

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Petitioner,

Case No. 19-4056

vs.

LIFE CARE CENTER OF PUNTA GORDA,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held in Tallahassee, Florida, on October 3, 2019, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Bradley Stephen Butler, Esquire
Ryan McNeill, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop 3
Tallahassee, Florida 32308

For Respondent: Amy W. Schrader, Esquire
Baker Donelson
101 North Monroe Street, Suite 925
Tallahassee, Florida 32301

STATEMENT OF THE ISSUES

Whether Life Care Center of Punta Gorda (Respondent), timely submitted its monthly nursing home quality assessment fee for

February 2019; and, if not, whether a fine should be imposed for each day that the payment was delinquent.

PRELIMINARY STATEMENT

Petitioner, Agency for Health Care Administration (Petitioner/Agency/AHCA), by correspondence dated April 3, 2019, informed Respondent that its facility "had an outstanding balance pertaining to a Quality Assessment Fee for February [2019]." Respondent challenged the Agency determination described in the referenced correspondence by timely filing a Petition for Formal Administrative Hearing. On July 31, 2019, Petitioner referred this matter to the Division of Administrative Hearings (DOAH) for assignment of an Administrative Law Judge.

At the final hearing, Petitioner presented the testimony of Darelyn Talbott, and Respondent offered testimony from Katrina Derico-Harris. Joint Exhibits 1 through 8 were admitted into evidence. Respondent's Exhibit 1 was admitted into evidence for the limited purpose of establishing that a check for payment of the February 2019 Quality Assessment Fee was generated by Respondent prior to payment due date of March 20, 2019.

A single-volume Transcript of the final hearing was filed on October 3, 2019. An Order was entered on the parties' Agreed Motion for Extension of Time, which allowed for the filing of proposed recommended orders (PRO) on or before October 30, 2019.

Petitioner and Respondent each timely filed a PRO and the same have been considered in preparing this Recommended Order.

FINDINGS OF FACT

1. AHCA, pursuant to section 409.913, Florida Statutes (2018),^{1/} is responsible for overseeing and administering the Medicaid program for the State of Florida.

2. At all times relevant hereto, Respondent was a Florida Medicaid provider authorized to provide nursing home services, and had a valid Medicaid provider agreement with AHCA.

3. Respondent operates a nursing home facility as defined by section 409.9082(1)(b), and is required, pursuant to section 409.9082(2), to "report monthly to [AHCA] its total number of resident days, exclusive of Medicare Part A resident days, and remit an amount equal to the assessment rate times the reported number of days." The monthly amount assessed pursuant to section 409.9082 is known as a "Quality Assessment Fee."

4. Section 409.9082(2) provides, in part, that AHCA "shall collect, and each facility shall pay, the quality assessment each month[, and [AHCA] shall collect the assessment from nursing home facility providers by the 20th day of the next succeeding calendar month."

5. Respondent's Quality Assessment Fee for February 2019 was to be remitted to AHCA by March 20, 2019. It is undisputed that AHCA received payment of Respondent's Quality Assessment Fee

on April 12, 2019, and that this was the first instance where Respondent failed to timely remit payment of the fee to AHCA.

6. In explaining why the Quality Assessment Fee was not tendered by the due date, Ms. Talbott testified that Respondent's customary process is to remit payment by FedEx "so that . . . [there is] a tracking mechanism on it." Ms. Talbott explained that her investigation revealed that the customary process for mailing payment to AHCA was not followed in the instant dispute because the accounts payable clerk, instead of using FedEx, and as a consequence of being distracted by a family emergency, inadvertently mailed the payment via the United States Postal Service, without requesting delivery confirmation. The accounts payable clerk did not testify during the final hearing and there is no specific finding of fact that the check was not delivered to AHCA because of any act(s) or omission(s) by the accounts payable clerk.

7. The check that was purportedly mailed by the accounts payable clerk for payment of the Quality Assessment Fee was never received by AHCA, and Ms. Talbott credibly testified that the same was never returned to Respondent by the postal service.

