

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE  
ADMINISTRATION,

Petitioner,

vs.

Case No. 17-1589

RSC HIDDEN OAKS OF FORT MYERS,  
d/b/a HIDDEN OAKS OF FORT MYERS,

Respondent.

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RSC HIDDEN OAKS OF FORT MYERS,  
d/b/a HIDDEN OAKS OF FORT MYERS,

Petitioner,

vs.

Case No. 17-1591

AGENCY FOR HEALTH CARE  
ADMINISTRATION,

Respondent.

\_\_\_\_\_/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this matter before Lynne A. Quimby-Pennock, Administrative Law Judge with the Division of Administrative Hearings (DOAH), on June 19 and 20, 2017, in Fort Myers, Florida.

APPEARANCES

For the Agency for Health Care Administration:

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Agency for Health Care Administration  
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For RSC Hidden Oaks of Fort Myers, d/b/a Hidden Oaks of  
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STATEMENT OF THE ISSUES

The issues in these consolidated cases are whether the Agency for Health Care Administration (AHCA or Agency) should discipline (including the imposition of administrative fines and survey fees) RSC Hidden Oaks Fort Myers LLC, d/b/a Hidden Oaks of Fort Myers (Hidden Oaks), for the statutory and rule violations alleged in the December 29, 2016, Administrative Complaint; and whether AHCA should renew the assisted living facility (ALF) license held by Hidden Oaks.

PRELIMINARY STATEMENT

On December 29, 2016, AHCA issued an eight-count Administrative Complaint (AC) seeking to impose an administrative fine of \$4,500.00 and survey fees of \$1,500.00 on Hidden Oaks. AHCA sought to impose the administrative fine and survey fees pursuant to sections 429.19(2)(b), (2)(c), (7), and (10), Florida

Statutes (2016). Hidden Oaks timely filed a Petition for Formal Hearing (Petition) contesting the factual basis in the AC. On March 16, 2017, AHCA referred the Petition to DOAH, where it was designated DOAH Case No. 17-1589.

On January 17, 2017, AHCA issued a "Notice of Intent to Deny for the Assisted Living Facility Renewal Application" (NOID) to Hidden Oaks. The NOID alleged Hidden Oaks failed to meet the minimum licensure requirements pursuant to: section 408, part II, Florida Statutes; section 429, part III, Florida Statutes (2016); and Florida Administrative Code Rule 59A-35. Further, the NOID advised that pursuant to sections "408.815(1)(c), 429.14(h)," and rule 59A-35.060(6)(c), the renewal application was denied. Hidden Oaks timely requested a hearing, and on March 16, 2017, the matter was referred to DOAH, where it was designated DOAH Case No. 17-1591.

The parties filed a "Joint Response to Initial Order and Joint Motion to Consolidate" on March 24, 2017. On March 27, 2017, an Order was issued consolidating the two cases. A Joint Motion for Continuance was filed on April 27, 2017, which was denied. Thereafter, AHCA filed a Motion to Relinquish Jurisdiction and Hidden Oaks timely filed its response. A case status telephonic hearing was held on May 12, 2017. As a result of the telephonic hearing, an Order Canceling the May 17 and 18,

2017, hearing was issued. On May 16, 2017, an Order Rescheduling Hearing was issued.

On May 26, 2017, AHCA filed a Motion for Sanctions based on Hidden Oaks' failure to file responses to discovery requests. A telephonic motion hearing was held on June 5, 2017, and a separate Order Imposing Sanctions Against Hidden Oaks was issued on June 6, 2017.<sup>1/</sup>

At hearing, AHCA called the following witnesses to testify: Jonathon Kummer, environmental specialist II (ES) for the Florida Department of Health (DOH); AHCA employees: Jon Seehawer, an AHCA field office manager; Nancy Furdell, Claire McGillivray, and Daniel Turbyfill, AHCA surveyors; Laura Werts, an AHCA health facility evaluator supervisor; Jon Alter, an AHCA health facility evaluator; and Robin Heimann, Wendy Snyder, Paul Asdale, and Lisa Humphries, AHCA registered nurse (RN) specialists. Hidden Oaks called the following witnesses to testify on its behalf: Rob Icard, Hidden Oaks' current facility administrator; and Argenis Gomez, Hidden Oaks' director of maintenance.

AHCA's Exhibits A through V<sup>2/</sup> were received in evidence. Hidden Oaks Exhibits A through I and K (pages 1, 2, 4, 5, 7, 8, and 37 through 40) were received in evidence.<sup>3/</sup>

At the conclusion of the first day of hearing, Hidden Oaks' counsel made an ore tenus motion asking the undersigned to make an onsite visit. The undersigned took the motion under advisement,

and at the start of the second hearing day, the ore tenus motion was denied.

Hidden Oaks subpoenaed its former executive director, Danielle Inman, to testify at the hearing. Ms. Inman failed to appear and Hidden Oaks' counsel motioned for the hearing record to remain open to allow Ms. Inman's deposition to be taken. Counsel for AHCA did not object, and Hidden Oaks was granted 30 days (until July 20, 2017) in which to depose Ms. Inman.

On July 19, 2017, Hidden Oaks filed a motion seeking to close the hearing record and to establish an alternate date for the post-hearing proposed orders to be filed. The Inman deposition transcript was not filed, and by an Order dated July 20, 2017, the hearing record was closed. The alternate date for submission of post-hearing orders was not set because the hearing transcript had not been filed and no submission date had been set.

