right to:

* * *

(j) Access to adequate and appropriate health care consistent with established and recognized standards within the community.

AHCA, however, did not incorporate into rule 59A-36.001 all the various Florida "community standards" that a surveyor may encounter to determine an ALFs' compliance with residents' rights. Ms. Avery explained that "community standards" are not

codified in statute. In addition, AHCA does not have authority to define "community standards." Instead, AHCA surveyors consider community standards on a case-by-case basis depending upon facts and circumstances that are particular to the specific community.

18. Ms. Avery also addressed a specific provision AHCA included in rule 59A-36.001 regarding the time period in which an ALF must produce documents following a surveyor's request. Rule 59A-36.001(2)(4) states that, "The facility must provide agency staff with requested documents in a timely manner and allow the agency staff to obtain copies." (Emphasis added). Rule 59A-36.001(1)(b) defines "timely manner" to mean "as soon as possible, but not to exceed 24 hours of Agency staff having requested materials."

19. Ms. Avery explained that the time period for an ALF to produce documents is already addressed in existing Florida law. Specifically, rule 58A-5.024 provides that an ALF "must maintain required records in a manner that makes such records readily available at the licensee's physical address for review by a legally authorized entity . . . 'readily available' means the ability to immediately produce documents, records, or other such data, either in electronic or paper format, upon request." (Emphasis added). AHCA decided to use "24 hours" in rule 59A-36.001(1)(b) instead of the term "immediately" as a way to provide the surveyor a workable frame of reference when

requesting documents from ALFs. Instead of demanding that an ALF produce documents "immediately," the surveyor will have the discretion to grant an ALF a more practical time period to produce the records (i.e., within 24 hours). Essentially, AHCA intended surveyors to use the 24-hour time period as a rule of thumb.

20. Ms. Avery opined that Petitioner will not be affected by a surveyor's use of the term "timely manner" in rule 59A-36.001(1)(b). AHCA can sanction an ALF for failing to produce records "immediately" under existing statutes and administrative rules. See, e.g., §§ 408.811(3), 429.14, and 429.34(2), Fla. Stat. AHCA will not cite to rule 59A-36.001 for an ALF's failure to produce records in a "timely manner."

21. Finally, Ms. Avery pointed out that AHCA does not have rulemaking authority regarding facility standards or residents' rights. Instead, the Department of Elder Affairs has sole authority under Florida law to promulgate rules for residents' rights in chapter 429. See § 429.41, Fla. Stat. Facility standards for ALFs are set forth in chapter 429, part I, and chapter 58A-5. Therefore, AHCA cannot, and did not, include any "uniform standards and criteria" in rule 59A-36.001 that expand, interpret, reduce, or otherwise modify the rules for facility standards and residents' rights promulgated by the Department of Elder Affairs.

22. Petitioner's owner and executive director, Douglas Adkins, testified on Petitioner's behalf. Mr. Adkins has administered Petitioner for over 29 years.

23. Petitioner asserts that rule 59A-36.001 is vague in that the proposed rule lacks adequate specificity. Because of its vagueness, Petitioner argues that rule 59A-36.001 fails to establish adequate standards for AHCA decisions and provides AHCA surveyors too much discretion during the survey process. Mr. Adkins expressed that the "uniform standards and criteria" listed in rule 59A-36.001 do not contain sufficient detail to fairly and reasonably inform ALFs how AHCA surveyors will determine compliance with applicable statutes and rules. Mr. Adkins expounded that AHCA must enunciate more clearly what regulations surveyors might cite to sanction ALFs, and how they will determine compliance.

24. Mr. Adkins explained that Petitioner initiated this rule challenge to ensure that it is fully aware of AHCA's expectations prior to its licensure renewal surveys. To make sure that its ALF services comply with all legal requirements, Petitioner seeks a comprehensive understanding of how AHCA surveyors will determine compliance with applicable facility standards and residents' rights. Mr. Adkins testified that he keenly reviews all materials and resources to which AHCA surveyors may refer during their surveys. He also studies AHCA postings and informational releases to ascertain pertinent

Florida law. Having AHCA set forth in rule 59A-36.001 the exact standards its surveyors will use to determine ALF compliance will greatly assist him achieve his goal of administrating his ALF in full compliance with Florida statutes and administrative rules, as well as be fully prepared for Petitioner's licensure renewal surveys.