8. AHCA, by correspondence dated April 3, 2019, and mailed on April 9, 2019, informed Respondent that there was "an outstanding balance pertaining to a Quality Assessment Fee for February [2019]," and that payment of the same was due

immediately. Respondent paid the Quality Assessment Fee on April 12, 2019.

CONCLUSIONS OF LAW

9. DOAH has jurisdiction over the subject matter of and the parties to this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

10. This is a proceeding in which AHCA seeks to impose a disciplinary sanction, by way of an administrative fine, against Respondent's license to operate as a Medicaid provider. Because disciplinary proceedings are considered to be penal in nature, AHCA is required to prove the allegations against Respondent by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

11. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). As stated by the Florida Supreme Court, the standard:

entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994)(citing, with approval, Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); see also In re Henson, 913 So. 2d 579, 590 (Fla. 2005).

"Although this standard of proof may be met where the evidence is in conflict, it seems to preclude evidence that is ambiguous."

Westinghouse Elec. Corp. v. Shuler Bros., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

12. Section 409.907, which governs Medicaid provider agreements, states, in part, as follows:

(1) Each provider agreement shall require the provider to comply fully with all state and federal laws pertaining to the Medicaid program, as well as all federal, state, and local laws pertaining to licensure, if required, and the practice of any of the healing arts, and shall require the provider to provide services or goods of not less than the scope and quality it provides to the general public.

13. Section 409.9082 provides, in part, as follows:

(2) A quality assessment is imposed upon each nursing home facility. The aggregated amount of assessments for all nursing home facilities in a given year shall be an amount not exceeding the maximum percentage allowed under federal law of the total aggregate net patient service revenue of assessed facilities. The agency shall calculate the quality assessment rate annually on a per-resident-day basis, exclusive of those resident days funded by the Medicare program, as reported by the facilities. The per-resident-day assessment rate must be uniform except as prescribed in subsection (3). Each facility shall report monthly to the agency its total number of resident days, exclusive

of Medicare Part A resident days, and remit an amount equal to the assessment rate times the reported number of days. The agency shall collect, and each facility shall pay, the quality assessment each month. The agency shall collect the assessment from nursing home facility providers by the 20th day of the next succeeding calendar month. The agency shall notify providers of the quality assessment and provide a standardized form to complete and submit with payments. The collection of the nursing home facility quality assessment shall commence no sooner than 5 days after the agency's initial payment of the Medicaid rates containing the elements prescribed in subsection (4). Nursing home facilities may not create a separate line-item charge for the purpose of passing the assessment through to residents.

* * *

(7) The agency may seek any of the following remedies for failure of any nursing home facility provider to pay its assessment timely:

(a) Withholding any medical assistance reimbursement payments until such time as the assessment amount is recovered;

(b) Suspension or revocation of the nursing home facility license; and

(c) Imposition of a fine of up to \$1,000 per day for each delinquent payment, not to exceed the amount of the assessment.

14. Florida Administrative Code Rule 59G-6.010(4) provides, in part, as follows:

(3) Each facility shall report monthly to the Agency for Health Care Administration (AHCA) its total number of resident days and remit an amount equal to the assessment rate times the reported number of days. Facilities are

required to submit their full quality assessment payment no later than 20 days from the next succeeding calendar month.

(4) Providers are subject to the following monetary fines pursuant to section 409.9082(7), Florida Statutes (F.S.), for failure to timely pay a quality assessment:

(a) For a facility's first offense, a fine of \$500 per day shall be imposed until the quality assessment is paid in full, but in no event shall the fine exceed the amount of the quality assessment.

(b) For any offense subsequent to a first offense, a fine of \$1,000 per day shall be imposed until the quality assessment is paid in full, but in no event shall the fine exceed the amount of the quality assessment. A subsequent offense is defined as any offense within a period of five years preceding the most recent quality assessment due date.

(c) An offense is defined as one month's quality assessment payment not received by the 20th day of the next succeeding calendar month.