The two-volume hearing Transcript was filed on July 31, 2017. On August 1, 2017, the parties were advised, via a Notice of Filing, that any proposed orders were to be filed on or before the close of business on August 21, 2017. Each party timely filed their proposed order, and each has been reviewed in the preparation of this Recommended Order.<sup>4/</sup>

Unless otherwise stated, all statutory references are to the codification of the Florida Statutes in effect at the time of the alleged violations. All rule references are to the Florida

Administrative Code rules in effect at the time of the alleged violations.

Prior to the hearing, the parties submitted a pre-hearing stipulation. Relevant factual stipulations are included in the Findings of Fact.<sup>5/</sup>

#### FINDINGS OF FACT

1. Hidden Oaks holds an ALF license issued by AHCA, number 5531. Hidden Oaks is located at 3625 Hidden Tree Lane, Fort Myers, Florida, and has a capacity of 110 beds. At all times material hereto, Hidden Oaks was required to comply with all applicable rules and statutes for its continued operation.

2. AHCA is the state agency charged with the licensure and regulatory oversight of ALFs and enforcement of applicable state statutes and rules governing ALFs pursuant to chapters 429, part I, and 408, part II, and Florida Administrative Code Chapters 59A-5 and 59A-35.

3. AHCA is responsible for conducting ALF surveys annually to determine compliance with Florida Statutes and rules. Surveys may be classified as annual inspections or complaint investigations. Section 408.813(2) provides that AHCA must classify deficiencies (violations) according to the nature and scope of the deficiency when the criteria for the facility operations are not met. A Class II violation is defined as:

[T]hose conditions or occurrences related to the operation and maintenance of a provider or to the care of clients which the agency determines directly threaten the physical or emotional health, safety, or security of the clients, other than class I violations. The agency shall impose an administrative fine as provided by law for a cited class II violation. A fine shall be levied notwithstanding the correction of the violation.

A Class III violation is defined as:

[T]hose conditions or occurrences related to the operation and maintenance of a provider or to the care of clients which the agency determines indirectly or potentially threaten the physical or emotional health, safety, or security of clients, other than class I or class II violations. The agency shall impose an administrative fine as provided in this section for a cited class III violation. A citation for a class III violation must specify the time within which the violation is required to be corrected. If a class III violation is corrected within the time specified, a fine may not be imposed.

§ 408.813(2) (b) and (2) (c).

4. AHCA takes specific steps in surveying facilities and making decisions as to appropriate actions to be undertaken. Once AHCA writes a citation, enumerating the violations, the facility is given 30 days to make the corrections or repairs. After the 30-day period ends, AHCA revisits the facility to check on the violations that prompted the citation(s). In typical cases, the cited facility has responded to the citation(s), and the first revisit finds the violations corrected; that ends the process. In

the event the original violations have not been corrected and/or additional violations are discovered, another revisit may occur.

5. In addition to the AHCA surveys, DOH is charged with conducting environmental health inspections to ensure the health quality of ALFs. These health inspections are conducted on an annual basis. Should a health inspection be deemed unsatisfactory, DOH provides a date certain for the facility to be re-inspected. High-risk violations could include trip hazards; abrasion hazards; sanitation conditions related to human or animal waste products (urine or feces); cleanliness of bed linens (including mattresses and box springs); and sanitary procedures of the housekeeping staff. Low-risk violations could include furniture that no longer has a cleanable surface or insufficient room lighting without any other hazard present.

6. On October 29, 2015, Surveyor Furdell conducted an unannounced complaint survey at Hidden Oaks. During this survey, the facility was found to have the following deficiencies: dirty, stained or frayed carpets; dirty or stained floors in rooms and bathrooms; floor linoleum peeling up near toilets; cracks in other linoleum; holes or nails in various walls; rusted out and inoperable stoves; dirty, missing or broken dresser drawers; dirty windows or curtains; closet doors missing in some rooms; and a lack of toilet paper in most bathrooms in the memory care unit. A citation was issued based on these Class III deficiencies.



7. On November 18, 2015, ES Kummer conducted an inspection of Hidden Oaks. ES Kummer observed the following violations: significant maintenance deficiencies; a lack of vermin control; soiled bedding, towels and personal items; and loose medication or toxic substances issues. Based on these observations, the inspection was marked unsatisfactory. A notice of violation was issued to Hidden Oaks and signed for by Argenis Gomez. Hidden Oaks was advised that a revisit would be on December 8, 2015.

8. On December 8, 2015, ES Kummer conducted a re-inspection of Hidden Oaks. ES Kummer observed the following cleanliness issues: dirty sheets and linens; dirty walls; dirty floors; soiled mattresses; the strong smell of urine; and feces on mattresses. He also saw loose medications and other possible trip hazards. Based on the number of violations observed, Hidden Oaks was advised the inspection was unsatisfactory, and if the violations were not corrected by a revisit date of December 22, 2015, the matter would be referred to the legal department.

9. On December 9, 2015, an unannounced follow-up survey was conducted at Hidden Oaks by Agency Surveyor McGillivray. During this survey, the facility was found to have the following deficiencies in the memory care unit: a strong urine odor<sup>6/</sup>; dried feces on a resident's shoes; missing window blind wands or no curtains<sup>7/</sup>; ceiling lights were not working; ceiling vents were dirty; ceiling tiles were stained; a shower wall was caving in;

and some floors and walls were in disrepair. Additionally, she observed: dirty mattresses; torn box-springs; missing dresser drawer handles; stained carpets and floors; dust on the walls; and a loose shower grab bar. A citation was issued based on these Class III deficiencies.

10. As part of her duties, Agency Surveyor McGillivray also observed other regulatory violations involving medication issues for Hidden Oaks residents.

