

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA


FILED
DEC 16 2013

A BETTER HOME CARE INC.,
Petitioner,

v.

DEPARTMENT OF COMMUNITY
HEALTH, HEALTHCARE FACILITY
REGULATION DIVISION
Respondent.

:
:
:
:
:
:
:
:
:
:
:
:

Docket Nos.:
OSAH-DCH-HFR-PCH-1409962-31-
Howells
OSAH-DCH-HFR-PCH-1412103-31-
Howells


Kevin Westray, Legal Assistant

INITIAL DECISION

I. Summary of Proceedings

Petitioner, A Better Home Care Inc. (“A Better Home Care” or “Petitioner”), a personal care home operating under a permit, appealed two separate decisions of the Department of Community Health, Healthcare Facility Regulation Division (“Department”): first, the decision to impose a \$1803 fine for three Initial Category I violations, and, second, the decision to deny Petitioner’s application for a capacity increase from three to six residents. Because the two issues arise out of the same facts, the two appeals were consolidated for a hearing on November 8, 2013.¹ Owner Teekewa Roundtree appeared on behalf of Petitioner. Respondent was represented by Shariyf Muhammad, Esq. For the reasons set forth below, the actions of the Department are **AFFIRMED**.

¹ The record was held open until November 22, 2012 to allow Petitioner to submit additional documentation.

II. Findings of Fact

Description of Home

1.

In 2010, Ms. Roundtree received a permit to operate A Better Home Care, a three-resident personal care home facility. (Testimony of Ms. Roundtree.) A Better Home Care is located in Ms. Roundtree's personal home. The facility has two levels. The majority of residents reside in bedrooms on the upper level. One resident lives on the lower level. (Testimony of Alice Honea, Audit Specialist Surveyor, Healthcare Facility Regulation Division.) Ms. Roundtree did not list the lower level in the initial permit application for inclusion as part of the facility. (Testimony of Ms. Roundtree.) However, the Department requires licensure of any portion of a house where personal care home residents live. On the other hand, no permit is required for a portion of the house that is rented to a third party if the personal care home provides no care for that individual and he or she does not infringe upon the space of the personal care home residents. (Testimony of Ms. Honea; Testimony of Patricia Waltower, Regional Director of Healthcare Facility Regulation Division.)

Annual Inspection

2.

On October 15 and 16, 2012, Ms. Alice Honea conducted an annual inspection of A Better Home Care. At the time, Ms. Honea was an auditor/specialist surveyor with the Department. (Testimony of Ms. Honea.) Although termed an "annual inspection,"² due to the number of personal care homes in Georgia and a dearth of Department employees to conduct inspections, these annual inspections are often conducted less frequently than the name would suggest. (Testimony of Ms. Waltower.) In fact, this was A Better Home Care's first inspection

² There are other kinds of inspections, such as those triggered by complaints, monitoring of troubled personal care homes, and investigations of unlicensed personal care homes. (Testimony of Ms. Waltower.)

since receiving its permit in 2010. (Testimony of Ms. Roundtree.) The investigation consisted of Ms. Honea's personal observations and interviews with staff, residents, and Ms. Roundtree. (Testimony of Ms. Honea.)

Categories of Rule Violations

3.

As a result of the inspection, A Better Home Care was cited for fifteen rule violations, only three of which were sufficiently serious to warrant the imposition of a fine. There are three categories of violations, increasing in severity from Category III to Category I. Thus, a Category III violation is the least serious and results when a violation is likely to impact the residents in a negative manner "indirectly or over a period of time." On the other end of the spectrum, Category I encompasses violations that have caused death or serious harm to a resident or pose a threat of imminent serious harm to a resident. (Testimony of Ms. Honea; Testimony of Ms. Waltower.)

Penalties

4.

The type of penalty imposed in any particular case, as well as the amount of a fine, is determined according to the State Enforcement Matrix. (Testimony of Ms. Honea; Respondent's Exhibit 3.) As can be seen from the Matrix, an Initial Category III violation is not subject to a monetary fine; instead, the violator must submit a plan of correction. Continued neglect of any corrective action would then result in a fine. By contrast, an Initial Category I violation is subject to a \$601 fine. Subsequent Category I violations result in increased fines. (Testimony of Ms. Waltower; Respondent's Exhibit 3.)