25. Despite his claim, however, Mr. Adkins did not point to any distinct example (or prospective AHCA survey) where an AHCA surveyor could cite rule 59A-36.001 as a basis for a legal deficiency or violation while surveying his facility. Neither did Mr. Adkins identify any standard or criteria set forth in rule 59A-36.001 with which Petitioner might fail to comply. Further, Mr. Adkins did not present evidence of any imminent or pending adverse administrative action Petitioner might or will confront based on AHCA's promulgation of rule 59A-36.001.

26. The competent substantial evidence presented at the final hearing fails to prove that Petitioner is substantially affected by rule 59A-36.001. Petitioner did not show that the proposed rule will cause a real or immediate injury in fact. In addition, Petitioner failed to establish, by a preponderance of the evidence in the record, a factual basis that the proposed rule is vague. Conversely, AHCA demonstrated that rule 59A-36.001 is not an invalid exercise of delegated legislative authority as to Petitioner's objection that the proposed rule is vague.

CONCLUSIONS OF LAW

27. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. See §§ 120.56 and 120.57(1), Fla. Stat.

28. Section 120.56(1)(a) states: "Any person substantially affected by a rule or a proposed rule may seek an administrative determination of the invalidity of the rule on the ground that the rule is an invalid exercise of delegated legislative authority." A party challenging a proposed rule has the burden of establishing a factual basis for the objections to the rule. SW Fla. Water Mgmt. Dist. v. Charlotte Cnty., 774 So. 2d 903, 908 (Fla. 2d DCA 2001) (quoting St. John's River Water Mgmt. Dist. v. Consolidated-Tomoka Land Co., 717 So. 2d 72, 77 (Fla. 1st DCA 1998)). The agency then has the burden to prove by a preponderance of the evidence that the proposed rule is not an invalid exercise of delegated legislative authority as to the objections raised. See § 120.56(2)(a), Fla. Stat.

29. Section 120.56(1)(e) provides that a rule challenge proceeding is de novo in nature, and the standard of proof is a preponderance of the evidence. The Administrative Law Judge should consider and base the decision upon all the available evidence, regardless of whether the evidence was placed before the agency during its rulemaking proceedings. Dep't of Health v. Merritt, 919 So. 2d 561, 564 (Fla. 1st DCA 2006) (concluding that the Legislature has overruled the court's holding in Board of

Medicine v. Florida Academy of Cosmetic Surgery, 808 So. 2d 943 (Fla. 1st DCA 2002), that an Administrative Law Judge's role in a proposed rule challenge is limited to a review of the record and a determination as to whether the agency action was supported by legally sufficient evidence).

30. AHCA raises a preliminary jurisdictional issue asserting that Petitioner lacks standing to challenge rule 59A-36.001. Therefore, the undersigned will address Petitioner's standing prior to considering the merits of Petitioner's rule challenge. See generally Ferreiro v. Phila. Indem. Ins. Co., 928 So. 2d 374, 376 (Fla. 3d DCA 2006) (noting that "[t]he issue of standing is a threshold inquiry which must be made at the outset of the case before addressing whether the case is properly maintainable as a class action").

31. In order to have standing to challenge the validity of a proposed administrative rule, a person must be "substantially affected" by the rule. See § 120.56(1)(a), Fla. Stat. Therefore, Petitioner has the burden to prove, by a preponderance of the evidence, that it would be substantially affected by rule 59A-36.001. See § 120.56(2)(a), Fla. Stat.

32. To establish standing under the "substantially affected" test, a party must show (1) that the rule or policy will result in a real or immediate injury in fact, and (2) that the alleged interest is within the zone of interest to be protected or regulated. Off. of Ins. Reg. v. Secure Enters.,

LLC, 124 So. 3d 332, 336 (Fla. 1st DCA 2013); see also Jacoby v. Fla. Bd. of Med., 917 So. 2d 358, 360 (Fla. 1st DCA 2005).