- One resident, whose health assessment documented a need for assistance with her medication, actually had the medication sitting next to her bedside.
- Residents were refusing to take their medication, however there was no documentation that their health care professionals were notified of the refusal, or that the refusal was documented in the residents' medication observation record (MOR).
- Another resident was not receiving medication because there was none in the medication cart. There was no indication that the health care professional had been contacted to obtain a refill.

A citation was issued based on these multiple Class III deficiencies.

11. On December 22, 2015, ES Kummer conducted a re-inspection of Hidden Oaks. ES Kummer again observed serious

violations regarding cleanliness and maintenance issues.

ES Kummer observed fecal matter in the same area as it was seen in his prior inspections. Based on the number of violations observed, Hidden Oaks was advised the inspection was unsatisfactory. Hidden Oaks was advised that a return inspection would be on January 12, 2016.

12. On January 12, 2016, ES Kummer conducted a re-inspection of Hidden Oaks. ES Kummer again observed cleanliness issues: feces present on resident's shoes and wall; dirty mattress covers, bed linens, tub, and sink; and ants in the kitchenette. He also found maintenance issues: floors peeling near toilets (moisture present); loose toilets; broken windows; and insufficient lighting. For some reason, ES Kummer checked "Satisfactory," yet provided four pages of issues that needed to be corrected.

13. On February 9, 2016, an unannounced follow-up survey was conducted at Hidden Oaks by RN Heimann. This survey was completed to determine whether the issues cited during AHCA's December 9, 2015, survey had been corrected. The following deficiencies were observed: laminate flooring continued to be in disrepair (peeling up and/or uneven in places); walls were in disrepair<sup>8/</sup>; carpets remained stained; ceiling tiles were stained; and a strong urine odor was present in the memory care unit. A citation was issued based on these Class III deficiencies.

14. On March 28, 2016, an unannounced follow-up survey was conducted at Hidden Oaks by RN Snyder. This survey was completed to determine whether the issues cited during the February 9, 2016, survey had been corrected. The following deficiencies remained outstanding: the flooring continued to be in disrepair; the walls and ceiling continued to be in disrepair; and there was a smell of urine. A citation was issued based on these Class III deficiencies.

15. Between May 23 and 26, 2016, an unannounced follow-up survey was conducted at Hidden Oaks by supervisor Werts. This survey was completed in conjunction with a complaint survey and in collaboration with the county health department to determine whether the issues cited during the previous three revisits had been corrected. The following violations were observed: carpets remained in disrepair; holes still found in the walls; and a sprinkler head and other electrical outlets were not flush with the walls. She also observed: feces on floors, shoes, clothing or smeared on walls; ceiling tiles dropped in at least one room because of a water leak; peeling wallpaper; and urine stains on the floor. In one room, dead bed bugs were seen on the mattress and the floor was damaged. When the mattress was raised, a container with dried urine was found. In another room, the carpet was damaged such that it presented a tripping hazard to all who entered. Supervisor Werts photographed the bedbugs,

floor damage, carpet damage, sprinkler head, and ceiling tile damage.

16. Supervisor Werts observed a Hidden Oaks employee with a mop and liquid solution, cleaning up urine or feces in one room. That same employee then went to the next room and, without changing or cleaning the mop and liquid solution, used the same to mop the next area.

17. Supervisor Werts, who has over 30 years of experience, issued a citation regarding resident's rights, based on the long-term deficiencies noted above. The citation was for failing to have a safe and clean living environment.

18. ES Kummer conducted an annual inspection of Hidden Oaks from May 23 through May 26, 2016. ES Kummer observed: dirty beds and linens; rust-colored water; feces (including a soiled adult diaper in the bushes in the facility's garden area); loose medications; full sharps container; trip hazards; cracked flooring; and dogs in the facility without proper rabies vaccinations or documentation of same. ES Kummer saw staff using the same bucket of water to clean urine and feces off the floor in one room, and then go to another room and use the same bucket to clean that floor. The photographs attached to AHCA's Exhibit M provided an appalling picture of the living conditions at Hidden Oaks. Based on the number of violations observed,

Hidden Oaks was advised the inspection was unsatisfactory, and was advised that a return inspection would be on July 5, 2016.

19. On July 5, 2016, ES Kummer conducted a re-inspection of Hidden Oaks. He returned on July 6, 2016, to complete the re-inspection. During the two-day inspection ES Kummer again observed: trips hazards; abrasion hazards; dirty floors; loose grab bars; and cleanliness issues throughout the areas. ES Kummer also observed Hidden Oaks staff using a bucket of water and mop to clean up urine in one room and then using the same bucket of water and mop to clean in another area. The photographs attached to AHCA's Exhibit N provided a grim picture of the living conditions at Hidden Oaks. Based on the number of violations observed, Hidden Oaks was advised the inspection was unsatisfactory, and was advised that a return inspection would be on July 26, 2016.

20. On July 26, 2016, ES Kummer conducted a re-inspection of Hidden Oaks. He also returned on July 27, 2016, to complete the re-inspection. He did not observe any appreciable improvement in the conditions at Hidden Oaks. His observations included: dirty floors; floors in disrepair; furniture in disrepair; wet underwear hanging from a door handle; and feces on different surfaces. ES Kummer also smelled urine throughout the facility. The photographs attached to AHCA's Exhibit O provided an unattractive picture of the living conditions at Hidden Oaks.

Based on the number of violations observed, Hidden Oaks was advised the inspection was unsatisfactory. Hidden Oaks was advised that a return inspection would be on August 22, 2016.

