

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
12 DHR 12401

FINAL DECISION

APPEARANCES

For Respondent: Joseph E. Elder
Assistant Attorney General
North Carolina Department of Justice
P. O. Box 629
Raleigh, NC 27602-0629

Whether Respondent deprived Petitioner of property, otherwise substantially prejudiced Petitioner's rights, exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously or failed to act as required by law or rule when Respondent assessed an administrative penalty in the amount of Six Thousand One Hundred Dollars (\$6,100.00) for an uncorrected Type B rule violation against Kevin Medley.

N.C. Gen. Stat. § 131D, Article 2
10A N.C.A.C. 13G.1004

RESPONDENT'S WITNESSES

1. D'Lane Fries, Adult Home Specialist, Mecklenburg County Department of Social Services
2. Linda Blalock, Team Supervisor, North Carolina Department of Health and Human Services, Division of Health Service Regulation, Adult Care Licensure Section.
3. Marie Rodgers, Branch Manager, North Carolina Department of Health and Human Services, Division of Health Service Regulation, Adult Care Licensure Section.
4. Barbara Ryan, Chief of the North Carolina Department of Health and Human Services, Division of Health Service Regulation, Adult Care Licensure Section.

PETITIONER'S WITNESSES

1. Teresia Hood, administrator of Pray Until Something Happens Assisted Living.

EXHIBITS

The following Exhibits offered by Respondent were accepted into evidence in this matter.

Exhibit 1 – Pages from Statement of Deficiencies February 13, 2012
Exhibit 2 – Pages from Statement of Deficiencies April 17, 2012
Exhibit 3 – Survey Notes of Linda Blalock
Exhibit 4 – Example of Medication Administration Record
Exhibit 5 – FL-2 form for Resident 2 (M.D.)
Exhibit 6 – Administrative Penalty Proposal and Recommendation
Exhibit 7 – September 11, 2012 Penalty Review Committee Notice
Exhibit 8 – October 15, 2012 Penalty Letter

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing and the entire record in this proceeding, the Undersigned makes the following findings of fact. In making the findings of fact, the Undersigned has weighed all the evidence and has assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including but not limited to the demeanor of the witness, any interests, bias, or prejudice the witness may have, the opportunity of the witness to see, hear, know or remember the facts or occurrences about which the witness testified, whether the testimony of the witness is reasonable, and whether the testimony is consistent with all other believable evidence in the case. From the sworn testimony of witnesses, the undersigned makes the following:

FINDINGS OF FACT

1. The Adult Care Licensure Section of the Division of Health Service Regulation (“Agency” or “DHSR”) inspects and licenses adult care facilities including family care homes licensed to house 6 or fewer residents and all other adult care homes in North Carolina.

2. The Agency conducts surveys of all adult care homes annually, and conducts complaint investigations, follow-up surveys, and death investigations at adult care homes as needed.

3. Routine monitoring, surveys and complaint investigations are done in conjunction with county departments of social services, and DHSR has oversight of county monitoring. The Mecklenburg County Department of Social Services, through its adult home specialists, conducts oversight activity of adult care homes located in Mecklenburg County.

4. At all times relevant to this matter, Respondent licensed Kevin Medley to operate a family care home known as Pray Until Something Happens Assisted Living, license number FCL-060-121, located at 8601 Dunsinane Dr., Charlotte, North Carolina. Ms. Teresia Hood was the administrator of Pray Until Something Happens Assisted Living.

5. By letter dated October 15, 2012, Respondent assessed an administrative penalty against Petitioner for an uncorrected Type B violation of 10A N.C.A.C. 13G.1004 for failing to properly document medication administration. The assessed amount was Six Thousand One Hundred Dollars (\$6,100.00). Included with the penalty assessment was a penalty recommendation sheet and penalty matrix completed by branch manager Dawn Biddix.

6. The assessed penalty was based on a penalty proposal prepared by Respondent, including the investigative findings contained in two separate reports – one for a facility survey completed February 13, 2012 and one for a facility survey completed April 17, 2012 at Pray Until Something Happens. These reports and the penalty proposal and recommendation were provided to Mr. Medley prior to the penalty being assessed.

7. At all times relevant to this case, Ms. D’Lane Fries was an adult home specialist with the Mecklenburg County Department of Social Services.

8. As part of her duties as an adult home specialist, Ms. Fries conducts monitoring of adult care homes to ensure a home’s compliance with licensure rules and when necessary conducts complaint and death investigations. She also assists Respondent with annual surveys of licensed adult care facilities.

9. At all times relevant to this case, Ms. Linda Blalock was a team supervisor with the NC Department of Health and Human Services, Division of Health Service Regulation, Adult Care Licensure Section. As part of her duties she supervised teams of facility survey consultants and would also participate in facility surveys.

