

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Petitioner,

vs.

Case No. 18-6677

BLUE ANGEL ENTERPRISES, INC.,
d/b/a BLUE ANGEL RESIDENCES,

Respondent.

_____ /

RECOMMENDED ORDER

The final hearing in this matter was conducted before Administrative Law Judge Andrew D. Manko of the Division of Administrative Hearings ("DOAH"), pursuant to sections 120.569 and 120.57(1), Florida Statutes (2018),^{1/} on May 7 and 8, 2019, by video teleconference between sites in Tallahassee and St. Petersburg, Florida, and on May 24, 2019, in St. Petersburg.

APPEARANCES

For Petitioner: Nicola Brown, Esquire
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For Respondent: Jeffrey Scott Howell, Esquire
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STATEMENT OF THE ISSUE

Whether Blue Angel Enterprises, Inc., d/b/a Blue Angel Residences ("Blue Angel"), committed the statutory or rule violations alleged in the Amended Administrative Complaint and, if so, what penalty is authorized for such violations.

PRELIMINARY STATEMENT

On May 2, 2018, the Agency for Health Care Administration (AHCA) issued a six-count administrative complaint against Blue Angel, seeking to impose fines and revoke its assisted living facility license for engaging in unlicensed activity, failing to complete background screening and maintain an updated background screening roster, failing to ensure medication was properly secured, and operating beyond its licensed capacity. On May 25, 2018, Blue Angel disputed the allegations and requested a hearing pursuant to section 120.57(1).

On December 18, 2018, AHCA referred the administrative complaint to DOAH to conduct a formal administrative hearing under section 120.57. The final hearing was initially set for February 18 and 19, 2019, but was continued upon agreement of the parties and rescheduled for May 7 and 8, 2019.

Before the hearing, AHCA moved to determine no justiciable issues of material fact on two of the six counts. The undersigned denied the motion without prejudice to renewing it at the hearing after the evidence had been presented.

The final hearing began on May 7, 2019. That morning, a proposed intervenor—whose facility was the subject of a number of allegations in the administrative complaint but was neither named as a respondent nor served with the complaint—filed motions to intervene and for continuance. Before any evidence was presented, the undersigned heard arguments and, on agreement of the parties and the proposed intervenor, AHCA filed an amended administrative complaint that removed all allegations concerning the proposed intervenor's facility and the proposed intervenor withdrew its motions.

On May 8, 2019, AHCA began its case-in-chief and presented the testimony of five witnesses: Unidad Bonoan, Laura Manville, Steven Brodsky, Rod Jean-Gilles, and Serita Evans. Petitioner's Exhibits 1 through 30, 33 through 41, 44, 47, and 49 through 51 were admitted without objection. The undersigned took official recognition of Petitioner's Exhibit 44.

On May 24, 2019, Blue Angel began its case-in-chief and presented the testimony of three witnesses: Maria Aussendorf, Saili Hernandez, and Edelma Perez Garcia. Respondent's Exhibits 3, 7, 15, and 18 were admitted without objection.

On May 24, 2018, AHCA presented one witness in its rebuttal case, Sharon Lawrence.

A three-volume Transcript of the final hearing was filed on June 10, 2019. The parties timely filed their Proposed

Recommended Orders ("PROs"), which were duly considered in preparing this Recommended Order.

To maintain confidentiality of the residents and staff at issue, the parties have referred to residents by number and to staff by letter throughout these proceedings. The undersigned utilizes the same system in this Recommended Order.^{2/}

FINDINGS OF FACT

1. AHCA is the state agency charged with licensing of assisted living facilities (ALFs) in Florida, pursuant to the authority in chapters 408, part II, and 429, part I, Florida Statutes, and Florida Administrative Code Chapter 58A-5. AHCA is authorized to evaluate ALFs to determine their compliance with statutes and rules regulating their licensure and operation.

2. Blue Angel, located in Tampa, Florida, has been a licensed ALF (#12211) since 2012 with an operating capacity of six beds. It is licensed to provide limited mental health services, participates in long-term care, and is a licensed adult daycare facility. Ms. Aussendorf owns the property, serves as Blue Angel's chief financial officer ("CFO"), and also assists with clinical care because she is a nurse. Armando Vazquez, Ms. Aussendorf's brother, serves as Blue Angel's president and administrator.

3. An ALF is a structure (whether a building, part of a building, or multiple buildings) that provides housing, meals, and one or more personal services to residents for at least 24 hours. These personal services typically include assistance with activities of daily living, such as bathing, dressing, ambulating, and feeding, among others. It also can include assistance with self-administration of medication, whereby the facility stores the medication in a locked cabinet, retrieves it, observes the resident taking it, and then documents that it was taken.

4. When an ALF applies for a license, it typically submits floor plans of the facility along with reports from local fire, zoning, and health agencies to ensure the structure meets regulatory and safety standards. AHCA reviews the application materials and conducts an inspection of the structure(s) to be licensed. If approved, the license is issued for the particular structure(s) inspected.

5. The property on which Blue Angel is located has two structures. The main building, located in the front of the property, has been licensed as an ALF since 2012. The back structure, located behind the main building, has never been licensed as an ALF. Ms. Aussendorf renovated the back structure in 2013, and lived in it for several months before "renting" it to four residents. Blue Angel's characterization of these

residents as independent, as opposed to assisted living, is one of the primary issues in this case.

6. AHCA conducts inspections, called surveys, of licensed ALFs to determine their compliance with governing statutes and rules. AHCA has a right of entry to conduct surveys at licensed ALFs at any time.