21. On July 27, 2016, an unannounced follow-up survey was conducted at Hidden Oaks by RN Asdale. This survey was conducted as a follow-up to prior surveys combined with three complaints. The following deficiencies were observed: rusty facets, sinks or drains; dirty floors; dirty carpets; soiled, ripped, stained or missing mattress covers; stained mattresses; pinwheel worms in common areas and rooms; doors in disrepair; and caulking in disrepair or missing altogether. These violations are classified as Class III.

22. During this survey, RN Asdale found two residents who were not receiving their medications according to their health assessment forms. One resident had returned to Hidden Oaks with a prescription for a pain killer. His prescription ran out and for four days he did not receive the prescribed pain medication. The other resident did not receive her seizure medication for three or four days. These violations are classified as Class II.

23. RN Humphries was also at Hidden Oaks during the July 27, 2016, survey. The following violations were observed: numerous pinwheel worms on the carpets, in sink drains, in shower drains, and in the ceiling fixtures. These violations were Class III.

24. RN Humphries also conducted medications compliance reviews. She determined that one resident needed medication which was not being administered. Regarding a different resident, RN Humphries could not determine from the MOR whether the resident was continually refusing her medication or the medication wasn't being provided. These violations were Class III.

25. On August 29, 2016, ES Kummer conducted a re-inspection of Hidden Oaks. ES Kummer observed: trips hazards; abrasion hazards; dirty floors; loose grab bars; and cleanliness issues throughout the facility. The photographs attached to AHCA's Exhibit P showed the substandard living conditions at Hidden Oaks. Based on the number of violations observed, Hidden Oaks was advised the inspection was unsatisfactory, and the matter was referred to legal.

26. On October 6, 2016, an unannounced follow-up survey was conducted at Hidden Oaks by health facility evaluator Alter. Evaluator Alter performed a staff training review. Three members of the Hidden Oaks staff, who had been onsite for at least four months, did not have certificates evidencing they had received proper training to perform their duties. When staff is not properly trained, staff cannot provide proper care, which could cause injury or harm to residents. These violations are Class III.



27. Additionally, Evaluator Alter noted that Hidden Oaks staff was not posting the daily menus for residents, as required. Residents could not know what options they had for each meal. This violation is a Class III.

28. Agency Surveyor Turbyfill is a registered nurse who also participated in the survey at Hidden Oaks in Fort Myers with Evaluator Alter. Agency Surveyor Turbyfill conducted a medication review and discovered that medication ordered to be provided two hours before the morning meal was actually being given after the meal had been eaten. Hidden Oaks' staff was not following the doctor's orders. The effectiveness of the medication may be altered by some foods. Additionally, on two occasions, Agency Surveyor Turbyfill observed that staff was not telling residents what medication they were being given.

29. Argenis Gomez worked for "the company (Hidden Oaks) about three years." He initially worked as a "med tech" and resident caregiver (RCA) for Hidden Oaks. While working as the med tech and RCA, he would come in on weekends to do odd jobs, such as painting. The prior executive director noted his work and hired Mr. Gomez as the maintenance director.<sup>9/</sup> Mr. Gomez does not have any prior training to be a maintenance director. Further, he admitted that once he became the maintenance director he found there was too much work for one person, and a part-time

assistant was hired. There are now three full-time maintenance workers at Hidden Oaks.

30. It remains unclear when Hidden Oaks actually engaged Mr. Gomez as its maintenance director. During his testimony, he claimed to be the maintenance director for about a year, which would be about June 2016, give or take a month or two. However, testimony by both ES Kummer and Mr. Gomez corroborate that Mr. Gomez accompanied the inspectors when they arrived at Hidden Oaks. Evidence as to how long Mr. Gomez had been working as the maintenance director is found on AHCA Exhibit I, which reflects that he signed the November 18, 2015, inspection report. The undersigned finds that it is highly improbable that a "med tech" or RCA would have the authority to accept a citation or inspection report.

31. Mr. Gomez acknowledged the multiple violations at Hidden Oaks to include: feces inside and around the grounds, the disrepair of various furnishings, the smell of urine within Hidden Oaks, and the lack of caulking at certain fixtures. Mr. Gomez took notes as to what needed to be addressed, but conceded that he did not have time to check on what should have been corrected. In some instances, outside contractors were necessary, but some repairs were inadequate at best. Mr. Gomez did not have the time to check on those repairs.

32. In addition to his maintenance duties, Mr. Gomez was also in charge of supervising the housekeeping staff. He again admitted that he could not effectively supervise the four housekeepers. Thereafter, Hidden Oaks engaged a housekeeper supervisor.

33. To his credit, Mr. Gomez determined the cause of the loose toilets. He determined that prior workers failed to fix the moisture issues at various toilets. Prior workers had merely placed more flooring over the old flooring, instead of ripping out the water-damaged flooring at the base of the toilet. However, despite determining how to correct the problem, Mr. Gomez did not correct it, and the problem persisted.

34. On November 29, 2016, ES Kummer conducted a re-inspection of Hidden Oaks. ES Kummer observed: trips hazards; abrasion hazards; dirty floors; loose grab bars; leaks at the water main; and cleanliness issues throughout the facility. The photographs attached to AHCA's Exhibit Q showed the living conditions at Hidden Oaks. Based on the number of violations observed, Hidden Oaks was advised the inspection was unsatisfactory, and the matter was referred to legal.

35. In January 2017, RN Humphries conducted an unannounced follow-up survey at Hidden Oaks. With respect to one resident, Hidden Oaks' staff was not providing medication as prescribed in the resident's health assessment form. The direction was for the

medication to be administered "on an empty stomach," which is usually two to four hours before meals, to allow for proper absorption. In this instance, the resident was provided the medication at 7:15 a.m., and went to breakfast at 7:30 a.m.