10. At all times relevant to this case, Marie Rodgers was a Branch Manager with the NC Department of Health and Human Services, Division of Health Service Regulation, Adult Care Licensure Section. Ms. Rodgers has served as Branch Manager since 2008 and prior to that worked as a surveyor conducting investigations and inspections of adult care homes.

11. As Branch Manager, Ms. Rodgers oversees surveyors who conduct annual surveys and various kinds of investigations for DHSR. She also participates in the QIC review process and prepares penalty recommendations for consideration by the Penalty Review Committee. Her penalty recommendations are based on penalty proposals received from county Departments of Social Services as well as DHSR staff. Ms. Rodgers considers specific criteria in determining a recommended monetary penalty amount based on her review. For assessing a penalty for an uncorrected violation, Ms. Rodgers uses the date that the violation was to be corrected and the amount of time that has passed between that date and the date that the violation is actually corrected.

12. At all times relevant to this matter, Barbara Ryan was the chief of the Adult Care Licensure Section of the Division of Health Service Regulation. Ms. Ryan has served as chief for eight years.

13. As chief, Ms. Ryan manages and oversees the Adult Care Licensure Section operations and enforces the law and rules applicable to adult care homes in North Carolina. Ms. Ryan is responsible for taking any necessary administrative actions that are permitted by law and supported by information gathered from facility surveys and investigations. Ms. Ryan is responsible for assessing administrative penalties based on information provided through the penalty process.

14. While participating in a facility survey completed on February 13, 2012 at Pray Until Something Happens Assisted Living, Ms. Fries confirmed that there were no records or documentation of medication administration for any of the facility's residents.

15. Mr. Medley was informed that the failure to have documentation of administered medications was a violation of 10A N.C.A.C. 13G.1004 and that the violation was a Type B violation. Mr. Medley was given until March 29, 2012 to correct the violation but this date was changed to March 1, 2012 at the request of the facility.

16. A follow up facility survey was completed on April 17, 2012 to review the areas in which violations were cited on the February 13, 2012 survey. Ms. Linda Blalock participated in this survey. As part of her duties on this survey, Ms. Blalock reviewed the complete record of two residents of the facility. Ms. Blalock reviewed the record of M.D., referred to as Resident #2 in the Statement of Deficiencies Report for the April 17, 2012 survey. As part of this record review, Ms. Blalock was looking for documentation of medication administration to Resident #2. Ms. Blalock found numerous deficiencies in the documentation of medications being administered to Resident #2 including the following:

- a. multiple days in the month of April 2012 where there was no documentation of medications being administered or any indication of medication refusal;
- b. some occasions where a progress note would reflect “administered meds” but did not indicate dose, time administered, the medication administered, or the signature of the person administering the medication – such information is required to be part of the medication administration documentation.

17. As a result of the continuing deficiencies in the area of medication administration, Respondent determined that the previously cited Type B violation of 10A N.C.A.C. 13G.1004 remained out of compliance and was cited against the facility. Mr. Medley was informed of this uncorrected violation and that a penalty proposal was being considered.

18. Ms. Rodgers reviewed the penalty proposal and recommendation sheet in this matter and confirmed that the amount that was proposed to be assessed was correct based on the information in the proposal and the date given for the Type B violation to be corrected. Ms. Rodgers confirmed that the findings supported a Type B level violation and subsequent finding of an uncorrected Type B violation.

19. The number of days that the facility was deemed to have failed to correct the Type B violation of 10A N.C.A.C. 13G.1004 was 61 days. This was determined based on the date that the facility stated it would correct the violation and the date the facility actually corrected. In this case, the facility proposed to have the violation corrected by March 1, 2012. The facility ceased operations on April 30, 2012 and this was the end date used for the determination of the penalty amount as the facility was not deemed to be in compliance prior to its closing.

20. Respondent assessed a One Hundred Dollars per day penalty for each of the 61 days that Petitioner failed to correct the Type B violation of 10A N.C.A.C. 13G.1004. A total penalty of Six Thousand One Hundred Dollars (\$6,100.00) was proposed.

21. Prior to assessment of the penalty, the penalty proposal and recommendation were forwarded for consideration by the Penalty Review Committee (the “PRC”). The PRC is an advisory body appointed by the Secretary of the Department of Health and Human Services which reviews proposed penalties and makes a recommendation as to whether a penalty should be assessed and in what amount. The PRC does not have any binding authority over whether the Adult Care Licensure Section assesses a penalty.

22. Mr. Medley did not attend the PRC meeting held on October 11, 2012. The PRC unanimously recommended a penalty be assessed in the amount of Six Thousand One Hundred Dollars (\$6,100.00).