7. ALFs are subject to bi-annual surveys, during which surveyors tour the facility, review resident and staff records, and observe compliance with core standards, medication storage, and direct care to residents. Surveyors interview residents, family members, and staff. Complaint surveys are conducted when AHCA receives a complaint from the public, another agency, or anonymously; those surveys are focused to the area of concern. Revisit surveys are conducted to ensure that any deficiencies cited in a prior survey have been corrected.

8. Surveyors also have authority to investigate unlicensed facilities if they suspect that unlawful activity is occurring, though entering an unlicensed building without the owner's permission could be a violation of the owner's rights.

9. If an ALF is not in compliance with the law, AHCA classifies the deficiencies based on the level of threat to the safety and welfare of the residents. They are categorized as Class I, II, III, IV, or unclassified deficiencies. Class III deficiencies are the most common and involve an indirect threat

to the health or well-being of the residents. AHCA typically gives the ALF 30 days to correct a Class III deficiency before seeking to impose a fine or penalty. An unclassified deficiency is one that does not meet the other classifications and often requires a fine or penalty to be assessed. A finding of unlicensed activity is treated as an unclassified deficiency, which often results in action being taken against the license.

10. On January 9, 2018, AHCA's surveyors, Mr. Brodsky and Mr. Jean-Gilles, conducted a complaint survey at Blue Angel for allegedly operating beyond its six-bed capacity. The complaint was not specific to the unlicensed back structure so the focus upon arrival was on the licensed main building.

11. Upon arrival at 6:00 p.m., the surveyors spoke to Staff A about the complaint, told her to contact the owner, and requested the admission/discharge log. Although Ms. Aussendorf was not present initially, she arrived about 30 minutes later.

12. Things were chaotic when the surveyors arrived due to a shift change and residents being moved around the facility, including out the back door and into the back structure. As a result, Mr. Brodsky inspected the main building, while Mr. Jean-Gilles went out back to inspect the unlicensed back structure.

13. In the main building, Mr. Brodsky interviewed several residents, including Resident 1, who said he lived in the main building. Resident 1's file contained a document showing an

admission date of December 2016, which indicated he had dementia and needed assistance with bathing, dressing, and ambulation, among others. He also was apparently admitted back into Blue Angel from the hospital in July 2017. Ms. Aussendorf maintained that Resident 1 was only there as an adult day care patient and went home every day, though his daughter told Mr. Brodsky on the phone that evening that he lived there. The surveyors believed that seven residents (including Resident 1) were living in the main building, one more than Blue Angel's license allowed.

14. Meanwhile, Mr. Jean-Gilles went out back and spoke to Staff C. She permitted him to enter the back structure. He observed a common area with a bunkbed and kitchenette, one bedroom with two beds, and another bedroom with one bed.

15. An unlocked cabinet in the kitchenette contained medication belonging to residents who lived in the main building and some who no longer lived in the facility. The majority of the medication was expired.

16. Mr. Jean-Gilles observed Residents 14, 15, and 16 in the back structure, interviewed them, spoke to Resident 13 outside the back structure, and contacted family members.^{3/}

Those interviews revealed the following:

- Resident 13 lives in the back structure and moved there from an ALF in Nebraska. Blue Angel provides her with meals, cleans her room, and brings a groomer for her dog.

- Resident 14 lives in the back structure and shares a room with another resident. Blue Angel assists her with bathing in the main building, changes her clothes, and provides her meals. She also uses a walker because she is not stable due to Parkinson's Disease.
- Resident 15 lives in the back structure and has for about five weeks after being discharged from the hospital. She shares the bunkbed with Staff C. Blue Angel provides her with meals, assists her with medication, and assisted her with bathing initially. Her son confirmed that she has dementia and needs assistance with everything.
- Resident 16 lives in the back structure and shares a room with Resident 14. Blue Angel assists her with her medication. A nurse comes to check her blood pressure and arrange her medicine in organizers.

17. Mr. Jean-Gilles interviewed Staff C during the survey and she informed him of the following:

- She lives in the back structure, supervises the residents at night, and helps them as needed. She assists all of them with their medication and confirmed they ate meals in the main building. She also sometimes fills in during day shifts.
- As to Resident 13, she bathes on her own in the back structure because she is in better shape than the others. But staff assists and watches her take her medication.
- As to Resident 14, Staff C or daytime staff assists her with bathing in the main building and changing her clothes because she is unstable and needs help.
- As to Resident 16, Staff C or daytime staff assists her with bathing in the main building and changing clothes.

18. Mr. Jean-Gilles also interviewed Staff D during the survey and she informed him of the following:

- She has worked there for three years and, though the residents in the back structure are independent, they do need supervision and assistance.

- As to Resident 13, she is independent and staff does not need to help her with anything.
- As to Resident 14, she walks by herself but also occasionally uses a walker. Staff D supervises her when she bathes so she does not fall. Staff makes sure she takes her medication during snacks and meals, but she does it in her room. Resident 14 also has been incontinent and staff helps to clean her.
- As to Resident 15, she initially bathed in the main building, but now does so in the back structure. She is assisted with her medication by Ms. Aussendorf.
- As to Resident 16, she is independent. Staff does not watch her or give her medication. She showers in the back structure.

19. Mr. Jean-Gilles also reviewed Blue Angel's files pertaining to Residents 13, 14, 15, and 16, which were kept in the main building even though they lived in the back structure.

20. All four residents executed residential leases with Blue Angel, signed by Ms. Aussendorf, whereby Blue Angel agreed to clean their rooms and assist them with laundry and meals. The leases prohibited the residents from having guests without prior written consent, required them to sign in/out before leaving the premises, and mandated that they be on the premises by 9 p.m. Resident 16 also signed an ALF contract with Blue Angel after she moved in, which indicated that her rent would start at \$700 but increase to \$1,500 once she was enrolled in a long-term care program.

