

**BEFORE THE OFFICE OF STATE ADMINISTRATIVE HEARINGS
STATE OF GEORGIA**

**THE BLUE GARNET PERSONAL CARE
HOME**

Petitioner,

v.

**DEPARTMENT OF COMMUNITY
HEALTH, HEALTHCARE FACILITY
REGULATION DIVISION,
Respondent.**

**Docket No.: OSAH-DCH-HFR-PCH-1541315-
33-WOODARD**

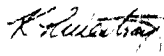


**FILED
OSAH**

APR 15 2015

INITIAL DECISION

APPEARANCES



Kevin Westray, Legal Assistant

For Petitioner:

Josephine Abner, RN, CEO, The Blue Garnet Personal Care Home, Inc., Marietta, Georgia.

For Respondent:

Stacey Hillock, Attorney at Law, Department of Community Health, Atlanta, Georgia.

I. FINDINGS OF FACT

1. Josephine Abner is the CEO of The Blue Garnet Personal Care Home in Marietta, Cobb County, Georgia. (in this Decision, this facility is called "Petitioner," "Facility," or "PCH"). Petitioner has been in business since November 2012, and can provide residential living for up to 12 people.
2. Petitioner is licensed and regulated by the Department of Community Health ("Respondent" or "DCH"), and undergoes routine annual surveys to ensure that it follows all State and Federal guidelines for PCH operations.
3. DCH's rules require all PCH residents to be "ambulatory." This is a safety issue, as a non-ambulatory resident might be trapped in the building in the event of a fire or other emergency. Allowing a non-ambulatory person to live in the PCH is considered a "Category III" offense under DCH rules.

4. During surveys conducted on May 29, 2013, October 7, 2013, and June 9, 2014, Karen Brown, a Nurse Surveyor employed by DCH, observed two residents identified as "M.B." or "Resident # 1," and "N.T.", or "Resident # 2." Ms. Brown determined that both M.B. and N.T. were unable to ambulate by walking without assistance, or by self-propelling a walker or wheelchair. Petitioner was cited by DCH following the June 9, 2014 inspection for a Repeat Category III violation of DCH's Rules for Personal Care Homes by allowing a non-ambulatory person to reside in the home.

5. On August 25, 2014, DCH notified Petitioner of its intent to impose a fine of \$300.00 for one (1) repeat Category III violation, based on the Petitioner's having two non-ambulatory residents. DCH also notified Petitioner that it would impose an additional \$300.00 fine for another repeat Category III violation due to Petitioner's failure to have all employees submit to a criminal records check.

6. Petitioner appealed this proposed adverse action, and the matter was referred to the Office of State Administrative Hearings for adjudication. The evidentiary hearing in this matter was conducted on April 13, 2015, by the undersigned administrative law judge. Prior to the presentation of evidence, Petitioner's CEO withdrew her appeal of the citation stemming from the failure to obtain a criminal records check on all employees. Therefore, the only issue for adjudication is whether DCH correctly cited and fined the Facility \$300.00 for its failure to ensure that all residents are ambulatory.

7. Josephine Abner testified that M.B. still resides at the Facility, but that N.H. has relocated to another personal care home. Ms. Abner does not know where N.H. now resides, nor does she know who owns that PCH.

8. M.B. is an 82 year-old woman who suffers from Alzheimer's Disease, and who is totally dependent on the Facility's staff for all her activities of daily living. M.B. cannot self-operate her wheelchair, to which she is confined for most of her waking hours, and therefore could not escape from the Facility without significant assistance from others. Further, M.B. is unable to effectively communicate with others, and therefore even if she could self-propel her wheelchair, it is highly unlikely that she could understand that an emergency existed that required her to leave the Facility.

9. Ms. Abner testified that N.T. was approximately 65 years old, and had suffered a stroke prior to her placement at the Facility. According to Ms. Abner, although N.T. might not have been ambulatory when the Nurse Surveyor came to the Facility, she was often able to move about by herself in her wheelchair without assistance from the Facility's staff.

10. Petitioner sought a waiver or variance of the ambulatory resident requirement from DCH for M.D. In support of this request, and in defense against the imposition of the Repeat Category III fine related to non-ambulatory residents, Ms. Abner stated the following:

1. M.B.'s treating physician has stated that M.B. should be allowed to reside in the Facility, even though she is not able to self-propel the wheelchair or otherwise ambulate in the event of an emergency.

2. M.B.'s family believes that the Facility is the best place for M.B. to live out her remaining years. M.B. was moved from nursing home to nursing home in the past, and her family wants her to remain at the Facility rather than be moved to a more restrictive nursing home environment.

