

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Petitioner,

vs.

Case No. 16-5764

WILLINE GRACIA,

Respondent.

_____ /

RECOMMENDED 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 120.569 and 120.57(1), Florida Statutes (2016),^{1/} on November 10, 2016, by video teleconference sites in Tallahassee and Orlando, Florida.

APPEARANCES

For Petitioner: Valerie Laurel Fritts, Esquire
Lindsey L. Miller, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 7
Tallahassee, Florida 32308

For Respondent: No appearance

STATEMENT OF THE ISSUES

The issues in this matter are whether Respondent, Willine Gracia, operated an assisted living facility without the required

license, thereby engaging in unlicensed activity; and, if so, the appropriate penalty.

PRELIMINARY STATEMENT

On July 8, 2016, Petitioner, the Agency for Health Care Administration (the "Agency"), issued an Administrative Complaint against Respondent, Willine Gracia. The Agency alleged that Respondent was operating an unlicensed assisted living facility in violation of chapter 429, Florida Statutes. The Agency seeks to impose an administrative fine against Respondent in the amount of \$19,000 pursuant to section 408.812, Florida Statutes.

On September 9, 2016, Respondent requested an administrative hearing under chapter 120. On October 3, 2016, the Agency referred the matter to the Division of Administrative Hearings ("DOAH") to conduct an evidentiary hearing.

The final hearing was held on November 10, 2016. Respondent did not appear. The Agency presented the testimony of Tresa Johnston, Anthony Alexander, and Keisha Woods. Agency Exhibits 1 through 5 were admitted into evidence.

A court reporter recorded the final hearing. Neither party requested a transcript. At the close of the hearing, the undersigned advised that the parties could submit post-hearing submittals within ten days following the final hearing. The Agency filed a Proposed Recommended Order which was duly considered in preparing this Recommended Order.

FINDINGS OF FACT

1. The Agency 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, the Agency serves as the enforcement arm regarding the licensed (and unlicensed) activity and operation of ALFs. See gen., Chs. 408 and 429, Fla. Stat.; Fla. Admin. Code R. 58A-5 and 59A-35.

2. Respondent owns a house located at 4502 Conley Street, Orlando, Florida.

3. In January 2016, the Agency received a complaint alleging the unlicensed operation of an ALF at the 4502 Conley Street location.

4. The Agency maintains records of ALF licenses and license applications pursuant to chapter 408 and rule 59A-35. Keisha Woods currently serves as an Operations and Management Consultant in the Assisted Living Unit for the Agency. Ms. Woods testified that she searched the Agency's databases on October 26, 2016, and November 9, 2016, and found no record that Respondent was currently licensed as an ALF or had ever applied to be licensed as an ALF.

5. Tresa Johnston is a Senior Human Services Program Specialist, also known as a "surveyor," for the Agency. Ms. Johnston investigated the complaint on behalf of the Agency.

On January 14, 2016, Ms. Johnston visited Respondent's house located at 4502 Conley Street, Orlando, Florida. Ms. Johnston arrived around 8:30 a.m. Respondent was not present.

Ms. Johnston knocked at the front door. An individual who Ms. Johnston later concluded was residing in the house, greeted her at the door and allowed her entry.

6. Upon entering the house, Ms. Johnston met three individuals who she determined were living in the residence. She observed that the house contained three bedrooms and one bathroom. The residents informed Ms. Johnston that they stayed in two of the three bedrooms. Ms. Johnston also found personal effects in the bedrooms and bathroom that belonged to the residents.

7. In the house, Ms. Johnston observed a combined living room/dining room area in which she found a piano, a small refrigerator, and a microwave. In the refrigerator, Ms. Johnston discovered several frozen meals and drinks. In the bathroom, Ms. Johnston did not find any toilet paper. She also noticed that the bathroom was lit only by a nightlight.

8. On the doorway to the kitchen, Ms. Johnston encountered a sign that read, "Do not enter kitchen at any time." The residents informed Ms. Johnston that Respondent forbade them from entering the kitchen. Disregarding the sign and entering the kitchen, Ms. Johnston saw that the refrigerator was chained and

locked. She found canned foods on the counter and packaged food in the pantry. Ms. Johnston also discovered a dead rat on the floor.

9. Ms. Johnston found the house was extremely cold. All three residents were wearing coats. The residents advised Ms. Johnston that Respondent did not allow them to manage the temperature.

10. Respondent arrived at the house around 9:10 a.m. Respondent was carrying a plastic bag containing medication for all three residents. Upon entering the house, Ms. Johnston testified that she saw Respondent take several prescription bottles out of the bag, pour a dosage of medication into the caps of each bottle, and instruct the residents to ingest the medication. The residents then placed some medications in a daily pill box for a one-day supply. Respondent observed that one medication bottle was empty. She shook it and advised one of the residents, "I owe you one of these. I have to refill it." Respondent, after giving the residents their medication, put the medication bottles back into the plastic bag. Ms. Johnston also heard Respondent declare that she would have to return in the afternoon to give a resident her medication.