21. Residents 13, 14, and 16 each had ALF resident health assessment forms (AHCA Form 1823). These forms were completed

by healthcare providers and confirmed that the residents needed assistance with personal services that would be met at an ALF. Each form listed Blue Angel as the licensed ALF, Ms. Aussendorf as the facility contact, and detailed the following information:

- Resident 13 (signed by Ms. Aussendorf on January 28, 2016) - she had schizophrenia-paranoid type, needed assistance with self-administration of medication, and needed daily oversight as to whereabouts and well-being, but was independent as to activities of daily life.
- Resident 14 (unsigned but dated October 23, 2017) - she was unsteady, used a walker, and had a tremor, needed supervision with bathing, meals, handling personal and financial affairs, assistance with self-administration of medication, and daily oversight as to her well-being, whereabouts, and reminders for important tasks.
- Resident 16 (unsigned, undated) - she needed supervision with bathing, transferring, preparing meals, shopping, handling personal affairs, and ambulating because she is unsteady, and needed daily oversight as to her well-being, whereabouts, and reminders for important tasks.

22. Blue Angel's files contained medical logs and forms for Residents 13, 14, 15, and 16, which is not typical for independent residents. The files contained the following:

- Resident 13 - monthly logs tracking her medications and the time of day taken from November 2017 through January 2018; monthly logs tracking her weight from November 2013 through April 2015; monthly progress notes from March through May 2015 indicating that Blue Angel checked her vitals, though noting she was very independent; certificate of Medicaid necessity signed by her medical provider, indicating that she needed assistance with self-administration of medication and health support, such as observing her whereabouts and well-being, reminders of important tasks, and recording and reporting significant changes in appearance and behavior; community living support plan, naming Blue Angel as the ALF and noting she needed assistance with medication management.

- Resident 14 - monthly logs tracking her weight from December 2015 through July 2016.
- Resident 15 - undated and unsigned observation log indicating that Blue Angel checked her vitals, though noting she was independent.
- Resident 16 - log tracking her medications and the time of day taken for January 2018; copies of prescriptions noting Blue Angel as the facility or listing its address.

23. The surveyors reviewed the AHCA background screening clearinghouse agency website to ensure all staff screenings were current. They discovered that Staff C's level II background screening had expired just a few days before the survey.

24. The surveyors walked around with Ms. Aussendorf to identify the issues they found. While in the back structure, they showed Ms. Aussendorf the unlocked medication cabinet and she acknowledged they were expired. They observed her removing medicine from the packaging and giving it to Resident 15 because she could not read the labels. Ms. Aussendorf admitted to assisting Resident 15 with her medication, but maintained that the residents in the back structure were independent.

25. Although Staff D and Ms. Aussendorf gave conflicting testimony as to the services provided, the undersigned finds the testimony of Mr. Jean-Gilles and Mr. Brodsky to be credible, particularly viewed in the context of the documents in Blue Angel's files, the statements made by staff and residents, and the observations made by the surveyors during the survey.

26. Before leaving that evening, the surveyors informed Ms. Aussendorf of the following deficiencies: overcapacity based on Resident 1 in the main building and the four residents in the back structure, the background screening issue, and the medication storage issue in the back structure. They did not inform her, show her their notes, or discuss an allegation of unlicensed activity. Thus, at that point, Blue Angel had no notice of that allegation.

27. The week following the survey, Ms. Aussendorf called Ms. Manville, AHCA's supervisor for the local field office. According to Ms. Aussendorf, Ms. Manville said the residents could not live in the back structure and that, though an exact deadline could not be given, she should be fine if she moved them before the revisit survey.

28. Based on that call, Ms. Aussendorf began to find other places for the four residents. Although there is conflicting evidence as to the date on which the last resident moved out, there is no dispute that Residents 13, 14, and 16 moved to other ALFs and Resident 15 moved in with her daughter.

29. On January 22, 2018, AHCA issued its Notice of Unlicensed Activity. Based on the weight of the credible evidence, this was the first date that AHCA notified Blue Angel that the activities in the back structure constituted unlicensed activity, as opposed to mere overcapacity.

30. In a letter dated January 25, 2018, AHCA reported its findings and enclosed a summary statement of deficiencies citing the following four deficiencies: Tag 0055 - medication storage and disposal, rule 58A-5.0185(6) (Class III); Tag Z815 - background screening, sections 408.809, 435.02(2), and 435.06 (unclassified); Tag Z827 - unlicensed activity (Residents 13, 14, 15, and 16 living in the back structure), section 408.812; and Tag Z828 - administrative fines and violations (overcapacity as to Resident 1 living in main building), section 408.813(3). The letter required all deficiencies to be corrected within 30 days of the date of the letter and mandated that a corrective action plan be submitted by February 4, 2018.

31. Blue Angel timely submitted its corrective action plan and indicated that all deficiencies were corrected as follows:

- Unlicensed Activity - All residents had been moved out of the back structure.
- Background Screening - Staff C had been scheduled for a background screening appointment as of the date of the survey and, on January 10, 2018, completed the rescreening and was in compliance.
- Overcapacity - Resident 1 was an adult daycare patient and his family had informed AHCA about their misunderstanding.
- Medications - All employees received additional training, medication was now locked in secure cabinets, and all expired medication was sent to the pharmacy and destroyed.