Three Category I Violations

5.

In this case, the Department concluded that there were three Initial Category I violations, posing serious threats to the safety of one or more residents. Thus, the Department seeks civil penalties in the amount of \$601 per violation, for a total fine of \$1803. (Testimony of Ms. Waltower, Ms. Honea.)

6.

The first Category I violation for which Petitioner was cited was a breach of Personal Care Home Rule 111-8-62-.14(2)(h), which mandates that all exterior doors be equipped with locks that do not require keys to open them from the inside. (Testimony of Ms. Waltower.) It is uncontested that the lower level of the house had an exterior door that required a key to open from the inside. (Testimony of Ms. Honea; Testimony of Ms. Roundtree.) This would not have resulted in a violation for A Better Home Care had none of the residents lived in that portion of the home (although an investigation of the entire property would still have been appropriate). (Testimony of Ms. Waltower; Testimony of Ms. Honea.) However, during her investigation, Ms. Honea observed that a resident of the personal care home lived on the lower level.³ Because a resident lives there, the lower level is considered to be part of the personal care home and is subject to the Department's rules. (Testimony of Ms. Honea.) While Ms. Roundtree denied that a resident lived on the lower level of the house, her testimony on this point was not credible.⁴

³ The resident specifically showed Ms. Honea "her" bedroom.

⁴ Specifically, her explanation of where the three female residents and one male resident resided was implausible. She asserted that two female residents resided in one upstairs bedroom, the male resident resided in a second upstairs bedroom, and the remaining female resident slept in her bedroom on a twin bed. In light of the availability of a fourth bedroom on the lower level, the undersigned finds it unlikely that Ms. Roundtree would not place the remaining female resident in the fourth bedroom downstairs. (Testimony of Ms. Roundtree.)

7.

The other Category I violations for which Petitioner was cited relate to the care of G.H., Petitioner's first resident. G.H. has been living with Ms. Roundtree since 2008, prior to the creation of A Better Home Care.⁵ Ms. Roundtree argued that G.H. was not a resident of the personal care home because she considers G.H. to be "family" (although they are not blood relations) and because G.H. was living with her before the creation of the home. However, G.H. sleeps in a room with another resident of the personal care home, uses the common areas of the home, and receives care from its staff—all of which render her a resident of the home. (Testimony of Ms. Roundtree; Testimony of Ms. Honea; Testimony of Ms. Waltower.)

8.

In June of 2012, G.H. suffered a stroke while undergoing gallbladder surgery that resulted in a significant loss of functioning. For a time, G.H. was on hospice care, but due to Ms. Roundtree's care, her condition has improved and she has since been taken off hospice.⁶ (Testimony of J.H., G.H.'s son; Testimony of Ms. Roundtree.) Nevertheless, G.H. still needs one-on-one care and is totally dependent on others for self-preservation. (Testimony of Ms. Honea.) Specifically, G.H. is unable to move independently or feed herself. At most, G.H. can track people with her eyes but is otherwise not responsive to external stimuli. (Testimony of J.H.; Testimony of Ms. Honea.) It requires two people using a Hoyer lift to move her from her bed to a wheelchair. She is fed through a tube and, because she is incapable of swallowing, a

⁵ Because she was the only non-related adult for whom Ms. Roundtree provided care at the time, there was no need for her to obtain a permit. A permit is only required once a home begins to care for two or more unrelated adults, as provided by the definition of a "personal care home." Ga. Comp. R. & Regs. 111-8-62-.03(x); (Testimony of Ms. Waltower.)

⁶ In finding the existence of rule violations, the Court does not negate the quality of care Ms. Roundtree provides. It is undisputed that the residents in the home are clean and happy and that the home has passed the fire marshal's inspection with a perfect score. (Testimony of J.H.; Testimony of Ms. Roundtree; Testimony of Ms. Honea; Petitioner's Exhibit 5.)

staff member crushes her medication, pursuant to doctor's orders, and administers it through the tube. (Testimony of Ms. Honea; Testimony of Ms. Roundtree; Testimony of J.H.) Although Ms. Roundtree denies that the personal care home staff administer G.H.'s medications on a regular basis, her testimony was not credible.

9.

