



FILED
OSAH

BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA

JAN 17 2014

TOP OF THE LINE RESIDENTIAL
CARE I & II,

Petitioner,

v.

DEPARTMENT OF COMMUNITY
HEALTH, HEALTHCARE FACILITY
REGULATION DIVISION

Respondent.

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Docket No.:

OSAH-DCH-HFR-PCH-1420852-33-Malihi

K. Westray
Kevin Westray, Legal Assistant

Ms. Edith Paige
For Petitioner

Mr. Shariyf Muhammad, Esq.
For Respondent

INITIAL DECISION

I. Introduction

Top of the Line Residential Care I & II (hereinafter "Petitioner"), appeals a determination by the Department of Community Health, Healthcare Facility Regulation Division (hereinafter "Respondent"), to deny its applications for licenses to operate two Personal Care Homes. A hearing was held on January 10, 2014 in Atlanta, Georgia. For the reasons indicated below, Respondent's decision to deny Petitioner's applications to operate Personal Care Homes is **AFFIRMED**.

II. Findings of Fact

1.

Respondent is responsible for the regulation of Personal Care Homes in Georgia. As part of that responsibility, it enforces the Rules and Regulations for Personal Care Homes (hereinafter "PCH Rules"), which prescribe an applications procedure for any individual who seeks to operate a PCH. This procedure can be summarized in the following steps: (1) Application, (2)

Review, (3) Provisional License Issuance, (4) Initial Licensing Survey, (5) Plan of Correction, (6) Follow-Up Survey, and (7) Permanent License Issuance.

2.

In March 2012, Ms. Edith Page, RN, sought a license to operate two Personal Care Homes: one at an address on Meadows Road (hereinafter "TOTL I") and one at an address on Brownsville Road (hereinafter "TOTL II"). Ms. Page listed herself as Petitioner's owner on the applications, and indicated that Mr. Osvaldo Hernandez would serve as the facilities' administrator. *Testimony of Edith Page.*

3.

In December 2012, Ms. Page and Mr. Hernandez provided care to "AH", an individual diagnosed with various mental and behavioral disorders. According to Ms. Page, AH presented her and her staff with tremendous difficulties due to his tendency to act out violently. AH remained in the care of Ms. Page and Mr. Hernandez for approximately three months, until he left in February 2013. *Testimony of Edith Page.*

4.

On March 21, 2013, a warrant was issued in the Magistrate Court of Cobb County for Ms. Page's arrest for false imprisonment in violation of O.C.G.A. § 16-5-41(a). The warrant affidavit alleged that on January 16, 2013, Ms. Page allowed two of her employees to physically restrain AH without his permission and transport him to TOTL II, where he was placed in restraints against his will. *Exhibit R-3.*

5.

The Cobb County Magistrate Court simultaneously issued a warrant for the arrest of Mr. Hernandez for aggravated assault, simple battery, and false imprisonment. The warrant affidavit

alleged that Mr. Hernandez attacked AH with a baseball bat at TOTL I and thereafter assisted in his subsequent restraint and transport to TOTL II. *Exhibit R-4*.

6.

Ms. Page and Mr. Hernandez voluntarily submitted to arrest after they were informed that a warrant had been issued against them.. Ms. Page was charged with false imprisonment. Mr. Hernandez was charged with aggravated assault, simple battery and false imprisonment. Ms. Page and Mr. Hernandez posted bond shortly thereafter. There has been no development in the criminal charges against them since that time. *Exhibits R-3, R-4; Testimony of Edith Page*.

7.

On April 11, 2013, Respondent sent a letter to Mr. Hernandez at TOTL II. The letter informed Mr. Hernandez that Respondent had made a determination that his criminal record was unsatisfactory due to his pending charges of aggravated assault and battery. *Exhibit R-2*.

8.

On May 15, 2013, Respondent sent two letters to Ms. Page and Mr. Hernandez, informing them that their applications for licenses to operate TOTL I and TOTL II as personal care homes had been denied. The reason for the denial, Respondent explained in the letter was that Ms. Page and Mr. Hernandez were parties to the crime of battery, aggravated assault, and false imprisonment. According to Respondent, because both parties had acted together with regard to the crimes of battery and aggravated assault, they had unsatisfactory criminal records and could not be granted a license to operate a personal care home at either address. *Exhibit R-1*.