32. AHCA's surveyors, Mr. Jean-Gilles, Ms. Evans, and Ms. Hardie, returned to Blue Angel to conduct a revisit survey on February 26, 2018. Ms. Aussendorf was out of the country, but the staff granted access to the surveyors. The surveyors spoke to staff, inquired about the number of residents currently living in the facility, and inspected the back structure.

33. As to the main building, the surveyors observed an unlocked medication cabinet that included medication for six residents present in the main building and two residents, including Resident 1, who were not present.

34. As to the back structure, Staff C confirmed she lived there, but no belongings of the four residents remained. The surveyors spoke to staff, reviewed records, and called or visited the residents, their family members, and the new ALFs to confirm when the residents moved out of the back structure.

35. The parties dispute when the last resident moved out of the back structure. Blue Angel maintains that it was January 23, 2018, whereas AHCA maintains that it was February 13, 2018. The evidence on this issue—testimony from AHCA's witnesses and its own exhibits—is conflicting.^{4/} However, the undersigned finds that the weight of the credible evidence, including in particular the testimony of Ms. Evans, established that Resident 16 moved out on January 16, 2018,

Residents 13 and 14 moved out on January 18, 2018, and Resident 15 moved out on January 23, 2018.

36. The revisit survey also revealed that Residents 13, 14, and 16 received long-term care services, including some type of supervision and assistance, and were eligible to receive Medicaid managed care services. Long-term care services are not offered to residents in independent facilities because such services indicate a need for supervision or assistance with daily activities of life. Ms. Aussendorf helped some of the residents with their applications for long-term care plans.

37. As required by the long-term care plans, Residents 13, 14, and 16 had assigned case managers who conducted in-person visits. Ms. Lawrence, Resident 13's case manager, confirmed that she is unable to take care of her own needs, including food preparation, medication, and transportation. Ms. Lawrence visited Resident 13 on Wednesdays to ensure that her bills were paid and her medications were stocked and taken correctly, and to assist with anything else she needed.

38. The revisit survey lastly revealed that Blue Angel failed to maintain its background screening clearinghouse employee roster. The surveyors reviewed the employee records and found that five employees had been omitted from the roster.

39. Based on the complaint and revisit surveys, AHCA pursued disciplinary action against Blue Angel. On May 2, 2018,

AHCA filed an administrative complaint seeking to impose administrative fines and to revoke Blue Angel's license.

40. On May 8, 2019, AHCA served an amended administrative complaint seeking the same relief based on the following six counts: (I) administrative fine of \$35,000 (\$1,000 per day) for unlicensed activity in the back structure from January 9, 2018, through February 13, 2018, pursuant to section 408.812; (II) license revocation for the unlicensed activity in the back structure, pursuant to sections 429.14(1)(j) and 408.815(1)(c); (III) administrative fine of \$500 for failing to maintain an updated background screening clearinghouse employee roster, pursuant to sections 429.19(2)(c) and 408.815(1)(c); (IV) administrative fine of \$500 for failing to secure medication in a locked storage room or cabinet, pursuant to section 429.19(2)(c); (V) administrative fine of \$500 for failing to conduct a level II background screening for an employee, pursuant to sections 429.19(2)(c) and 408.813(3)(b); and (VI) administrative fine of \$500 for overcapacity, pursuant to section 408.813(3).^{5/}

41. Blue Angel admitted the allegations of Counts III, V, and VI and conceded to the \$500 fines imposed in each.

FINDINGS OF ULTIMATE FACT

42. It is well settled under Florida law that determining whether alleged misconduct violates a statute or rule is a

question of ultimate fact to be decided by the trier-of-fact based on the weight of the evidence. Holmes v. Turlington, 480 So. 2d 150, 153 (Fla. 1985); McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995). Thus, determining whether the alleged misconduct violates the law is a factual, not legal, inquiry.

43. AHCA has the burden to prove its allegations against Blue Angel by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 934 (Fla. 1996); Avalon's Assisted Living, LLC v. Ag. for Health Care Admin., 80 So. 3d 347, 348-49 (Fla. 1st DCA 2011) (citing Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987)). As the Florida 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 explicit and the witnesses must be lacking in confusion as to the facts in 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 Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

44. Based on the findings of fact above, AHCA established by clear and convincing evidence that Blue Angel engaged in unlicensed activity in the back structure. §§ 408.812(2) & 429.04, Fla. Stat. The weight of the credible evidence proved that Blue Angel provided housing, meals, and multiple personal services for more than 24 hours in the back structure to Residents 13, 14, 15, and 16, none of whom were relatives of Blue Angel's owners. § 429.02(5), Fla. Stat. Specifically, it supervised and/or assisted residents with bathing (Residents 14, 15, and 16), ambulating (Residents 14 and 15), dressing (Residents 14 and 16), washing clothes (all four residents), and self-administration of medication, including storing, bringing it to the resident, verbally reading the label, and maintaining records tracking same (all four residents). See Avalon's Assisted Living, 80 So. 3d at 348-49 (holding that "personal services" as defined in section 429.02, includes "washing clothes and feeding, bathing, grooming, and administering medications to its residents").

45. Based on the findings of fact above and the weight of the credible evidence, AHCA failed to establish by clear and convincing evidence that it put Blue Angel on notice of the unlicensed activity allegation on January 9, 2018, the date of the complaint survey, nor that Blue Angel did not cease such operations until February 13, 2018. Instead, the undersigned

finds that the weight of the credible evidence established that AHCA put Blue Angel on notice of the unlicensed activity violation on January 22, 2018, when it issued its notice of unlicensed activity, and that Blue Angel ceased such activity by January 23, 2018, the date the last resident moved out.