3. The Facility has complied with the instructions of the Cobb County Fire Marshal by installing a sprinkler system to protect its residents and staff.

Respondent has not approved or denied the waiver or variance request as of the hearing date, as more information is needed to complete its review.

II. CONCLUSIONS OF LAW

1. As DCH has proposed a civil money penalty against Petitioner for violating its rules for Personal Care Homes, DCH bears the burden of proof. OSAH Published Rule 616-1-2-.07. The standard of proof is by a preponderance of the credible evidence. OSAH Published Rule 616-1-2-.21(4).

2. DCH has published rules regarding personal care homes at Ga. R. & Regs. 11-8-62-.01 et seq. (hereafter "PCH Rules").

3. PCH Rule 111-8-62.15 provides the criteria for admission of residents to a PCH. This rule states at 111-8-62.15(1) (b) as follows:

The home is permitted to admit and retain only ambulatory residents who are capable of self-preservation with minimal assistance, i.e. staff may assist the resident in transferring

from a sitting or reclining position and provide verbal directions to residents who are able to self-propel to the nearest exit.

“Ambulatory Resident” is defined in PCH Rule 111-8-62-.03(c) as:

...a resident who has the ability to move from place to place by walking, either unaided or aided by prosthesis, brace, cane, crutches, walker or hand rails, or by propelling a wheelchair; who can respond to an emergency condition, whether caused by fire or otherwise, and escape with minimal human assistance such as guiding a resident to an exit, using the normal means of egress....

4. PCH Rule 111-8-62-.34(5) authorizes DCH to enforce its rules, “[s]ubject to notice and the right to hearing,” by:

- (a) Issuing a public or private reprimand;
- (b) Imposition of a fine; and
- (c) Limitation, suspension, or restriction of a permit or provisional permit.

Fines (also called “civil money penalties”) are based on the severity and frequency of the rules violation. Guidelines for determining and assessing penalties are found in DCH Rule 111-8-25-.05(1). The most serious violations are “Category I” violations, and carry the highest civil money penalties of \$601 to \$1000 per day, per violation. The next most serious violations are “Category II” violations, and carry fines of \$301 to \$600 per violation, per day. The least serious level of violations are “Category III” violations, which carry fines of \$50 to \$300 per day, per violation.

Category III violations are defined as:

A violation or combination of violations of licensing requirements which indirectly or over a period of time has or is likely to have an adverse effect on the physical or emotional health and safety of a person or persons in care, or a violation or violations of administrative, reporting, or notice requirements.

5. DCH has produced a “HFRD State Enforcement Matrix” as an easy-to-follow guide for imposition of civil money penalties under each category of offense. According to this Matrix, initial Category III violations require the PCH to prepare a “Plan of Correction.” Subsequent Category III violations require another Plan of Correction, but DCH can “Consider other sanction options.” Repeat Category III violations require another Plan of Correction, and imposition of a fine “at highest allowable” rate “per violation.”

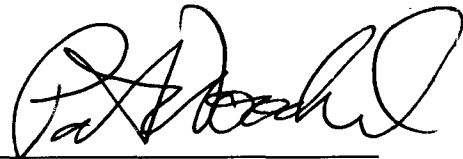
6. In this case, DCH imposed two fines against Petitioner, first for failing to have all employees undergo a criminal records check, second, for allowing two non-ambulatory individuals to reside in the Facility. In regard to the first allegation, Petitioner admits that the criminal records check violation should be affirmed in the amount of \$300.00.

7. In regard to the second allegation, which is contested by Petitioner, DCH considers Petitioner's failure to admit or retain only ambulatory residents to be a "Category III" violation. During two site surveys in 2013, Petitioner was found to have allowed two non-ambulatory residents in its PCH, and was cited each time. During a third visit in 2014, Petitioner was again found to have allowed two non-ambulatory residents to remain in the facility. Thus, DCH correctly determined that Petitioner was a "Repeat" violator of PCH rules, as the facility has been cited on three separate occasions. According to the HFRD State Enforcement Matrix, DCH is authorized to impose a \$300.00 fine for this violation. There is nothing in the PCH rules, or the underlying Federal law, that would allow the Administrative Law Judge to reduce or reverse the fine based on the factors argued by Ms. Abner during the hearing, specifically that the Facility was protected by a sprinkler system; that family members wanted at least one resident to remain in the PCH despite her inability to self-ambulate in an emergency; or that the resident's physician authorized her continued stay.

III. Decision

The Respondent's decision to impose a fine against Petitioner in the total amount of \$600.00 for two Repeat Category III violations of PCH Rules is **AFFIRMED**.

SO ORDERED, this 15th day of April, 2015.



M. PATRICK WOODARD, JR.
Administrative Law Judge