33. To satisfy the sufficiently real and immediate injury in fact element, the injury must not be based on pure speculation or conjecture. Lanoue v. Fla. Dep't of Law Enf., 751 So. 2d 94, 97 (Fla. 1st DCA 1999). A "real or immediate injury in fact" does not include injury that is abstract, conjectural, hypothetical, or speculative. Rather, a rule challenge petitioner must allege that it has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct. Village Park Mobile Home Ass'n. v. State, Dep't of Bus. Reg., Div. of Fla. Land Sales, etc., 506 So. 2d 426, 433 (Fla. 1st DCA 1987). Stated differently, the petitioner's allegations "must be of 'sufficient immediacy and reality' to confer standing." Id.; see also Abbott Labs. v. Mylan Pharms., Inc., 15 So. 3d 642, 651 n.2 (Fla. 1st DCA 2009).

34. Petitioner alleges that it has standing to bring this proposed rule challenge because, as a licensed ALF, it will be required to comply with rule 59A-36.001. Petitioner argues that, as an entity AHCA regulates, it is entitled to know the exact standards and criteria AHCA surveyors will use to determine its compliance with facility standards and residents' rights. Petitioner desires AHCA to adopt a rule that more fully informs ALFs exactly how AHCA surveyors will determine compliance.

35. With regard to the second prong of the substantially affected test, Petitioner met its burden of showing that its alleged interest is within the "zone of interest" of rule 59A-36.001. Petitioner, as an ALF, is regulated by AHCA. Accordingly, AHCA surveyors will use the rule 59A-36.001 uniform standards and criteria to inspect it to determine general compliance with facility standards and resident rights. See generally Televisual Commc'ns v. Dep't of Labor & Emp. Sec./Div. of Workers' Comp., 667 So. 2d 372, 374 (Fla. 1st DCA 1995).

36. As for the first prong of the substantially affected test, however, based on the evidence produced at the final hearing, Petitioner fails to establish that it is immediately in danger of sustaining some direct injury as a result of AHCA's promulgation of rule 59A-36.001. AHCA provided persuasive evidence and testimony that rule 59A-36.001 will not cause Petitioner a real or immediate injury in fact. Ms. Avery credibly testified that the proposed rule imposes no new statutory or regulatory requirements on Petitioner's facility or business operations. Rule 59A-36.001 does not create new standards for Petitioner that are not already established by Florida statutes and administrative rules.^{7/} AHCA will not use rule 59A-36.001 as a basis to impose sanctions or other penalties for Petitioner's noncompliance. Instead, Rule 59A-36.001 is directed exclusively for use by AHCA surveyors, not ALFs, for use during surveys.

37. Furthermore, based on the evidence in the record, the future harm about which Petitioner complains rests on too much conjecture and speculation to conclude that it is immediately in danger of sustaining some direct injury as a result of the proposed rule. Petitioner ostensibly initiated this rule challenge to be as prepared as possible for future licensure renewal surveys. However, Petitioner has not shown, by a preponderance of the evidence, how any provisions in rule 59A-36.001 will cause it real or immediate injury. Petitioner did not establish that rule 59A-36.001 will require it to comply with some new or additional statutory or regulatory requirements regarding facility standards or residents' rights. The proposed rule, on its fact, does not place Petitioner at risk of administrative fines or sanctions that are not already expressed in statutes and administrative rules. Should an AHCA surveyor determine that Petitioner failed to comply with a provision of the resident bill or rights, AHCA will cite to section 429.28, not to rule 59A-36.001.

38. Moreover, Petitioner did not demonstrate how rule 59A-36.001 will make it change how it conducts its business or the services it offers. Petitioner did not show how the proposed rule will affect its preparation for a licensure renewal survey. Petitioner did not convey how rule 59A-36.001 will force it to alter how it maintains its facility or protects residents' rights. Petitioner did not relay that it will be required to

modify its policies and procedures or adjust how it educates, prepares, or trains its staff.