46. Based on the findings of fact above and the weight of the credible evidence, AHCA established by clear and convincing evidence that Blue Angel knowingly and unlawfully operated the back structure as an ALF without a license in violation of sections 429.14(1)(j), 408.812(2), and 408.815(1)(c). Blue Angel used its licensed structure to serve the residents meals, bathe some of them, and maintain their files. The Form 1823s listed Blue Angel as the receiving ALF and Ms. Aussendorf as the contact, and detailed the personal services these four residents needed. Ms. Aussendorf, Blue Angel's CFO and a controlling interest, owned the property, acted on Blue Angel's behalf in handling issues with AHCA, and had clear knowledge of the types of services ALFs provide. The leases with the residents listed Blue Angel as the landlord and were signed by Ms. Aussendorf. And, the leases detailed broad personal services provided by Blue Angel and imposed movement restrictions, which would not apply in an independent facility.

47. Based on the findings of fact above and the weight of the credible evidence, AHCA established by clear and convincing

evidence that Blue Angel violated rule 58A-5.0185(6) by failing to keep the centrally-stored medication cabinet in the back structure locked and properly dispose of the expired medications found therein. However, AHCA did not establish by clear and convincing evidence that Blue Angel failed to timely correct that Class III deficiency (e.g., keeping medication in an unlocked cabinet in the unlicensed back structure). The evidence was undisputed that Blue Angel had properly removed all of the medication from the cabinet in the back structure and, thus, a fine cannot be imposed. § 408.813(2)(c), Fla. Stat.

CONCLUSIONS OF LAW

48. DOAH has jurisdiction over the parties and the subject matter of this cause. §§ 120.569 & 120.57(1), Fla. Stat.

Count I - \$35,000 Fine for Unlicensed Activity^{6/}

49. AHCA seeks to impose an administrative fine against Blue Angel for unlicensed activity. § 408.812(4), Fla. Stat.

50. Section 429.04(1) requires ALFs to be licensed. Although the statute contains several exemptions, none of them are applicable here. § 429.04(2), Fla. Stat.

51. An ALF is defined as:

[A]ny building or buildings, section or distinct part of a building, private home, boarding home, home for the aged, or other residential facility, regardless of whether operated for profit, which through its ownership or management provides 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.

§ 429.02(5), Fla. Stat. (emphases added).

52. "Personal services" are defined as:

direct physical assistance with or supervision of the activities of daily living, the self-administration of medication, or other similar services which the department may define by rule. The term may not be construed to mean the provision of medical, nursing, dental, or mental health services.

§ 429.02(17), Fla. Stat.

53. "Activities of daily living" are defined as "functions and tasks for self-care, including ambulation, bathing, dressing, eating, grooming, and toileting, and other similar tasks." § 429.02(1), Fla. Stat.

54. "Supervision" is defined as "reminding residents to engage in activities of daily living and the self-administration of medication, and, when necessary, observing or providing verbal cuing to residents while they perform these activities."

§ 429.02(24), Fla. Stat.

55. As authorized by section 429.02(17), AHCA has further defined assistance with activities of daily living to include "individual assistance" with any of the following:

(a) Ambulation - Providing physical support to enable the resident to move about within or outside the facility. Physical support includes supporting or holding the

resident's hand, elbow, or arm; holding on to a support belt worn by the resident to assist in providing stability or direction while the resident ambulates; or pushing the resident's wheelchair. The term does not include assistance with transfer.

(b) Bathing - Assembling towels, soaps, or other necessary supplies; helping the resident in and out of the bathtub or shower; turning the water on and off; adjusting water temperatures; washing and drying portions of the body that are difficult for the resident to reach; or being available while the resident is bathing.

(c) Dressing - Helping residents to choose, put on, and remove clothing.

(d) Eating - Helping residents with or by cutting food, pouring beverages, or feeding residents who are unable to feed themselves.

(e) Grooming - Helping residents with shaving, oral care, care of the hair, or nail care.

(f) Toileting - Assisting the resident to the bathroom, helping the resident to undress, positioning the resident on the commode, and helping the resident with related personal hygiene including assistance with changing an adult brief and assistance with the routine emptying of a catheter or ostomy bag.

Fla. Admin. Code R. 58A-5.0131.

56. "Assistance with self-administration of medication" is defined by statute to include:

(a) Taking the medication, in its previously dispensed, properly labeled container, including an insulin syringe that is prefilled with the proper dosage by a

pharmacist and an insulin pen that is prefilled by the manufacturer, from where it is stored, and bringing it to the resident.

(b) In the presence of the resident, reading the label, opening the container, removing a prescribed amount of medication from the container, and closing the container.

(c) Placing an oral dosage in the resident's hand or placing the dosage in another container and helping the resident by lifting the container to his or her mouth.

* * *

(e) Returning the medication container to proper storage.

(f) Keeping a record of when a resident receives assistance with self-administration under this section.

* * *

(1) Assisting with measuring vital signs.

§ 429.256(3), Fla. Stat. Additionally, "assistance with self-administration of medication includes, in the presence of the resident, reading the medication label aloud and verbally prompting a resident to take medications as prescribed." Fla. Admin. Code R. 58A-5.0185(3)(b).

57. Section 408.812(2) provides that "[t]he 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."

58. Based on the findings of fact and ultimate fact above, AHCA proved by clear and convincing evidence that Blue Angel engaged in unlicensed activity in the back structure by providing housing, meals, and "personal services" for more than 24 hours to Residents 13, 14, 15, and 16, in violation of sections 429.04(1) and 408.812(2).