The Department asserts that in providing the level of care necessary to retain G.H. as a resident of the personal care home Petitioner violated two Departmental rules. First, the Department asserts that it is a violation of Personal Care Home Rule 111-8-62-.16(1)(e), which does not permit personal care homes to directly provide "medical, nursing, health or supportive services required on a periodic basis, or for short-term illness." Second, the Department asserts that these same actions violate Personal Care Home Rule 111-8-62-.16(2), which bans the admission or retention of residents "need[ing] care beyond which the facility is permitted to provide." There are two relevant restrictions on admission and retention: a personal care home cannot provide medical or nursing services, nor can it provide care to completely dependent, non-ambulatory individuals. (Testimony of Ms. Honea; Testimony of Ms. Waltower; Respondent's Exhibit 1, Attachment A.) Each will be addressed in turn.

10.

First, the Department argues that retaining G.H. is a violation of the restriction on providing nursing services, because tube feedings and crushing and administering medication through a tube are considered to be nursing services. While personal care home staff can assist a resident in taking his or her medications—such as by crushing medications and putting them in a cup for the resident—they cannot actually administer the medications. In other words, the resident cannot be a passive recipient of care but must be able to participate. Administering

medication through a tube presents a danger of aspiration if the patient's stomach contents are not checked before and after administering the medications. (Testimony of Ms. Honea; Testimony of Ms. Waltower.)

11.

Second, the Department argues that retaining G.H. violates the Departmental rule mandating that personal care homes may not admit or retain a resident who needs care beyond what the personal care home is permitted to provide. The Department claims that Petitioner violated this rule because G.H. required one-on-one care and could not ambulate. (Testimony of Ms. Honea; Testimony of Ms. Waltower; Respondent's Exhibit 1, Attachment A, pages 8-9.) Exacerbating this violation was the fact that on both days of the inspection, the facility had only one staff member on duty, although two residents would have required assistance in evacuating.⁷ (Respondent's Exhibit 1, Attachment A, page 3.)

Notice of Fine and Appeal

12.

By letter, dated January 29, 2013, the Department notified Ms. Roundtree of its intent to impose an \$1803 fine for the three Initial Category I violations. (Respondent's Exhibit 1.) Attached to the notice was the investigative report listing all fifteen violations, including the three for which the fine was imposed. (Respondent's Exhibit 1, Attachment A.) On or about February 8, 2013, Ms. Roundtree appealed the Department's finding of the three Category I violations and the resultant fine. (Respondent's Exhibit 2.)

⁷ This was a Category III violation for which Petitioner was not fined. (Respondent's Exhibit 1, Attachment A, page 3.)

Denial of Request for Capacity Increase

13.

Subsequently, Ms. Roundtree applied to increase the capacity under her existing personal care home permit from three to six residents. This request was denied by letter, dated February 14, 2013. The letter based its denial on the “facility’s failure to be in substantial compliance with the Rules and Regulations for Personal Care Homes,” citing all fifteen violations arising out of the October 2012 inspection. (Respondent’s Exhibit 4.) Although the denial was primarily due to the more serious Category I violations, the twelve Category III violations informed the Department’s decision regarding the facility’s request for an increase in capacity. (Testimony of Ms. Honea; Testimony of Ms. Waltower; Respondent’s Exhibit 1, Attachment A.) Perhaps the most relevant of these Category III violations is the fact that at the time of the inspection in October 2012, A Better Home Care exceeded its existing capacity limitation. (Testimony of Ms. Waltower.) Specifically, A Better Home Care was authorized to admit three residents, yet Ms. Honea observed four residents living in the home and being cared for by its staff. (Testimony of Ms. Honea.) The failure to comply with current capacity restrictions often leads to the refusal of requests for an increase in capacity. Furthermore, in this case, it would not be prudent to authorize more residents when the home was already over capacity⁸ and has a particularly frail patient who needs a lot of attention. (Testimony of Ms. Waltower.)

14.

On or about February 26, 2013, Ms. Roundtree appealed the denial of capacity increase and requested a joint hearing on the two pending appeals. (Respondent’s Exhibit 5.) The Department referred the appeals to OSAH on September 18 and October 1, 2013.

⁸ Currently, the home is no longer over-capacity. (Testimony of Ms. Roundtree.)

III. Conclusions of Law

1.