11. Thereafter, Ms. Johnston interviewed Respondent. During this interview, Respondent informed Ms. Johnston that she:

- a. does not live at 4502 Conley Street;
- b. is not related to any of the three residents;
- c. provides housing, meals, and manages medications for all three residents;
- d. cooks two meals a day for the residents. (The residents are supposed to eat a frozen meal for their third meal);
- e. does not allow the residents into the kitchen;
- f. keeps the residents' medications in a locked cabinet in her home because two of the residents cannot take care of their own medications without her assistance; and
- g. generally arrives at the 4502 Conley Street location between 9:00 to 9:30 a.m. each day.

12. Respondent also called the residents her "clients." Respondent explained to Ms. Johnston that her clients were referred to her by a local hospital.

13. Respondent explained to Ms. Johnston that she is paid to lodge two of the residents through a payee. She was in the process of obtaining a payee for the third resident.

14. On January 22, 2016, Ms. Johnston contacted Anthony Alexander, who is a Representative Payee for the Social Security Administration. At the final hearing, Mr. Alexander explained that the Social Security Administration designated him a payee for certain individuals who have been determined to be unable to manage paying their own personal expenses with their Social

Security benefits. Mr. Alexander testified that in his capacity as Representative Payee, he made rental payments to Respondent for two of the residents Ms. Johnston found staying at Respondent's house. Mr. Alexander recounted that he made the rental payments through direct deposit to Respondent's bank account. Mr. Alexander further stated that he mailed weekly stipend checks for the two residents to the 4502 Conley Street address. Mr. Alexander represented that his records show that the stipend checks were cashed.

15. In addition, Mr. Alexander testified that, as of the date of the final hearing, he is still paying rent to Respondent for one of the residents. He is also still mailing a weekly stipend check for that individual to 4502 Conley Street, Orlando, Florida.

16. Based on her personal observations and the information provided directly to her from Respondent and the three residents of 4502 Conley Street, Ms. Johnston concluded that Respondent was engaged in unlicensed activity by operating an ALF without a license. Therefore, on January 14, 2016, Ms. Johnston issued Respondent a Notice of Unlicensed Activity (the "Notice"). The Notice instructed Respondent to immediately cease operating an ALF without proper licensure.

17. On February 1, 2016, Ms. Johnston revisited 4502 Conley Street. Ms. Johnston again asked a resident permission to enter

the house. This time she was denied entry. However, she saw that two of the three residents she met during her initial visit on January 14, 2016, were still in the house. Based on her observations, Ms. Johnston determined that Respondent was continuing to engage in unlicensed activity after receiving the Notice on January 14, 2016.

18. Respondent was not present at the final hearing. However, in her Election of Rights she presented to the Agency, Respondent wrote:

I Willine Gracia have never owned or operated a non license facility. . . . I've never promoted myself as such. However, I did have renters in my home and at times some of them came through Lakeside Behavioral. Each of these ladies were independent and did not require supervision and could live on their own without a caregiver. . . . I only offered meals to those ladies who wanted that. I did not provide anything more. . . . I do live at 4502 Conley Street and this is my personal home, which I can prove not a ALF or business.

19. Based on the competent substantial evidence in the record, the facts demonstrate that Respondent was operating an ALF as that term is defined in section 429.02(5). The evidence and testimony also establish that Respondent was engaging in this activity, without the proper license, from January 14, 2016, through February 1, 2016.

CONCLUSIONS OF LAW

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

21. The Agency initiated this action against Respondent alleging that she owned, operated, or maintained an unlicensed ALF at 4502 Conley Street, Orlando, Florida.

22. The Agency is responsible for the licensure of ALFs in the State of Florida pursuant to chapter 429 and Florida Administrative Code Rule 58A-5. As part of its responsibilities, the Agency enforces all applicable federal regulations, Florida statutes, and administrative rules governing the unlicensed operation of ALFs. See gen., Chs. 408 and 429, Fla. Stat.; and Fla. Admin. Code R. 58A-5 and 59A-35.

23. Based on her unlicensed activity, the Agency seeks to impose sanctions on Respondent in the form of an administrative fine. An action to impose a fine is penal in nature. Accordingly, AHCA bears the burden of proof to establish the grounds for doing so by clear and convincing evidence. Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996); see also Fla. Dep't of Child. & Fams. v. Davis Fam. Day Care Home, 160 So. 3d 854 (Fla. 2015).

24. Clear and convincing evidence is a heightened standard that requires more proof than a mere preponderance of the evidence. Clear and convincing evidence requires that the evidence "must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts at 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 Davey, 645 So. 2d 398, 404 (Fla. 1994); Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

25. According to section 429.07(1), "[a] license issued by the agency is required in order to operate an assisted living facility in this state." ALFs are required to be licensed by the Agency unless specifically exempted under section 429.04.

26. An ALF is defined in section 429.02(5) to mean:

[A]ny building or . . . 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.

27. "Personal services" are defined in section 429.02(17)

to mean:

[D]irect 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.

28. The Agency seeks to fine Respondent for her unlicensed activity pursuant to section 408.812. Section 408.812 states, in pertinent part:

(1) A person or entity may not offer or advertise services that require licensure as defined by this part, authorizing statutes, or applicable rules to the public without obtaining a valid license from the agency.