9.

Respondent further provided in both letters that its rules required satisfactory criminal records checks for owners, administrators, and employees of personal care homes. Therefore,

Mr. Hernandez's unsatisfactory criminal records check disqualified Petitioner from operating a personal care home. Respondent concluded both letters by averring that it had the "legal authority to deny an application where the applicant failed to demonstrate compliance with the licensing requirements [pursuant to O.C.G.A. § 31-2-8(b) and Rule 111-8-25-.05(2)(a)(1)]."

Exhibit R-1.

10.

At the hearing of this matter, Petitioner introduced extensive evidence that tended to show AH had fabricated the incident giving rise to Mr. Hernandez's and Ms. Page's arrests. Petitioner argued that she should not be denied her license based simply on the March 21, 2013 arrests, especially when the circumstances giving rise to the arrest were so questionable.

Testimony of Edith Page.

11.

Respondent did not dispute the circumstances preceding the arrest. However, Respondent contended that it was within its authority to deny Petitioner's application to operate personal care homes based on her and Mr. Hernandez's arrests and charges. Respondent argued that, because Ms. Page was "listed as a co-defendant" in the warrants and charges, it was authorized in denying the application, and would have to do so again even if she applied without listing Mr. Hernandez as an administrator. Petitioner argued that false imprisonment, the only crime with which she had been charged, was not listed in the statute as one of the crimes for which a license to operate a personal care home could be denied.

III. Conclusions of Law

1.

As Respondent seeks to deny Petitioner's application for a license, Petitioner bears the

burden of proof. GA. COMP. R. & REGS. 616-1-2-.07(1)(c). The standard of proof is a preponderance of evidence. GA. COMP. R. & REGS. 616-1-2-.21(4).

2.

All persons operating as PCHs in Georgia must be licensed by the Respondent, which is authorized to promulgate rules to protect the health, safety, and welfare of occupants of such facilities. O.C.G.A. § 31-7-3, and O.C.G.A. § 31-7-12. Respondent has promulgated rules governing the licensing and operation of Personal Care Homes in Chapter 111-8-62 of the Official Compilation, Rules and Regulations for the State of Georgia pursuant to Title 31 of the Georgia Code. GA. COMP. R. & REGS. 111-8-62 et seq. [hereinafter PCH RULES]; see O.C.G.A. 31-2-1 et seq.

3.

Respondent enforces the rules governing PCHs through its General Licensing and Enforcement Requirements, which are found in Chapter 111-8-25 of the Official Compilation, Rules and Regulations for the State of Georgia. GA. COMP. R. & REGS. 111-8-25-.01 et seq. [hereinafter ENFORCEMENT RULES]. Pursuant to its Enforcement Rules, Respondent may refuse to grant a license where the facility has “failed to demonstrate compliance with licensing requirements” ENFORCEMENT RULE 5(2)(a)(1).

A. Respondent is not justified in denying Petitioner’s application to operate a Personal Care Home based on the fact that she was arrested and charged with false imprisonment.

4.

O.C.G.A. § 31-2-9(b) forbids Respondent from issuing a Personal Care Home license to any applicant with a criminal record, providing specifically that:

An owner with a criminal record **shall not** operate or hold a license to operate a facility,¹

¹ The statute further defines “facility” to specifically include a Personal Care Home. O.C.G.A. § 31-2-9(a)(4)(A)

and the department shall revoke the license of any owner operating a facility or refuse to issue a license to any owner operating a facility if it determines that such owner has a criminal record.

O.C.G.A. § 31-2-9(b) (2013) (emphasis added); see also PCH RULE 9(7)(b) (“A personal care home license **must not be issued**, and any license issued must be revoked where it has been determined that the owner has a criminal record as defined in O.C.G.A. § 31-2-9 or specific rules passed pursuant to the statute.”) (emphasis added).

5.

As specified in the statute, an *owner* must not be issued a license upon determination that he or she has a criminal record. The statute defines owner to include: “any individual or any person affiliated with a corporation, partnership, or association with 10 percent or greater ownership interest in a facility providing care to persons under the license of the facility in this state and who:

- (A) Purports to or exercises authority of the owner in a facility;
- (B) Applies to operate or operates a facility;
- (C) Maintains an office on the premises of a facility;
- (D) Resides at a facility;
- (E) Has direct access to persons receiving care at a facility;
- (F) Provides direct personal supervision of facility personnel by being immediately available to provide assistance and direction during the time such facility services are being provided; or
- (G) Enters into a contract to acquire ownership of a facility.