59. AHCA seeks to impose an administrative fine of \$35,000—\$1,000 for each day that Blue Angel failed to cease operating the unlicensed facility after agency notification. § 408.812(3), (4), Fla. Stat. AHCA contends that Blue Angel was put on notice of the unlicensed activity on January 9, 2018, the date of the complaint survey, and did not cease operations until February 13, 2018, the date AHCA contends Resident 13 moved out of Blue Angel.

60. However, the clock for correcting the cited deficiency does not run from verbal communications of agency staff, but instead from the provider's receipt of written notice of the deficiency. See § 408.811(4), Fla. Stat. (requiring deficiency to "be corrected within 30 calendar days after the provider is notified of inspection results"); Fla. Admin. Code R. 59A-35.120(1)(a) ("Deficiencies must be corrected within 30 days of the date the Agency sends the deficiency notice to the provider...."); Fla. Admin. Code R. 58A-5.033(2)(a) (requiring agency to "issue a statement of deficiency" for violations

observed during inspections with a timeframe for correction). AHCA's argument has been previously rejected. See Pinehurst Convalescent Ctr. v. Ag. for Health Care Admin., 814 So. 2d 452, 453 (Fla. 4th DCA 2001) ("The notion that a nursing home could suffer a substantial fine or lose its license based solely on verbal communication makes about as much sense as the notion that police officers could issue verbal traffic citations.").

61. Moreover, even if verbal notice was sufficient, the surveyors conceded that they never informed Blue Angel of an unlicensed activity violation at the complaint survey and instead solely discussed an allegation of overcapacity, which is a distinct violation with differing penalties. And, to boot, the evidence was undisputed that AHCA's staff never gave Blue Angel a timeframe for correction.

62. Based on the findings of fact and ultimate fact above and the weight of the credible evidence, AHCA established by clear and convincing evidence that Blue Angel was put on notice of the allegation of unlicensed activity on January 22, 2018, when it issued its notice of unlicensed activity, and that violation was corrected one day later, on January 23, 2018, when the last resident moved out of the back structure.

63. For the foregoing reasons, the undersigned concludes that a fine of \$1,000 is appropriate under section 408.812.^{7/}

Count II - License Revocation for Unlicensed Activity

64. AHCA also seeks to revoke Blue Angel's license for engaging in unlicensed activity, pursuant to sections 429.14(1)(j) and 408.815(1)(c).

65. Section 429.14(1)(j) authorizes AHCA to revoke Blue Angel's license for "[k]nowingly operating any unlicensed facility or providing without a license any service that must be licensed under this chapter or chapter 400."

66. Based on the findings of fact and ultimate fact above, AHCA established by clear and convincing evidence that Blue Angel engaged in unlicensed activity in the back structure and did so knowingly, in violation of sections 429.04(1), 429.14(1)(j), and 408.812(2).

67. The undersigned rejects Blue Angel's argument that AHCA's failure to notify it on prior surveys that the back structure had to be licensed undermines the knowing nature of its conduct. AHCA had no reason to inspect the back structure because Blue Angel never applied for it to be licensed. And, Blue Angel's knowledge of its unlawful activity cannot be ignored simply because it evaded being caught for several years. The conduct of Blue Angel's CFO upon being caught confirmed the knowing nature of the violation, as she tried to convince AHCA that the residents were independent.

68. Section 408.815(1)(c) also authorizes AHCA to revoke Blue Angel's license if a "controlling interest" commits "[a] violation of this part, authorizing statutes, or applicable rules." A "controlling interest" includes the "licensee" and "[a] person or entity that serves as an officer of, is on the board of directors of, or has a 5-percent or greater ownership interest in the applicant or licensee," so long as the person is not a voluntary board member. § 408.803(7)(a) & (b), Fla. Stat.

69. Based on the findings of fact and ultimate fact above, AHCA established by clear and convincing evidence that Blue Angel along with its CFO, Ms. Aussendorf, unlawfully operated the unlicensed facility in the back structure in violation of sections 408.812(2) & (3) and 408.815(1)(c).

70. For the foregoing reasons, the undersigned concludes that revocation of Blue Angel's license is appropriate.

Count III - \$500 Fine for Failing to Maintain Updated Background Screening Clearinghouse Roster

71. AHCA seeks to impose an administrative fine for Blue Angel's failure to maintain an updated background screening clearinghouse employee roster for five of six employees, as required by section 435.12, Florida Statutes. AHCA seeks to impose a \$500 fine for this violation pursuant to sections 429.19(2)(e) and 408.815(1)(c).

72. Blue Angel admitted to the allegations in Count III and to the \$500 administrative fine imposed therein.

Count IV - \$500 Fine for Failing to Secure Medication

73. AHCA seeks to impose a \$500 administrative fine for Blue Angel's failure to correct a class III deficiency within 30 days, as required by 429.19(2)(c).

74. The law requires ALFs that centrally store medications for residents keep them "in a locked cabinet; locked cart; or other locked storage receptacle, room, or area at all times" and ensure abandoned or expired medications are "disposed of within 30 days of being determined abandoned or expired." Fla. Admin. Code R. 58A-5.0185(6)(c)1. & (f).

75. Section 408.813(2)(c) defines Class III violations as:

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.

76. After the complaint survey, AHCA cited Blue Angel for failing to ensure that medications were kept centrally stored and locked for two residents who required assistance with self-

administration of medication, and failing to ensure that abandoned and expired medications were destroyed or returned to the pharmacy, in violation of rule 58A-5.0185(6). Both of these failures concerned an unlocked cabinet in the back structure. AHCA cited that violation as a class III deficiency and gave Blue Angel 30 days to correct it.