39. At the final hearing, Petitioner took issue with two provisions AHCA included in the proposed rule that appear to be specifically directed at ALFs. Ms. Avery testified that AHCA drafted rule 59A-36.001 solely to guide AHCA surveyors. Petitioner disputed this assertion by first pointing to the requirement in rule 59A-36.001(2)4 that: "The facility must provide agency staff with requested documents in a timely manner. . . ." Rule 59A-36.001(1)(b) defines "timely manner" to mean "as soon as possible, but not to exceed 24 hours." Ms. Avery, however, persuasively testified that AHCA will not cite rule 59A-36.001(1)(b) as a basis for a deficiency should Petitioner not produce documents within 24 hours. Enforcement of this provision is controlled by rule 58A-5.024, which provides that an ALF must "immediately produce documents, records, or other such data . . . upon request."^{8/} Rule 58A-5.024 was adopted by the Department of Elder Affairs prior to rule 59A-36.001. Thus, AHCA will not sanction Petitioner under rule 59A-36.001(1)(b) if a surveyor determines that Petitioner failed to provide requested documents in a "timely manner."

40. Petitioner also objected to rule 59A-36.001(2)2.a., which provides: "The facility may not restrict Agency staff from conducting confidential interviews pursuant to 429.14(6), F.S." As with an ALF's production of records, enforcement of this

provision is controlled by an existing statute, section 429.14. Section 429.14(6) states: "The licensee may not restrict agency staff . . . from conducting confidential interviews with facility staff or any individual who receives services from the facility." The reference of rule 59A-36.001 to the specific statutory section governing interviews informs Petitioner that any legal obligations regarding surveyor interviews are governed by that statute, not rule 59A-36.001(2)2.a. Consequently, the proposed rule's standard that Petitioner may not restrict AHCA staff from conducting confidential interviews will not cause Petitioner a real or immediate injury in fact.

41. In sum, Petitioner did not show, by a preponderance of the evidence, that rule 59A-36.001 will cause it to suffer a real or immediate injury in fact. Therefore, Petitioner did not meet its burden of proving that it will be substantially affected by rule 59A-36.001. Consequently, Petitioner failed to demonstrate that it has standing to challenge the validity of rule 59A-36.001.

42. Further, even if Petitioner could demonstrate that it has standing to challenge rule 59A-36.001, AHCA met its burden of proving, by a preponderance of the evidence, that rule 59A-36.001 is not an invalid exercise of delegated legislative authority. Petitioner objects to the "uniform standards and criteria" listed in rule 59A-36.001 as being impermissibly vague in violation of section 120.52(8)(d).

43. Section 120.52(8) states in pertinent part:

(8) "Invalid exercise of delegated legislative authority" means action that goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one of the following applies:

* * *

(d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency;

44. An administrative rule is invalid for vagueness under section 120.52(8)(d) "if it requires the performance of an act in terms that are so vague that men of common intelligence must guess at its meaning." SW Fla. Water Mgmt. Dist., 774 So. 2d at 915, citing Cole Vision Corp. v. Dep't of Bus. & Prof'l Reg., 688 So. 2d 404 (Fla. 1st DCA 1997); see also Witmer v. Dep't of Bus. & Prof'l Reg., 662 So. 2d 1299, 1302 (Fla. 4th DCA 1995).

45. Petitioner argues that rule 59A-36.001 does not contain sufficient detail to enable ALFs to determine "what and how" AHCA will conduct surveys. Petitioner, however, does not complain that any terms or provisions in the proposed rule are vague in and of themselves. Petitioner laments that the proposed rule does not completely encompass all governing statutory provisions pertaining to "facility standards" and "residents' rights."

46. The undersigned concludes that rule 59A-36.001 appropriately implements section 429.28(3)(a). The Florida Legislature directed AHCA to survey ALFs to determine general

compliance with facility standards and residents' rights prior to licensure or licensure renewal. In furtherance of this task, the Legislature instructed AHCA to adopt rules creating uniform standards and criteria that surveyors will use during their surveys. Rule 59A-36.001 accomplishes this purpose. The proposed rule carries out the governing statute's objective by listing uniform standards and criteria to which AHCA surveyors will refer to determine an ALF's general compliance with applicable statutes and rules. As drafted, rule 59A-36.001 provides coherent and fair notice of the provisions and regulations surveyors will apply when conducting initial licensure and licensure renewal surveys. Accordingly, the undersigned concludes that rule 59A-36.001 provides persons of "common intelligence" sufficient notice of the standards and criteria AHCA surveyors will apply to determine compliance with required facility standards and residents' rights.