O.C.G.A. § 31-2-9(a)(8) (2013); see PCH RULE 3(aa).

6.

O.C.G.A. 31-2-9 defines “criminal record” as:

- (A) Conviction of a crime
- (B) Arrest, charge, and sentencing for a crime . . .
- (C) **Arrest and being charged for a crime if the charge is pending, unless the time for prosecuting such crime has expired pursuant to Chapter 3 of Title 17.**

(2013).

O.C.G.A. § 31-2-9(a)(3) (2013) (emphasis added); see PCH RULE 3(i).

7.

It is not enough for the owner to have committed *any* violation of the law. The violation for which the owner has been arrested and charged must be a “crime” as enumerated in the statute. The Code Section further defines “crime” to include:

- (A) A violation of Code Section 16-5-1, relating to murder and felony murder
- (B) A violation of Code Section 16-5-21, relating to aggravated assault;
- (C) A violation of Code Section 16-5-24, relating to aggravated battery;
- (D) A violation of Code Section 16-5-70, relating to cruelty to children;
- (E) A violation of Article 8 of Chapter 5 of Title 16;
- (F) A violation of Code Section 16-6-1, relating to rape;
- (G) A violation of Code Section 16-6-2, relating to aggravated sodomy;
- (H) A violation of Code Section 16-6-4, relating to child molestation;
- (I) A violation of Code Section 16-6-5, relating to enticing a child for indecent purposes;
- (J) A violation of Code Section 16-6-5.1, relating to sexual assault against persons in custody, detained persons, or patients in hospitals or other institutions;
- (K) A violation of Code Section 16-6-22.2, relating to aggravated sexual battery;
- (L) A violation of Code Section 16-8-41;
- (M) Any other offense committed in another jurisdiction that, if committed in this state, would be deemed to be a crime listed in this paragraph without regard to its designation elsewhere; or
- (N) Any other criminal offense as determined by the department and established by rule adopted pursuant to Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," that would indicate the unfitness of an individual to provide care to or be in contact with persons residing in a facility.²

O.C.G.A. § 31-2-9(a)(2) (2013).

8.

While Ms. Page fits the definition of an “owner” according to the statute and Respondent’s rules, she was not arrested and charged with the commission of one of the crimes enumerated in the statute or in Respondent’s rules. As discussed *supra*, the definition of “crime” in the Code Section governing Personal Care Home licensure does not include “false

² Respondent has not promulgated a rule adding false imprisonment to the list of crimes for which an owner may be denied a PCH license.

imprisonment.” Accordingly, Ms. Page’s false imprisonment charge does not mandate the automatic denial of her application.

9.

Respondent would nonetheless be required to deny Petitioner’s application if Mr. Hernandez were an “owner” of the prospective Personal Care Homes. Respondent did not allege that Mr. Hernandez was an owner and Mr. Hernandez was listed on Petitioner’s application as an administrator. Moreover, the relevant statutes and rules provide separate definitions for an “owner” and “administrator.” From the record, it is clear that Mr. Hernandez is an administrator, as that term is defined in Respondent’s rules, rather than an owner.³

B. Respondent is not justified in denying Petitioner’s application based on its conclusion that Petitioner’s owner was a “party to the crime” of Aggravated Assault.

10.

Respondent submitted in its notices of denial and at the hearing of this matter that the description of the crime in the arrest warrants indicated that Ms. Page was a “party to the crime” of aggravated assault, which justified the denial of her application. However, Respondent’s argument ignores the fact that the statute and the rules governing the licensing of personal care homes provide that an applicant must be denied where they have been (1) arrested and (2) charged with one of the crimes enumerated in § 31-2-9.

11.

Respondent did not establish that Ms. Page was ever arrested for, or charged with, aggravated assault or any other crime listed in the relevant Code Section or Respondent’s rules. There is no provision in the relevant statute or regulations that define “criminal record” to

³ Respondent’s rules define “administrator” as “the manager designated by the governing body as responsible for the day-to-day management, administration and supervision of the personal care home, who may also serve as the on-site manager and responsible staff person except during periods of his or her own absence.” PCH RULE 3(C).

include instances where allegations surrounding the owner's arrest indicate that the owner was a party to a covered crime but never charged for that crime.