77. Based on the findings of fact and ultimate fact above, AHCA established by clear and convincing evidence that Blue Angel violated rule 58A-5.0185(6) by failing to keep the centrally-stored medication cabinet in the back structure locked and properly dispose of the expired medications found therein.^{8/}

78. However, based on the findings of fact and ultimate fact above, AHCA did not establish by clear and convincing evidence that Blue Angel failed to correct that cited deficiency within 30 days. Blue Angel corrected that cited deficiency by removing and properly disposing of all medication from the cabinet in the back structure before the revisit survey. As such, "a fine may not be imposed." § 408.813(2)(c), Fla. Stat.

79. Albeit in the same general subject matter, the deficiency cited after the revisit survey concerned a different cabinet in an entirely separate building. Those distinctions matter here. See Ag. for Health Care Admin. v. Tampa Health Care Associates, LLC, Case No. 03-165 (Fla. DOAH May 30, 2003; Fla. AHCA Nov. 14, 2003) (finding fine inappropriate based on

failure to timely correct a deficiency because initial survey cited one broken laundry shoot door, which had been fixed, but revisit survey cited a different broken laundry shoot door).

Count V - \$500 Fine for Lack of Background Screening

80. AHCA seeks to impose an administrative fine for Blue Angel's failure to ensure that a level II background screening had been completed for one of its employees who resided in the facility and provided care to its residents, as required by section 408.809(1)-(2). AHCA seeks to impose a \$500 fine for this violation pursuant to sections 429.19(2)(e) and 408.813(3)(b).

81. Blue Angel admitted to the allegations in Count V and to the \$500 administrative fine imposed therein.

Count VI - \$500 Fine for Overcapacity

82. AHCA seeks to impose an administrative fine of \$500 for Blue Angel operating over its 6-bed capacity in violation of section 408.813(3). AHCA alleged that Resident 1 lived at Blue Angel along with six other residents and that, as such, it was operating beyond its licensed six-bed capacity.

83. Blue Angel admitted to the allegations in Count VI and to the \$500 administrative fine imposed therein.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Agency for Health Care

Administration issue a final order revoking the license (#12211) of Blue Angel Enterprises, Inc., d/b/a Blue Angel Residences, and imposing an administrative fine totaling \$2,500.

DONE AND ENTERED this 5th day of July, 2019, in Tallahassee, Leon County, Florida.



ANDREW D. MANKO
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of July, 2019.

ENDNOTES

^{1/} All statutory references are to Florida Statutes (2018), unless otherwise noted.

^{2/} AHCA filed both un-redacted and redacted versions of all of its exhibits to protect the confidentiality of the residents. The un-redacted exhibits, including a demonstrative aid that identifies the names of the residents and staff with their corresponding resident number or staff letter, have been sent back to AHCA in a sealed box labelled to indicate that the contents are confidential.

^{3/} Consistent with section 120.57(1)(c), the undersigned has not based any finding of fact on hearsay evidence alone, unless it would be admissible over objection in a civil action or merely supplements or explains other admissible evidence.

For example, AHCA introduced its survey notes into evidence, which contain both notes of what the surveyors observed during their investigations and summaries of out-of-court statements made by Blue Angel's staff, residents, and family members to the surveyors. The records constitute hearsay and, in some cases, hearsay within hearsay. However, the survey notes themselves are admissible under the public records exception, as they are records created by AHCA pursuant to a duty to report and contain observations made by the surveyors during their investigation. § 90.803(8), Fla. Stat. Summaries of the out-of-court statements made by Blue Angel's staff and Ms. Aussendorf to the surveyors are admissible as party admissions. See § 90.803(18), Fla. Stat. (providing that statements made either by a party or by a party's servant about a matter within the scope of employment are admissible as admissions). Although the summaries of the statements made by the residents and family members to the surveyors are hearsay (as is any testimony by surveyors as to what residents or family members told them), they supplement and explain other admissible evidence, including the multitude of records maintained in Blue Angel's files, i.e., residential leases, medication logs, and medical records documenting the needs of the residents, that detail the types of services being provided to the residents.

^{4/} The testimony and exhibits revealed the following conflicting evidence.

As to Resident 13, Ms. Evans testified that she was discharged from Blue Angel to a private house on January 18, 2018, based on her interview with Blue Angel's staff and her conversations with staff from Kristiana's ALF and Resident 13 herself. The survey notes indicate that both a friend of Resident 13 and her long-term care case manager, Ms. Lawrence, told Ms. Evans that she had been living at Orchard Hills ALF for several weeks and that staff at Kristiana's ALF told Ms. Evans she arrived on February 13, 2018. Ms. Lawrence testified that she moved Resident 13 from Blue Angel to Kristiana's ALF around February 13, 2018, though she only visited her once a week and could not confirm whether Resident 13 was only at Blue Angel on the days she visited. Ms. Bonoan, the administrator of Kristiana's ALF, also testified that Resident 13 was admitted on February 13, 2018, though she did not know the name of the ALF from which Resident 13 came and could not confirm that it was Blue Angel.

As to Resident 14, Ms. Evans testified that she moved to another ALF on January 18, 2018. Yet, the survey notes indicate

that Ms. Evans spoke with the administrator for Rose and Mary ALF, who confirmed that Resident 14 moved there on January 23, 2018.

As to Resident 15, Ms. Evans testified that she moved out to live with family on January 23, 2018. The survey notes confirm that Resident 15's daughter told Ms. Evans that her mother had been with her in Tennessee for two to three weeks.