47. Furthermore, Petitioner's contention that rule 59A-36.001 is vague because it does not incorporate all the "community standards" in Florida is not persuasive. Rule 59A-36.001(2) informs AHCA surveyors that the "core survey tasks" to be used to determine compliance with residents' rights are derived from section 429.28 and rule 58A-5.0182. Section 429.28(1)(j) specifically states that every ALF resident shall have the right to "[a]ccess to adequate and appropriate health care consistent with established and recognized standards within

the community.”^{9/} Rule 59A-36.001 fairly notifies a person of “common intelligence” that a surveyor may consider “standards within the community” while conducting a survey to determine general compliance with residents’ rights.

48. Similarly, Petitioner’s argument that rule 59A-36.001 is vague because it does not reference the Resource Manual or the Aspen Reg Set is not persuasive. Rule 59A-36.001 fairly notifies Petitioner of the “uniform standards and criteria” AHCA surveyors will use during surveys. While surveyors might employ the Aspen Reg Set or the Resource Manual as reference sources, AHCA will only determine ALF compliance with facility standards and residents’ rights based on the existing statutory and rule provisions that are identified in rule 59A-36.001.

49. Finally, Petitioner objects to AHCA limiting the standards and criteria listed in rule 59A-36.001 to just the “core survey tasks.” Petitioner argues that section 429.28(3)(a) does not allow AHCA to pick and choose which facility standards and residents’ rights to include in its “uniform standards.” However, a proposed rule should not be invalidated simply because it does not appear to the challenger to be the best choice for accomplishing the agency’s objective. “An agency’s interpretation of the guidelines that it is charged with administering is entitled to judicial deference, and should not be overturned as long as the interpretation is in the range of permissible interpretations.” Atl. Shores Resort, LLC v. 507

South Street Corp., 937 So. 2d 1239, 1245 (Fla. 3d. DCA 2006); see also Paloumbis v. City of Miami Beach, 840 So. 2d 297, 298-99 (Fla. 3d DCA 2003) (explaining that "administrative interpretation is entitled to judicial deference as long as it is within the range of possible permissible interpretations"); and Bd. of Trs. of the Int. Imp. Trust Fund v. Levy, 656 So. 2d 1359, 1363 (Fla. 1st DCA 1995) ("If an agency's interpretation of its governing statutes is one of several permissible interpretations, it must be upheld, despite the existence of reasonable alternatives.").

50. The discretion AHCA used to formulate the uniform standards and criteria listed in rule 59A-36.001 is fair and reasonable based on the instruction in section 429.28 for AHCA to conduct a survey to determine general compliance with facility standards and residents' rights. AHCA persuasively testified that its surveyors will not use rule 59A-36.001 as a basis to deny an ALF's application for licensure or licensure renewal. Instead, AHCA will cite the authority referenced in the proposed rule, e.g., section 429.28, for violations of the resident bill of rights or rule 58A-5.0182 for violations of resident care standards. See e.g. SW Fla. Water Mgmt., 774 So. 2d at 917 ([W]here the court held that the Southwest Florida Water Management District adopted "reasonable rules" in connection with its water use permitting duties in implementing section 373.223, Florida Statutes. The court noted that the "sufficiency of a

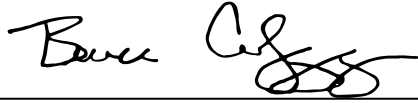
rule's standards and guidelines may depend on the subject matter dealt with and the degree of difficulty involved in articulating finite standards" and concluded that "where the considerations are site-specific as the ALJ found, or specific to the individual WUP applicant as are the economic considerations, the [proposed rule] is not vague because the District failed to or was unable to articulate more refined criteria, nor does it vest unbridled discretion in the District.").