36. There were numerous surveys or inspections conducted on Hidden Oaks over 15 months. Each survey or inspection recorded numerous violations, either Class II or Class III, which Hidden Oaks failed to timely address.

#### CONCLUSIONS OF LAW

37. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

38. This case combines an AC to assess fines on various grounds (DOAH Case No. 17-1589) and the denial of an application to renew an ALF on some of the same grounds (DOAH Case No. 17-1591). A threshold legal issue to be determined is the burden of proof to apply.

39. The burden of proof in DOAH Case No. 17-1589 is on AHCA to prove the allegations in its Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

40. The Supreme Court has stated:

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 lacking in confusion as to the facts in issue. The evidence must be of such a weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

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

41. The burden of proof in DOAH Case No. 17-1591 is on AHCA, as its stated intention is to deny the renewal of Hidden Oaks' license is tantamount to revoking the license. See Wilson v. Pest Control Comm'n, 199 So. 2d 777, 781 (Fla. 4th 1967). AHCA's burden of persuasion on this issue is by clear and convincing evidence. Coke v. Dep't of Child. & Fam. Servs., 704 So. 2d 726 (Fla. 5th DCA 1998); Dubin v. Dep't of Bus. Reg., 262 So. 2d 273, 274 (Fla. 1st DCA 1972); Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., supra.

42. Section 429.28 provides in pertinent part:

(1) No resident of a facility 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. Every resident of a facility shall have the right to:

(a) Live in a safe and decent living environment, free from abuse and neglect.

(b) Be treated with consideration and respect and with due recognition of personal dignity, individuality, and the need for privacy.

\* \* \*

(3)(c) During any calendar year in which no survey is conducted, the agency shall conduct at least one monitoring visit of each facility cited in the previous year for a class I or class II violation, or more than three uncorrected class III violations.

43. Rule 58A-5.0185 provides in pertinent part:

Pursuant to Sections 429.255 and 429.256, F.S., and this rule, licensed facilities may assist with the self-administration or administration of medications to residents in a facility. A resident may not be compelled to take medications but may be counseled in accordance with this rule.

\* \* \*

(3) ASSISTANCE WITH SELF-ADMINISTRATION.

(a) Any unlicensed person providing assistance with self administration of medication must be 18 years of age or older, trained to assist with self administered medication pursuant to the training requirements of Rule 58A-5.0191, F.A.C., and must be available to assist residents with self-administered medications in accordance with procedures described in Section 429.256, F.S. and this rule.

(b) In addition to the specifications of Section 429.256(3), F.S., assistance with self-administration of medication includes verbally prompting a resident to take medications as prescribed.

(c) In order to facilitate assistance with self-administration, trained staff may prepare

and make available such items as water, juice, cups, and spoons. Trained staff may also return unused doses to the medication container. Medication, which appears to have been contaminated, must not be returned to the container.

(d) Trained staff must observe the resident take the medication. Any concerns about the resident's reaction to the medication or suspected noncompliance must be reported to the resident's health care provider and documented in the resident's record.

(e) When a resident who receives assistance with medication is away from the facility and from facility staff, the following options are available to enable the resident to take medication as prescribed:

1. The health care provider may prescribe a medication schedule that coincides with the resident's presence in the facility;
2. The medication container may be given to the resident, a friend, or family member upon leaving the facility, with this fact noted in the resident's medication record;
3. The medication may be transferred to a pill organizer pursuant to the requirements of subsection (2), and given to the resident, a friend, or family member upon leaving the facility, with this fact noted in the resident's medication record; or
4. Medications may be separately prescribed and dispensed in an easier to use form, such as unit dose packaging;

(f) Assistance with self-administration of medication does not include the activities detailed in Section 429.256(4), F.S.

1. As used in Section 429.256(4)(h), F.S., the term "competent resident" means that the resident is cognizant of when a medication is

required and understands the purpose for taking the medication.

2. As used in Section 429.256(4) (i), F.S., the terms "judgment" and "discretion" mean interpreting vital signs and evaluating or assessing a resident's condition.

\* \* \*

(5) MEDICATION RECORDS.

(a) For residents who use a pill organizer managed in subsection (2), the facility must keep either the original labeled medication container; or a medication listing with the prescription number, the name and address of the issuing pharmacy, the health care provider's name, the resident's name, the date dispensed, the name and strength of the drug, and the directions for use.

(b) The facility must maintain a daily medication observation record (MOR) for each resident who receives assistance with self-administration of medications or medication administration. A medication observation record must include the name of the resident and any known allergies the resident may have; the name of the resident's health care provider, the health care provider's telephone number; 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 medication observation record must be immediately updated each time the medication is offered or administered.

(c) For medications that serve as chemical restraints, the facility must, pursuant to Section 429.41, F.S., maintain a record of the prescribing physician's annual evaluation of the use of the medication.

\* \* \*



(7) MEDICATION LABELING AND ORDERS.

(a) The facility may not store prescription drugs for self-administration, assistance with self-administration, or administration unless it is properly labeled and dispensed in accordance with Chapters 465 and 499, F.S. and Rule 64B16-28.108, F.A.C. If a customized patient medication package is prepared for a resident, and separated into individual medicinal drug containers, then the following information must be recorded on each individual container:

1. The resident's name; and
2. Identification of each medicinal drug in the container.

(b) Except with respect to the use of pill organizers as described in subsection (2), no individual other than a pharmacist may transfer medications from one storage container to another.