In these consolidated matters, the Department bears the burden of proof as to the imposition of a fine. Ga. Comp. R. & Regs. 616-1-2-.07(1). Whereas, Petitioner bears the burden of proof to show that she is entitled to the increase in capacity under her permit. Ga. Comp. R. & Regs. 616-1-2-.07(1)(d). The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4).

Fines Imposed

2.

Pursuant to Ga. Comp. R. & Regs. 111-8-62-.34 and 111-8-25-.05, the Department is authorized to enforce its rules by imposing an array of sanctions, including fines. Fine amounts are based on the severity and frequency of rule violations. A Category I violation is the most severe, a Category II violation is less severe, and a Category III violation is the least severe. Ga. Comp. R. & Regs. 111-8-25-.05. A Category I violation is defined as “[a] violation or combination of violations of licensing requirements which has caused death or serious physical or emotional harm to a person or persons in care or poses an imminent and serious threat or hazard to the physical or emotional health and safety of one or more persons in care.” Ga. Comp. R. & Regs. 111-8-25-.05(1)(e)(1)(i). Category I violations are punishable by a fine ranging from \$601 to \$1,000 per violation, per day. *Id.* The exact amount of the fine depends on whether the violation is “Initial,” “Subsequent,” or “Repeat.” Ga. Comp. R. & Regs. 111-8-25-.05(1)(e)(2). An Initial violation, i.e., one that has “not been cited previously by the [D]epartment within the past twenty-four (24) months against the facility,” is penalized by the lowest amount within the allowable range: \$601. *Id.*

3.

In this case, Petitioner was cited for three Initial Category I violations. The first violation was of Personal Care Home Rule 111-8-62-.14(2)(h), relating to safety standards, which states that “exterior doors shall be equipped with locks which do not require keys to open them from the inside,” whether or not any local ordinance requires such a safety precaution.⁹ Because it is uncontested that the lower level of the home had a door to the exterior that required a key to open from the inside, Petitioner was in violation of this rule.¹⁰ Furthermore, the violation falls within Category I, because, if not corrected, it poses an imminent threat to the safety of the resident living on the lower level who might not be able to escape the home in the event of a fire blocking the exit through the upper level. See Ga. Comp. R. & Regs. 111-8-62-.14 (raising fire safety and evacuation concerns). Because Petitioner had not been cited for this violation in the previous twenty-four months, it is an initial violation warranting a \$601 fine.

4.

The other two Category I violations relate to the purpose of a personal care home, which is to “provide residential services to the citizens of this State who require varying degrees of supervision and care and to assure safe, humane, and comfortable supportive residential settings for adults who need such services.” Ga. Comp. R. & Regs. 111-8-62-.02. The rules for personal care homes limit the provision of medical and nursing services. Specifically, personal care home residents must be able to “self-administer” required medication, and while there are some exceptions, the individual must “generally [be] capable of self-administration.” Ga. Comp.

⁹ Thus, the fact that Petitioner received a perfect score from the fire marshal’s inspection is irrelevant to this Rule.

¹⁰ Petitioner contends that she should not be fined because the lower level of the house was not included in the permit and was her personal home where no residents lived. The Court did not find her testimony on this point to be credible. The evidence shows that one female resident was living downstairs at the time of the inspection. Any areas of the facility where residents live, even an area that would not otherwise have been included under the permit, are considered to be part of the facility and are subject to the rules of Chapter 111-8-62.

R. & Regs. 111-8-62-.21(1). If the individual cannot independently administer his or her medication, a staff member can provide a certain level of assistance not rising to the level of administering medication. See Ga. Comp. R. & Regs. 111-8-62-.21(3). For instance, a staff member can remind a resident to take his or her medications and can even “physically assist[] [the resident] in pouring or otherwise taking medication.” Ga. Comp. R. & Regs. 111-8-62-.21(3)(a), (d) (emphasis added). From the context, it is clear that this does not include actually administering the medication. See Ga. Comp. R. & Regs. 111-8-62-.21(3).

5.