51. Based on the competent substantial evidence and testimony in the record, the undersigned concludes that rule 59A-36.001 is not vague. Rule 59A-36.001 sets forth reasonable and sufficient guidance regarding how AHCA surveyors will determine Petitioner's general compliance with the facility standards and residents' rights required by Florida law. AHCA has proven, by a preponderance of the evidence, that rule 59A-36.001 is not an invalid exercise of delegated legislative authority as to Petitioner's objection that the proposed rule is vague. Accordingly, Petitioner's challenge to proposed rule 59A-36.001 must be dismissed.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, Petitioner has no standing, and AHCA's proposed rule 59A-36.001 is not an invalid exercise of delegated legislative authority. Accordingly, it is ORDERED that Dayspring Village, Inc.'s challenge to rule 59A-36.001 is dismissed.

DONE AND ORDERED this 24th day of October, 2016, in
Tallahassee, Leon County, Florida.



J. BRUCE CULPEPPER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of October, 2016.

ENDNOTES

^{1/} All statutory references are to the 2016 Florida Statutes, unless otherwise noted.

^{2/} At AHCA's request, the undersigned took official recognition of: chapter 58A-5; Agency for Health Care Administration v. Dayspring Village, Inc., Case No. 13-1451 (Fla. DOAH Apr. 28, 2014; AHCA June 3, 2014); Dayspring Village, Inc. v. Agency for Health Care Administration, Case No. 13-1836RU (Fla. DOAH June 24, 2013); and Florida Administrative Code Rule 28-106.213(6).

^{3/} After the ten-day day time period designated for submitting post-hearing submittals, AHCA filed a document entitled Objection to Petitioner's Proposed Final Order. Promptly thereafter, Petitioner filed a document entitled Response to Agency's Objection to Proposed Final Order. The undersigned notes the comments by both parties. To the extent that AHCA's "objection" moves for some relief, AHCA's motion is denied.

^{4/} In addition to the directive in section 429.28, AHCA's rulemaking authority is expressed in section 408.819, Florida Statutes.

^{5/} The quoted sections of rule 59A-36.001 include the amendments AHCA published in its Notice of Change/Withdrawal on June 8, 2016.

^{6/} See, e.g., Section 429.14 which states, in pertinent part:

(1) In addition to the requirements of part II of chapter 408, the agency may deny, revoke, and suspend any license issued under this part and impose an administrative fine in the manner provided in chapter 120 against a licensee for a violation of any provision of this part, part II of chapter 408, or applicable rules, or for any of the following actions by a licensee, any person subject to level 2 background screening under s. 408.809, or any facility staff:

(a) An intentional or negligent act seriously affecting the health, safety, or welfare of a resident of the facility.

* * *

(c) Misappropriation or conversion of the property of a resident of the facility.

(d) Failure to follow the criteria and procedures provided under part I of chapter 394 relating to the transportation, voluntary admission, and involuntary examination of a facility resident.

^{7/} As stated above, AHCA is not authorized to adopt rules regarding facility standards as that responsibility is delegated to the Department of Elder Affairs. See § 429.41, Fla. Stat. Consequently, during surveys of ALFs, AHCA surveyors may only apply those facility standards that have been previously established by the Department of Elder Affairs.

^{8/} See also section 429.14(6), which states:

As provided under s. 408.814, the agency shall impose an immediate moratorium on an assisted living facility that fails to provide the agency with access to the facility or prohibits the agency from conducting a regulatory inspection. The licensee may not restrict agency staff from

accessing and copying records at the agency's expense or from conducting confidential interviews with facility staff or any individual who receives services from the facility.

^{9/} See also section 429.29(3) and (4), which reference community standards and state:

3) In any claim brought pursuant to this section, a licensee, person, or entity shall have a duty to exercise reasonable care. Reasonable care is that degree of care which a reasonably careful licensee, person, or entity would use under like circumstances.

4) In any claim for resident's rights violation or negligence by a nurse licensed under part I of chapter 464, such nurse shall have the duty to exercise care consistent with the prevailing professional standard of care for a nurse. The prevailing professional standard of care for a nurse shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar nurses.

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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.