(c) If the directions for use are "as needed" or "as directed," the health care provider must be contacted and requested to provide revised instructions. For an "as needed" prescription, the circumstances under which it would be appropriate for the resident to request the medication and any limitations must be specified; for example, "as needed for pain, not to exceed 4 tablets per day." The revised instructions, including the date they were obtained from the health care provider and the signature of the staff who obtained them, must be noted in the medication record, or a revised label must be obtained from the pharmacist.

(d) Any change in directions for use of a medication for which the facility is providing assistance with self-administration or administering medication must be accompanied by a written medication order issued and signed by the resident's health care provider,

or a faxed or electronic copy of such order. The new directions must promptly be recorded in the resident's medication observation record. The facility may then place an "alert" label on the medication container that directs staff to examine the revised directions for use in the medication observation record, or obtain a revised label from the pharmacist.

(e) A nurse may take a medication order by telephone. Such order must be promptly documented in the resident's medication observation record. The facility must obtain a written medication order from the health care provider within 10 working days. A faxed or electronic copy of a signed order is acceptable.

(f) The facility must make every reasonable effort to ensure that prescriptions for residents who receive assistance with self-administration of medication or medication administration are filled or refilled in a timely manner.

(g) Pursuant to Section 465.0276(5), F.S. and Rule 61N-1.006, F.A.C., sample or complimentary prescription drugs that are dispensed by a health care provider, must be kept in their original manufacturer's packaging, which must include the practitioner's name, the resident's name for whom they were dispensed, and the date they were dispensed. If the sample or complimentary prescription drugs are not dispensed in the manufacturer's labeled package, they must be kept in a container that bears a label containing the following:

1. Practitioner's name;
2. Resident's name;
3. Date dispensed;
4. Name and strength of the drug;

5. Directions for use; and

6. Expiration date.

(h) Pursuant to Section 465.0276(2)(c), F.S., before dispensing any sample or complimentary prescription drug, the resident's health care provider must provide the resident with a written prescription, or a faxed or electronic copy of such order.

44. Florida Administrative Code Rule 58A-5.019 provides in pertinent part:

(2) STAFF.

\* \* \*

(b) Staff must be qualified to perform their assigned duties consistent with their level of education, training, preparation, and experience. Staff providing services requiring licensing or certification must be appropriately licensed or certified. All staff must exercise their responsibilities, consistent with their qualifications, to observe residents, to document observations on the appropriate resident's record, and to report the observations to the resident's health care provider in accordance with this rule chapter.

(c) All staff must comply with the training requirements of Rule 58A-5.0191, F.A.C.

45. Rule 58A-5.191 provides in pertinent part:

(2) STAFF IN-SERVICE TRAINING. Facility administrators or managers shall provide or arrange for the following in-service training to facility staff:

(a) Staff who provide direct care to residents, other than nurses, certified nursing assistants, or home health aides trained in accordance with Rule 59A-8.0095,

F.A.C., must receive a minimum of 1 hour in-service training in infection control, including universal precautions, and facility sanitation procedures before providing personal care to residents. Documentation of compliance with the staff training requirements of 29 CFR 1910.1030, relating to blood borne pathogens, may be used to meet this requirement.

(b) Staff who provide direct care to residents must receive a minimum of 1 hour in-service training within 30 days of employment that covers the following subjects:

1. Reporting major incidents.
2. Reporting adverse incidents.
3. Facility emergency procedures including chain-of-command and staff roles relating to emergency evacuation.

(c) Staff who provide direct care to residents, who have not taken the core training program, shall receive a minimum of 1 hour in-service training within 30 days of employment that covers the following subjects:

1. Resident rights in an assisted living facility.
2. Recognizing and reporting resident abuse, neglect, and exploitation.

(d) Staff who provide direct care to residents, other than nurses, CNAs, or home health aides trained in accordance with Rule 59A-8.0095, F.A.C., must receive 3 hours of in-service training within 30 days of employment that covers the following subjects:

1. Resident behavior and needs.
2. Providing assistance with the activities of daily living.

(e) Staff who prepare or serve food, who have not taken the assisted living facility core training must receive a minimum of 1-hour-in-service training within 30 days of employment in safe food handling practices.

(f) All facility staff shall receive in-service training regarding the facility's resident elopement response policies and procedures within thirty (30) days of employment.

1. All facility staff shall be provided with a copy of the facility's resident elopement response policies and procedures.

2. All facility staff shall demonstrate an understanding and competency in the implementation of the elopement response policies and procedures.

\* \* \*

(12) TRAINING DOCUMENTATION AND MONITORING.

(a) Except as otherwise noted, certificates, or copies of certificates, of any training required by this rule must be documented in the facility's personnel files. The documentation must include the following:

1. The title of the training program;

2. The subject matter of the training program;

3. The training program agenda;

4. The number of hours of the training program;

5. The trainee's name, dates of participation, and location of the training program;

6. The training provider's name, dated signature and credentials, and professional license number, if applicable.

(b) Upon successful completion of training pursuant to this rule, the training provider must issue a certificate to the trainee as specified in this rule.

(c) The facility must provide the Department of Elder Affairs and the Agency for Health Care Administration with training documentation and training certificates for review, as requested. The department and agency reserve the right to attend and monitor all facility in-service training, which is intended to meet regulatory requirements.

46. Rule 58A-5.023 provides in pertinent part:

(3) OTHER REQUIREMENTS.

(a) All facilities must:

1. Provide a safe living environment pursuant to Section 429.28(1)(a), F.S.;

2. Be maintained free of hazards; and

3. Ensure that all existing architectural, mechanical, electrical and structural systems, and appurtenances are maintained in good working order.