As to Resident 16, Ms. Evans testified that she moved to another ALF on January 16, 2018. Yet, the survey notes indicate that Ms. Evans spoke with the administrator for Rose and Mary ALF, who confirmed that Resident 16 moved there on January 23, 2018.

^{5/} In what appear to be mere typos, AHCA cited section 408.805(1)(c) as a basis for license revocation in Count II and section 408.815(1)(c) as a basis for imposing an administrative fine in Count III. However, section 408.805 concerns licensure fees, not revocation, and there is no subsection (1)(c) therein. AHCA again mistakenly cited section 408.805(1)(c) at the hearing as grounds for revocation, but made it clear that it was pursuing revocation on grounds that Blue Angel's controlling interest violated chapter 408 and other governing statutes and rules. The statute that authorizes revocation on that basis is section 408.815(1)(c), which is just one number off from AHCA's citations. Similarly, AHCA cited section 408.815(1)(c) as one of the bases for imposing the fine in Count III (it also properly cited section 429.19(2)(e)), rather than citing section 408.813(3)(b), as it correctly did in Counts IV, V, and VI. However, Blue Angel did not argue lack of notice or raise any issue as to these apparent typos at any point during this case.

^{6/} At the beginning of the final hearing, AHCA renewed its pre-hearing motion to determine no justiciable issues of material fact as to Count I. The basis for AHCA's motion is that, on January 16, 2018, Blue Angel filed an application to increase its capacity from six to ten beds in the main building. Although the timing of this application happened to coincide with the complaint survey, Blue Angel had sought approval from the zoning board in early 2017 to increase its bed capacity and had been unable to file the application until it received zoning approval in December 2017. The application did not seek to convert or license the back structure. On April 12, 2018, AHCA denied the application for six reasons, including that the complaint survey uncovered unlicensed activity. On June 1, 2018, AHCA issued a final order denying the application.

Because Blue Angel neither requested a hearing on the denial of its application nor appealed AHCA's final order after it was issued, AHCA argues that the findings made in its notice of denial and final order concerning the unlicensed activity were entitled to res judicata effect on Count I in this proceeding, which are based on those violations. The undersigned denied this motion before the hearing without prejudice to re-raising it after all of the evidence had been presented.

Although AHCA renewed its motion at the beginning of the final hearing, it failed to re-raise the issue during closing arguments after the evidence had been presented or include any argument about it in its PRO. Thus, AHCA waived this issue.

Even if the issue had been preserved, the motion would be denied. AHCA failed to introduce the notice of denial or the final order into evidence, both of which are necessary to make findings of fact on the issue of res judicata. AHCA did not request that official recognition be taken of either document and merely attaching copies of them to its pre-hearing motion is insufficient to rely on them as evidence in this matter.

Regardless, the denial of the motion would stand for the same reasons explained in the pre-hearing Order dated February 27, 2019. Res judicata may be applied in administrative proceedings, but only with "great caution." Thomson v. Dep't of Env'tl. Reg., 511 So. 2d 989, 991 (Fla. 1987). Because of the fluidity of facts and shifting policies of government work, res judicata will not apply if there are "new facts, changed conditions, or additional submissions" by the non-governmental entity. See id. (holding that res judicata did not apply to second application for permit because first application was denied on somewhat different grounds and second application changed the location of the dock); Delray Med. Ctr. v. Ag. for Health Care Admin., 5 So. 3d 26, 29 (Fla. 4th DCA 2009) (noting that "Florida courts do not apply the doctrine of administrative finality when there has been a significant change of circumstances or there is a demonstrated public interest"). As the First District Court of Appeal recognized:

This doctrine bars relitigation of an issue when the following five factors are met:
"(1) an identical issue must have been presented in the prior proceeding; (2) the issue must have been a critical and necessary part of the prior determination;

(3) there must have been a full and fair opportunity to litigate that issue; (4) the parties in the two proceedings must be identical; and (5) the issue[] must have been actually litigated.”

Felder v. Dep't of Mgmt. Servs., Div. of Ret., 993 So. 2d 1031, 1034 (Fla. 1st DCA 2008) (quoting Goodman v. Aldrich & Ramsey Enters., Inc., 804 So. 2d 544, 546-47 (Fla. 2d DCA 2002)).

In this case, AHCA seeks to use its unchallenged findings in denying Blue Angel's application to increase its capacity as res judicata for the facts underlying its attempt to impose administrative fines in Count I and revoke Blue Angel's license in Count II. However, these two matters are distinct (denial of an application vs. revocation of a license), the standards and burdens of proof are quite different, and AHCA's denial of the application was based on four factors beyond the unlicensed activity. Even the factual findings as to unlicensed activity in the notice of intent were not specific. In sum, the critical differences between the two matters and the burdens of proof, and the lack of specificity of the prior findings render res judicata inapplicable in this instance.

^{7/} The undersigned rejects Blue Angel's argument that a fine would be improper because AHCA failed to consider the factors outlined in section 429.19(3). Those factors are required to be considered only when AHCA imposes a fine under section 429.19. Here, AHCA seeks to impose a fine under sections 408.812, 408.815, and 429.14, none of which contain the factors outlined in section 429.19(3). Accordingly, section 429.19(3) is inapplicable here.

^{8/} The undersigned rejects Blue Angel's argument that it cannot be fined for its admitted failure to keep centrally-stored medications locked in a cabinet because the back structure was not a licensed facility that had such a requirement. Not only is this argument made solely in the conclusion section of its PRO with no citation to supporting legal authority, but the findings of fact and conclusions of law above confirm that Blue Angel was operating an ALF and was required to comply with the legal requirements for doing so, notwithstanding that it was unlawfully operating without a license.

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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.