C. Respondent's determination to deny Petitioner's license was nonetheless correct because Petitioner failed to establish that it complied with Respondent's licensing requirements.

12.

Respondent also submitted that its rules require administrators to have satisfactory criminal records checks. Therefore, according to Respondent, it was justified denying Petitioner's applications because it determined that Mr. Hernandez, the administrator listed on Petitioner's applications, had an unsatisfactory criminal record.

13.

Applicants who seek to operate personal care homes must obtain satisfactory fingerprint records check determinations for the person being considered for employment as a director, administrator, or onsite manager. PCH Rule 9(8). This record check determination must be done in compliance with the provisions of O.C.G.A. § 31-7-250 et seq. Id. The PCH Rules further provide that a person with an unsatisfactory criminal record determination must not serve as the director of a licensed Personal Care Home.⁴

14.

Reference to the term "director" in the PCH Rules requires clarification. The PCH Rules do not define the term "director" and that term is used in the PCH Rules only insofar as it relates to criminal record checks for personnel other than the owner. This is likely due to the PCH Rules' citation to the section of the Georgia Code pertaining to criminal records checks for personnel other than PCH owners. See O.C.G.A. § 31-7-250 et seq. This Code Section defines

⁴ The terms "crime" and "criminal record" as they are used in O.C.G.A. 31-7-250 et seq., have the same definitions used to describe the terms as they are used in O.C.G.A. 31-2-9.

director, but contains no definition for “administrator.” Id. A comparison of the definitions of the two terms, however, reveals that the two positions, at the very least, have overlapping job functions.⁵ Accordingly, where the PCH Rules impose a requirement for a Personal Care Home’s director, it is safe to conclude that the same requirement is applicable to an administrator, such as Mr. Hernandez.

15.

It is clear from the record that Mr. Hernandez has a “criminal record” as that term is defined in the relevant statute. Mr. Hernandez was arrested on March 21, 2013 and charged with aggravated assault, which fits the aforementioned definition of “crime.” The remaining issue for the undersigned to determine, therefore, is whether Mr. Hernandez’s unsatisfactory criminal record justifies the denial of Petitioner’s applications.

16.

Respondent’s determination that Petitioner’s director had an unsatisfactory criminal record does not, *per se*, demand that Petitioner be denied a Personal Care Home license. However, Petitioner failed to establish that it had complied with Respondent’s licensing requirements upon learning that its prospective administrator had a criminal record.

17.

Georgia law and the PCH Rules impose affirmative duties upon operators of Personal Care Homes upon learning that a member of their staff has a criminal record. See, e.g., O.C.G.A. § 31-7-259 et seq. Petitioner did not argue that it took any remedial measures whatsoever upon learning that the prospective administrator for its Personal Care Home had a

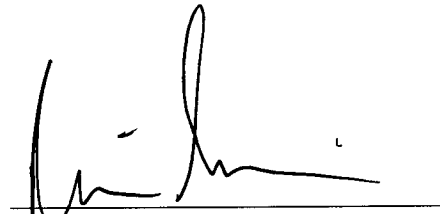
⁵ Compare PCH Rule 3(c) (“‘Administrator’ means the manager designated by the governing body as responsible for the day-to-day management, administration and supervision of the personal care home, who may also serve as the on-site manager and responsible staff person except during periods of his or her own absence.”), with O.C.G.A. § 31-7-250 (“‘Director’ means the chief administrative or executive officer or manager.”).

criminal record. From the record, it appears that Mr. Hernandez was still slated to be the Personal Care Home's administrator in spite of the criminal record. Petitioner submitted no evidence that Mr. Hernandez had been replaced as director of the Personal Care Home, despite the PCH Rules' direct prohibition against persons with criminal records serving as directors. Accordingly, Petitioner failed to demonstrate that it was in compliance with Respondent's license requirements, as was its burden. Therefore, Respondent was authorized to deny Petitioner's applications.

IV. Decision

For the foregoing reasons, Respondent's decisions to deny Petitioner's applications for a licenses to operate Personal Care Homes is hereby affirmed as long as Mr. Hernandez remains on the application.

SO ORDERED, this the 17th day of January, 2014.



Michael Malihi, Judge