15. Respondent agrees that the February 2019 Quality Assessment Payment was not timely received by AHCA. The essence of Respondent's defense is twofold. First, Respondent contends that the United States Postal Service is to blame for not delivering the quality assessment payment to AHCA. Second, Respondent contends that section 409.908(7) gives AHCA "discretion regarding whether to assess penalties against a provider for failure to timely pay a quality assessment fee," and further, that once AHCA realized that payment had not been received, the agency

should have contacted Respondent by expedited means (e.g. fax, email, or phone), as opposed to certified mail.

16. Regarding Respondent's first defense, the evidence failed to establish that Respondent actually mailed the missing payment to AHCA and that the agency actually received the missing payment before the due date. Respondent's inability to establish such a predicate places Respondent squarely within the "mandatory"^{2/} provisions of section 409.9082, which require AHCA to "collect the assessment from nursing home facility providers by the 20th day of the next succeeding calendar month." Additionally, in considering section 409.9082, there is no indication that the Legislature authorized an exception to the timely remittance requirement for payments lost or untimely delivered by the United States Postal Service.

17. Respondent's second defense is grounded in its belief that section 409.9082(7) grants AHCA discretion to waive delinquent quality assessment payment fines. Respondent, in support of its argument, notes that the statute provides that AHCA "may" seek any of the listed remedies, and therefore, the use of the word "may" implies that AHCA has discretion to pursue no remedy at all. While it is true that AHCA has some discretion under the statute, that discretion is not as broad as suggested by Respondent.

18. As previously noted, section 409.9082(7) provides that AHCA "may seek any of the following remedies for failure of any nursing home facility provider to pay its assessment timely." The phrase "any of the following remedies" is a limitation on AHCA's authority; and this limitation dictates that AHCA can only exercise its discretion within the framework established by the Legislature. Succinctly stated, the clear text of the statute does not support Respondent's contention that AHCA is authorized to waive, or otherwise avoid, the imposition of a fine resulting from a provider's untimely payment of its quarterly assessment.

19. AHCA proved by clear and convincing evidence that Respondent failed to remit its February 2019 quality assessment payment by the due date of March 20, 2019.

20. AHCA proved by clear and convincing evidence that Respondent's February 2019 quality assessment payment was received by the agency on April 12, 2019.

21. AHCA proved by clear and convincing evidence that Respondent's failure to timely remit its February 2019 quality assessment payment violates section 409.9082, and that this statutory violation is Respondent's first offense within the meaning of rule 59G-6.010.

22. Rule 59G-6.010(4) provides that "[f]or a facility's first offense, a fine of \$500 per day shall be imposed until the quality assessment is paid in full. . . ." Respondent's February

2019 quality assessment payment was received by AHCA 23 days after the due date, and therefore, \$11,500 is the fine resulting from the untimely payment.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby RECOMMENDED that Petitioner, Agency for Health Care Administration, enter a final order finding that Life Care Center of Punta Gorda committed its first offense of section 409.9082 and imposing a fine of \$11,500.

DONE AND ENTERED this 26th day of November, 2019, in Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of November, 2019.

ENDNOTES

^{1/} All subsequent references to Florida Statutes will be to 2018, unless otherwise indicated.

^{2/} As previously noted, section 409.9082 provides that the agency "shall" collect from a provider the quality assessment by the 20th day of the next succeeding calendar month, and imposes "a fine of up to \$1,000 per day for each delinquent payment." As observed in Allied Fidelity Insurance Co. v. State, 415 So. 2d 109, 111 (Fla. 3d DCA 1982):

Whether "shall" is mandatory or discretionary will depend, then, upon the context in which it is used and the legislative intent expressed in the statute. Thus, for example, where "shall" refers to some required action preceding a possible deprivation of a substantive right, or the imposition of a legislatively-intended penalty, or action to be taken for the public benefit, it is held to be mandatory.

Because section 409.9082 uses "shall" in the context of collecting the assessment payment, and imposes a fine when a provider fails to timely remit payment, then it is evident that use of the word "shall" in this context imposes a mandatory obligation on the provider to timely remit payment.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.