\* \* \*

(e) Facilities must make available linens and personal laundry services for residents who require such services. Linens provided by a facility must be free of tears, stains and must not be threadbare.

47. Rule 58A-5.024 provides in pertinent part:

(2) STAFF RECORDS.

(a) Personnel records for each staff member must contain, at a minimum, a copy of the employment application, with references furnished, and documentation verifying freedom from signs or symptoms of communicable disease. In addition, records must contain the following, as applicable:

1. Documentation of compliance with all staff training and continuing education required by Rule 58A-5.0191, F.A.C.;

2. Copies of all licenses or certifications for all staff providing services that require licensing or certification;

3. Documentation of compliance with level 2 background screening for all staff subject to screening requirements as specified in Section 429.174, F.S. and Rule 58A-5.019, F.A.C.;

4. For facilities with a licensed capacity of 17 or more residents, a copy of the job description given to each staff member pursuant to Rule 58A-5.019, F.A.C.;

5. Documentation verifying direct care staff and administrator participation in resident elopement drills pursuant to paragraph 58A-5.0182(8)(c), F.A.C.

48. Rule 59A-35.060, Licensure Application Process, provides in pertinent part:

(6) An application is considered complete upon receipt of:

(a) All required documents and information and appropriate fee;

(b) All required background screening results; and,

(c) Completion of a satisfactory inspection if required by authorizing statutes or rules.

Satisfactory inspection means no regulatory violations exist, or all prior violations found have been determined by the Agency to be corrected.

49. Section 408.813 provides in pertinent part:

Administrative fines; violations.—As a penalty for any violation of this part, authorizing statutes, or applicable rules, the agency may impose an administrative fine.

\* \* \*

(2) Violations of this part, authorizing statutes, or applicable rules shall be classified according to the nature of the violation and the gravity of its probable effect on clients. The scope of a violation may be cited as an isolated, patterned, or widespread deficiency. An isolated deficiency is a deficiency affecting one or a very limited number of clients, or involving one or a very limited number of staff, or a situation that occurred only occasionally or in a very limited number of locations. A patterned deficiency is a deficiency in which more than a very limited number of clients are affected, or more than a very limited number of staff are involved, or the situation has occurred in several locations, or the same client or clients have been affected by repeated occurrences of the same deficient practice but the effect of the deficient practice is not found to be pervasive throughout the provider. A widespread deficiency is a deficiency in which the problems causing the deficiency are pervasive in the provider or represent systemic failure that has affected or has the potential to affect a large portion of the provider's clients. This subsection does not affect the legislative determination of the amount of a fine imposed under authorizing statutes. Violations shall be classified on the written notice as follows:

\* \* \*



(b) Class "II" violations are those conditions or occurrences related to the operation and maintenance of a provider or to the care of clients which the agency determines directly threaten the physical or emotional health, safety, or security of the clients, other than class I violations. The agency shall impose an administrative fine as provided by law for a cited class II violation. A fine shall be levied notwithstanding the correction of the violation.

(c) Class "III" violations are those conditions or occurrences related to the operation and maintenance of a provider or to the care of clients which the agency determines indirectly or potentially threaten the physical or emotional health, safety, or security of clients, other than class I or class II violations. The agency shall impose an administrative fine as provided in this section for a cited class III violation. A citation for a class III violation must specify the time within which the violation is required to be corrected. If a class III violation is corrected within the time specified, a fine may not be imposed.

50. Section 429.14 provides 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:

\* \* \*

(h) Failure of the license applicant, the licensee during relicensure, or a licensee

that holds a provisional license to meet the minimum license requirements of this part, or related rules, at the time of license application or renewal.

51. Section 429.19(2) provides in pertinent part:

(2) Each violation of this part and adopted rules shall be classified according to the nature of the violation and the gravity of its probable effect on facility residents. The agency shall indicate the classification on the written notice of the violation as follows:

\* \* \*

(b) Class "II" violations are defined in s. 408.813. The agency shall impose an administrative fine for a cited class II violation in an amount not less than \$1,000 and not exceeding \$5,000 for each violation.

(c) Class "III" violations are defined in s. 408.813. The agency shall impose an administrative fine for a cited class III violation in an amount not less than \$500 and not exceeding \$1,000 for each violation.

52. Section 408.815 provides in pertinent part:

(1) In addition to the grounds provided in authorizing statutes, grounds that may be used by the agency for denying and revoking a license or change of ownership application include any of the following actions by a controlling interest:

\* \* \*

(c) A violation of this part, authorizing statutes, or applicable rules.

53. Count I alleges that Hidden Oaks failed to: provide a safe living environment pursuant to section 429.28(1)(a); be

maintained free of hazards; and ensure that all existing architectural, mechanical, electrical and structural systems and appurtenances were maintained in good working order. These violations constituted Class III deficiencies. The allegations were proven by clear and convincing evidence.

54. Count II re-alleges all the paragraphs in Count I. It alleges that in addition to any administrative fines imposed, AHCA "may assess a survey fee equal to the lesser of one half of a facility's biennial license and bed fee or \$500, to cover the cost of conducting" an initial complaint investigation that is conducted pursuant to section 429.28(3)(c) and results in a finding of the complained violation. The basis to impose the survey fee was proven.

55. Count III alleges that AHCA completed a third revisit survey of Hidden Oaks and found identified deficiencies that were cited on previous surveys, which constituted Class III offenses, as defined in section 429.19(2)(c), above. The allegations were proven by clear and convincing evidence.