Petitioner violated the prohibition on providing “[m]edical, nursing, health or supportive services required on a periodic basis, or for short-term illness”¹¹ by administering tube feedings to G.H. and by crushing G.H.’s medications and administering them to her by means of a feeding tube. Ga. Comp. R. & Regs. 111-8-62-.16(1)(e).¹² This is an Category I violation because administration of tube feedings and medication via a feeding tube takes skill and knowledge in order to avoid patient aspiration and respond appropriately to medical emergencies. Because Petitioner had not been cited for this violation in the previous twenty-four months, it is an initial violation warranting a \$601 fine.

¹¹ A resident may, however, purchase such services from “appropriately licensed providers managed independently for the home.” Ga. Comp. R. & Regs. 111-8-62-.16(1)(e).

¹² Petitioner seeks to rely on the Rules and Regulations for Proxy Caregivers Used in Licensed Healthcare Facilities to exempt A Better Home Care from the general ban on providing nursing care to residents. (See Petitioner’s Exhibits 6 through 11.) The proxy caregiver rules, located at Chapter 111-8-100, allow licensed facilities, including personal care homes, to provide health maintenance activities by means of a proxy caregiver when the individual or his or her authorized representative “has executed a written informed consent.” Ga. Comp. R. & Regs. 111-8-100-.04(1). The burden of proof in an administrative proceeding is on the person claiming the exemption. O.C.G.A. § 43-26-12(b); Ga. Comp. R. & Regs. 111-8-100-.01(rules promulgated pursuant to O.C.G.A. § 43-26-12). Here, however, Petitioner has not introduced evidence that tube administration of medications is a “health maintenance activity,” nor has Petitioner introduced evidence of an executed written informed consent or shown compliance with other steps necessary for the Department to authorize the delivery services using proxy caregivers. See Ga. Comp. R. & Regs. 111-8-100-.04(2) (written consent), (4) (facility must adhere to requirements before can deliver services through proxy caregivers); 111-8-100-.05(2) (medication assistance), (7) (prohibited medication assistance).

6.

Petitioner also violated Personal Care Home Rule 111-8-62-.16(2), which bans the admission or retention of residents “need[ing] care beyond which the facility is permitted to provide.” This would include retaining residents needing “continuous medical or nursing services” or those unable to ambulate. Ga. Comp. R. & Regs. 111-8-62-.16(1)(b), (d), (2). As discussed above, G.H. requires continuous nursing services, as she is unable to assist in her own care.

7.

Here, G.H.’s condition changed after she suffered a stroke in 2012. She is now unable to move independently and would not be able to evacuate without total assistance. Not only is this a violation of the Personal Care Home Rule 111-8-62-.16(2), but it also poses an imminent threat of danger to her life in the event of a fire or other emergency and, thus, is a Category I violation. Because this is the first instance in which Petitioner has been cited for this violation within the past twenty-four months, it is an initial violation warranting a \$601 fine.

Capacity Increase Request Denied

8.

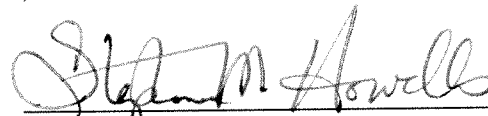
Denying Petitioner’s application for a capacity increase is appropriate in this case. A facility cannot provide services to more residents than its permit specifically allows. Ga. Comp. R. & Regs. 111-8-62-.06(6). “The [D]epartment may limit or restrict any license as the [D]epartment deems necessary for the protection of the public,” including limiting the number of residents the personal care home may admit under its permit if the facility “is unable or unwilling to render care in compliance with licensing requirements.” Ga. Comp. R. & Regs. 111-8-25-.05(1)(f); see also Ga. Comp. R. & Regs. 111-8-25-.04 (d) (authority to impose sanctions for

failure to comply with rules); Ga. Comp. R. & Regs. 111-8-62-.34(3), (5)(b) and (c). In finding that Petitioner has not complied with the rules and regulations for personal care homes, in particular those intended to safeguard the wellbeing of residents, the Department appropriately restricted Petitioner's permit to its currently authorized capacity of three residents.

IV. Decision

In accordance with the foregoing Findings of Fact and Conclusions of Law, the Department's decisions to (1) impose a fine of \$1803 for three Initial Category I violations, and (2) to deny Petitioner's application for an increase in capacity are **AFFIRMED**.

SO ORDERED, this 10th day of December, 2013.



STEPHANIE M. HOWELLS
Administrative Law Judge