* * *

(2) The operation or maintenance of an unlicensed provider or the performance of any services that require licensure without proper licensure is a violation of this part and authorizing statutes. Unlicensed activity constitutes harm that materially affects the health, safety, and welfare of clients.

* * *

(3) It is unlawful for any person or entity to own, operate, or maintain an unlicensed provider. If after receiving notification from the agency, such person or entity fails to cease operation and apply for a license under this part and authorizing statutes, the person or entity shall be subject to penalties as prescribed by authorizing

statutes and applicable rules. Each day of continued operation is a separate offense.

(4) Any person or entity that fails to cease operation after agency notification may be fined \$1,000 for each day of noncompliance.

29. Based on the evidence in the record, the Agency proved, by clear and convincing evidence, that Respondent operated an ALF without the required license, in violation of chapter 429.

30. Initially, the uncontroverted records of the Agency establish that Respondent does not possess, has never possessed, nor has she ever applied for a license to operate an ALF in Florida.

31. Next, the clear and convincing evidence presented at the final hearing demonstrates that Respondent operated an ALF as defined in section 429.02(5), from January 14 through February 1, 2016. The evidence shows that Respondent had undertaken to provide housing, meals, and one or more personal services to three adults who were not her relatives.

32. Ms. Johnston credibly testified regarding her observations of Respondent's house located at 4502 Conley Street, Orlando, Florida, as well as the conversations she had with its three occupants and Respondent. Regarding Respondent's provision of housing to the residents, Ms. Johnston relayed that while touring the house, she discovered three beds that were currently in use, as well as various personal items belonging to the

residents throughout the premises. In addition, all three residents, as well as Respondent, confirmed to Ms. Johnston that Respondent was housing the residents. Furthermore, Ms. Johnston verified that Respondent was receiving rental payments for two of the three residents during the relevant time period. Finally, at least two of the three residents she encountered at the house on January 14, 2016, were observed in the house on February 1, 2016.

33. Regarding the provision of meals, Respondent admitted to Ms. Johnston that she does not allow the residents in the kitchen to cook their own meals. Instead, she routinely provides the residents at least two of their meals a day. This finding is supported by the sign located outside the kitchen door forbidding the residents from entering, as well as the chained and locked refrigerator.

34. Regarding the provision of "personal services," Ms. Johnston observed Respondent directly assist and supervise the residents' administration of their daily medications. Respondent also admitted to Ms. Johnston that she personally maintained custody of the residents' medication in a locked cabinet in her home.

35. In the course of this administrative proceeding, Respondent did not present evidence that she should be exempt from licensure under section 429.04. Therefore, the undersigned concludes that Respondent should have been licensed as an ALF

when she provided personal services to one or more residents at the house located at 4502 Conley Street, Orlando, Florida. The undersigned further concludes that Respondent offered services as an ALF from January 14 through February 1, 2016.

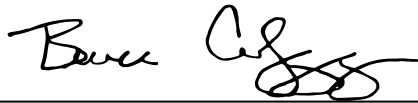
36. Section 408.812(4) provides that any person who "fails to cease operation after agency notification may be fined \$1,000 for each day of noncompliance." On January 14, 2016, Ms. Johnston notified Respondent that she was operating an ALF without the proper license. On February 1, 2016, Ms. Johnston returned to the house and observed that Respondent was continuing to provide services as an ALF. The time period between January 14 and February 1, 2016, is 18 days.^{2/} Accordingly, the Agency is entitled to impose an administrative fine in the amount of \$18,000 against Respondent.

37. In sum, based on the competent substantial evidence in the record, the Agency met its burden of establishing by clear and convincing evidence that Respondent provided housing, meals, and personal services to one or more adults without the requisite ALF license. Accordingly, the Agency proved that Respondent's actions constituted the unlicensed operation of an ALF in violation of chapter 429.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Agency issue a final order finding that Respondent Willine Gracia operated an ALF without a license in violation of chapter 429. It is further recommended that the Agency impose an administrative fine in the amount of \$18,000 against Respondent pursuant to section 408.812.

DONE AND ENTERED this 9th day of December, 2016, in Tallahassee, Leon County, Florida.



J. BRUCE CULPEPPER
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of December, 2016.

ENDNOTES

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

^{2/} In calculating the fine, the Agency counted 19 days of noncompliance. The Agency included January 14, 2016, the day it served the Notice of Unlicensed Activity on Respondent, in its calculation. Section 408.812(3) states: "Each day of continued operation is a separate offense." Section 429.812(5) instructs that the Agency may fine Respondent for each day of noncompliance

only "after agency notification." Further, section 429.02(5) defines "assisted living facility" as a private home operated "for a period exceeding 24 hours." Reading these sections in conjunction, the undersigned concludes that the Agency should begin counting the days of noncompliance on January 15, 2016, not the day it served the Notice of Unlicensed Activity. Accordingly, for purposes of calculating the administrative fine, the facts in the record establish that Respondent was noncompliant with chapter 429 for a period of 18 days.

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.