56. Count IV was the result of AHCA revisiting Hidden Oaks to determine whether previously cited deficiencies had been corrected. The deficiencies had not been corrected. The allegations were proven by clear and convincing evidence.

57. Count V detailed conditions found at a third revisit to Hidden Oaks regarding alleged failures "to maintain a clean and

safe environment for residents.” This continual failure constituted an uncorrected Class III deficient practice for the third time. The allegations were proven by clear and convincing evidence.

58. Count VI alleges that AHCA, on another revisit to Hidden Oaks, found its continued failure to ensure a safe and decent living environment, free from abuse and neglect. The residents were not being treated with consideration and respect regarding their personal dignity, individuality, or the need for privacy in their environs. Hidden Oaks was again cited with a Class III deficiency and afforded the requisite 30 days to correct the conditions. Such corrections were not evident when AHCA revisited Hidden Oaks 30 days later. The allegations were proven by clear and convincing evidence.

59. Count VII alleges that Hidden Oaks failed to ensure that residents’ medications were filled or refilled in a timely manner. The allegations were proven by clear and convincing evidence.

60. Count VIII re-alleges that a survey fee may be imposed should those deficiencies fail to be corrected during the applicable time following notification of the deficiencies. The basis to impose the survey fee was proven.

61. Under section 408.815(1)(d), AHCA may deny a license for a “demonstrated pattern of deficient performance.” There is no case law construing this phrase. An accepted definition of the

word "pattern" is: "a reliable sample of traits, acts, tendencies, or other characteristics of a person, group, or institution." Merriam-Webster Online Dictionary (2017). The repeated violations amount to a troubling pattern.

62. The evidence was clear and convincing that Hidden Oaks was not in compliance with the minimal requirements to maintain an ALF. The violations noted from the multiple surveys and inspections, while relatively minor, reflect a troubling pattern of deficient performance involving inadequate staffing, inadequate supervision, and inappropriate attention to the cleanliness and maintenance of the ALF and its residents. Despite notification of the deficiencies, Hidden Oaks failed to appreciate their significance and correct them. Those violations can be considered in determining whether AHCA proved a pattern of deficient performance that would warrant license discipline under section 408.815(1)(d). AHCA proved the allegation by clear and convincing evidence.

63. Based on these allegations, AHCA seeks to impose \$4,500.00 in administrative fines and \$1,500.00 in survey fees.

64. An applicant for renewal of an ALF license must demonstrate compliance with the authorizing statutes and applicable rules during an inspection pursuant to section 408.811, as required by authorizing statutes. § 408.806(7)(a), Fla. Stat.

65. AHCA presented clear and convincing evidence that Hidden Oaks failed to maintain a clean and safe environment for its residents.

66. AHCA presented clear and convincing evidence that Hidden Oaks committed multiple Class III violations within six months and failed to correct those violations in a timely manner.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Agency for Health Care Administration enter a final order finding that the AC allegations were proven by clear and convincing evidence, fining the facility a total of \$6,000.00 (\$4,500.00 in administrative fines and \$1,500.00 in survey fees); and denying Hidden Oaks license renewal application.<sup>10/</sup>

DONE AND ENTERED this 25th day of September, 2017, in Tallahassee, Leon County, Florida.



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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 25th day of September, 2017.

ENDNOTES

<sup>1/</sup> That Order stated in pertinent part:

2. The Motion for Sanctions is granted to the extent that AHCA is entitled to attorney's fees and costs as it relates to the review of the late filed material in response to the RFP, the creation and filing of the Motion for Sanctions. Such affidavit as to the amount of attorney's fees and costs associated with these tasks shall be attached to any proposed recommended order submitted following the hearing in this matter. Hidden Oaks shall be afforded an opportunity to respond solely to AHCA's affidavit for attorney's fees and costs no later than ten days after such affidavit is filed. The undersigned shall issue an order with respect to the sanctions once the deadline for Hidden Oaks' response expires.

The undersigned did not find an affidavit attached to the proposed recommended order.

<sup>2/</sup> AHCA's Exhibits R through V were inspection reports or surveys completed by AHCA, the Department of Health, or the local county health department after the dates listed in either the AC or the NOID. (emphasis added).

<sup>3/</sup> Hidden Oaks provided pictures of its facility, which were taken after the AC and the NOID were issued.

<sup>4/</sup> Hidden Oaks' proposed recommended order is replete with grammatical and typographical errors making it virtually incomprehensible, and therefore of no assistance to this process.

<sup>5/</sup> Hidden Oaks provided responses to AHCA's First Request for Admissions. AHCA attached those responses to the pre-hearing stipulation averring that "Hidden Oaks has admitted some material facts related to the allegations." Of the twelve responses provided: one does not reflect any response; five statements are

"DENIED"; and of the remaining six responses admitted, one involved two residents paying for their own transportation to physician appointments in contravention to Hidden Oaks' contractual obligation to provide transportation and five involved employees who failed to receive required training in a timely or documented manner.

6/ Surveyor McGillivray is a licensed registered nurse with years of experience. In describing the permeating odor of urine, she testified that the odor was so strong "It kind of made my eyes water because the door shut behind me."

7/ Missing blinds or a lack of curtains are issues that go directly to each residents' right to privacy and is a personal dignity issue.

8/ The holes in the walls had been spackled or caulked, but the surface was not sanded, finished or painted, thus creating an abrasion hazard.

9/ Prior to hiring Mr. Gomez as the maintenance director, Hidden Oaks' prior maintenance director had been on medical leave for two to three months. Outside service individuals were called in to address issues.

10/ AHCA should provide for sufficient time to allow the current residents to relocate.

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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.