23. The PRC recommendation was accepted by Ms. Ryan and she decided, based on the findings from the investigation and the information in the penalty proposal and penalty recommendation, that an uncorrected Type B violation of 10A N.C.A.C. 13G.1004 was

supported. Ms. Ryan assessed an administrative penalty in the amount of Six Thousand One Hundred Dollars (\$6,100.00).

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact, the undersigned Administrative Law Judge makes the following Conclusions of Law:

1. The North Carolina Office of Administrative Hearings has jurisdiction over the parties and subject matter of this contested case under N.C. Gen. Stat. § 150B-23. There is no question as to misjoinder or nonjoinder. The parties received proper notice of the hearing in this matter.

2. Petitioner has the burden of proving that Respondent deprived Petitioner of property, otherwise substantially prejudiced Petitioner's rights, exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously or failed to act as required by law or rule when Respondent assessed an administrative penalty in the amount of Six Thousand One Hundred Dollars (\$6,100.00) for an uncorrected Type B rule violation against Petitioner.

3. As the licensee of the Pray Until Something Happens Assisted Living facility, Kevin Medley was responsible for its operation and ensuring that the facility operated in compliance with all applicable laws and rules.

4. N.C. Gen. Stat. § 131D-2 *et seq.* authorizes Respondent to regulate and monitor adult care homes in the State of North Carolina. Pursuant to N.C. Gen. Stat. § 131D-34, Respondent is authorized to assess administrative penalties against adult care homes for violations of relevant federal and State laws, rules, and regulations of adult care homes.

5. At the time the violation at issue in this matter was cited, N.C. Gen. Stat. § 131D-34 defined a Type B level violation as any violation of law or rules applicable to adult care homes that is detrimental to the health, safety, or welfare of any resident. While an initial citation of a Type B violation does not carry with it an assessed penalty or fine, Respondent is required to assess a penalty for any uncorrected Type B violation. The amount to be assessed for an uncorrected Type B violation can be as much as Four Hundred Dollars (\$400.00) per day.

6. Adult care homes are required by administrative rule to document the administration of medication to its residents as set forth in 10A N.C.A.C. 13G.1004. This includes indicating the medication administered, the name of the person administering the medication, the date administered, the dose administered, and any refusals of medication.

7. Pray Until Something Happens Assisted Living failed to adequately document the administration of medications as required by 10A N.C.A.C. 13G.1004. The facility was initially cited with this violation during a facility survey completed on February 13, 2012 and this violation was correctly cited as a Type B violation because the failure to document

medication administration is detrimental to the health, safety, and welfare of facility residents.

8. Pray Until Something Happens Assisted Living failed to correct this violation within the time it was required to correct the violation. There were multiple instances of the facilities failure to properly document the administration of medications after the time it was to have corrected this violation. This continuing violation was appropriately cited as a Type B violation because the failure to document medication administration is detrimental to the health, safety, and welfare of facility residents.

9. Respondent's citation of an uncorrected Type B violation of 10A N.C.A.C. 13G.1004 is supported by a preponderance of the evidence. Respondent did not act erroneously, did not fail to act as required by rule or law, did not fail to follow proper procedure, did not act arbitrarily or capriciously when citing the uncorrected Type B violation.

10. An uncorrected Type B violation requires the assessment of an administrative penalty. Respondent did not exceed its authority or jurisdiction, did not act erroneously, did not fail to act as required by rule or law, did not fail to follow proper procedure, did not act arbitrarily or capriciously when assessing an administrative penalty against Petitioner in the amount of Six Thousand One Hundred Dollars (\$6,100.00). This penalty amount was reasonable.

DECISION

NOW THEREFORE, based on the foregoing Findings of Fact and Conclusions of Law, the undersigned Administrative Law Judge determines that Respondent did not exceed its authority or jurisdiction, did not act erroneously, did not fail to act as required by rule or law, did not fail to follow proper procedure, did not act arbitrarily or capriciously when citing the uncorrected Type B violation and assessing an administrative penalty in the amount of Six Thousand One Hundred Dollars (\$6,100.00) against Petitioner. The penalty is payable as set forth in N.C. Gen. Stat. § 131D-34.

NOTICE

Under the provisions of North Carolina General Statute 150B-45, any party wishing to appeal the final decision of the Administrative Law Judge must file a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. **The appealing party must file the petition within 30 days after being served with a written copy of the Administrative Law Judge's Final Decision.** In conformity with the Office of Administrative Hearings' rule, 26 N.C.A.C. 03.0102, and the North Carolina Rules of Civil Procedure, **this Final Decision was served on the parties the date it was placed in the mail as indicated by the date on the Certificate of Service attached to this Final Decision.** N.C. Gen. Stat. §150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Under N.C. Gen. Stat. §150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the

Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal is initiated in order to ensure the timely filing of the record.

This the 15th day of November, 2013.

Selina M. Brooks
Administrative Law Judge