

STATE OF NORTH CAROLINA
COUNTY OF CHEROKEE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
21 DHR 04917

<p>Appalachian Community Services Petitioner,</p> <p>v.</p> <p>NC Department of Health and Human Services Respondent.</p>	<p>FINAL DECISION</p>
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THIS MATTER came for hearing before the undersigned, David F. Sutton, Administrative Law Judge, on May 2-3, 2022, in the Office of Administrative Hearings in Waynesville, North Carolina.

PROTECTIVE ORDER

Any information related to residents, including their names, mentioned in this proceeding shall be considered confidential and is used for the sole purpose of findings in this proceeding alone and is not properly disclosed in any other setting or hearing.

APPEARANCES

For Petitioner: Nathan A. Kottkamp, Esq.
Williams Mullen
200 South 10th Street, Suite 1600
Richmond, Virginia 23219

Joel Johnson, Esq.
Williams Mullen
301 Fayetteville Street, Suite 1700
Raleigh, North Carolina 27601

For Respondent: William F. Maddrey
Assistant Attorney General
North Carolina Department of Justice
114 West Edenton Street
Raleigh, North Carolina 27603

ISSUES

Whether Respondent deprived Petitioner of property or otherwise substantially prejudiced Petitioner’s rights *and* exceeded its authority or jurisdiction, acted erroneously, failed to use proper procedure, acted arbitrarily or capriciously, or failed to act as required by rule or law when it, by letter dated October 25, 2021, notified Petitioner that Respondent was imposing a Type A1 Administrative Penalty of \$5,000.00 against Petitioner.

Also, in its contested case petition filed on November 15, 2021, Petitioner contested a Suspension of Admissions issued to it by Respondent in an additional letter dated October 25, 2021. However, Petitioner did not include the Suspension of Admissions in its Prehearing Statement filed on January 7, 2022. The Suspension of Admissions was lifted by Respondent by letter dated February 25, 2022 (P. Ex. 4). Based upon the foregoing, the Undersigned concluded, without objection from the parties, that Petitioner’s contest of the October 25, 2021, Suspension of Admissions had been rendered moot and was no longer before this Tribunal.

APPLICABLE LAW

N.C. Gen. Stat. §§ 122C, Art. 1, 2, 3, 3A
10A NCAC Ch. 27C through 27G

EXHIBITS ADMITTED INTO EVIDENCE

Petitioner’s Exhibits 1 through 4 and 6 through 34 were admitted into evidence.

Respondent’s Exhibits 1 through 25 were admitted into evidence.

WITNESSES

For Petitioner: Jessica Tewell
 Nicholas Riehl
 Thomas Blackburn

For Respondent: Anne Nelson
 Robin Sulfridge
 Michiele Elliott (Direct and Rebuttal)

BASED UPON careful consideration of the sworn testimony of witnesses presented at the hearing, documents received and admitted into evidence, and the entire record in this proceeding, the Undersigned makes the following 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 interest, bias, or prejudice the witness may have; the opportunity of the witness to see, hear, know, and remember the facts or occurrences about which the witness testified; whether the testimony of the witness is reasonable; and whether such testimony is consistent with all other believable evidence in the case.

FINDINGS OF FACT

Parties/Witnesses

1. The Mental Health Licensure and Certification Section of the Division of Health Service Regulation (“Respondent”) inspects and licenses mental health facilities in North Carolina. Respondent conducts annual surveys of mental health facilities in the state as well as complaint investigations and follow-up surveys at mental health facilities as needed.

2. At all times relevant to this matter, Respondent licensed Appalachian Community Services (“Petitioner”), to operate a mental health facility known as SA Recovery (the “Facility”), license number MHL-020-084, located at 750 Highway 64, Murphy, North Carolina 28906.

3. At all times relevant to this matter, Petitioner was licensed to provide a Substance Abuse Intensive Outpatient Program (“SAIOP”) pursuant to 10 NCAC 27G .4400.

4. Anne Nelson worked as a Facility Compliance Consultant for the Mental Health Licensure and Certification Section of the Division of Health Service Regulation. Her primary job responsibilities as a Facility Compliance Consultant are to visit facilities to check their compliance with Respondent’s rules. She also performs annual, complaint, and follow up surveys at the facilities, as well as writes reports and submits them to her supervisor. (T Vol. 1, pp. 12-14)

5. Robin Sulfridge served as a Branch Manager for the Mental Health Licensure and Certification Section of the Division of Health Service Regulation. Ms. Sulfridge has approximately thirty years of experience in the field of mental health and has worked with the Division of Health Service Regulation for approximately fourteen and a half years. As a Branch Manager, Ms. Sulfridge coordinates with team leaders to ensure that the State mandates regarding residential annual evaluations are completed. She also ensures that complaint and other investigations are completed. (T Vol. 1, pp. 66-67)

6. Michiele Elliott is the Chief of the Mental Health Licensure and Certification Section of the Division of Health Service Regulation. Ms. Elliott has been with the Division of Health Service Regulation since 2000. As Chief of the Mental Health Licensure and Certification Section, Ms. Elliot is responsible for the day-to-day operations and the oversight of eight survey teams across the state. (T Vol. 1, pp. 91-92)

7. Jessica Tewell is the Director of Outpatient and Community based Services for the Western Region of Appalachian Community Services. (T Vol. 1, pp. 100-01)

8. Nicholas Riehl is the in-house counsel for ncgCARE, which owns Appalachian Community Services. (T Vol. 1, p. 184)

9. Thomas Blackburn is the quality manager for ncgCARE. (T Vol. 1, p. 190)

Licensure Survey Process

10. The Facility is licensed to provide a SAIOP. The purpose of a SAIOP is “to provide structured individual and group addiction treatment and services that are provided in an outpatient setting designed to assist adults or adolescents with a primary substance-related diagnosis to begin recovery and learn skills for recovery maintenance.” 10A NCAC 27G .4401(a).

11. Respondent conducts surveys of licensed facilities on an annual basis and upon receiving complaints. N.C. Gen. Stat. § 122C-25. A complaint survey is performed in response to a complaint made about the Facility. During a complaint survey, Respondent’s Facility Compliance Consultants (“surveyor”) document their investigation and compile various records, including, but not limited to, interviews, record reviews, and observations. These materials are stored in a non-disclosure file, which is maintained by Respondent as a record of the survey.

12. Following a survey, surveyors prepare a Statement of Deficiencies detailing the findings of the survey.

October 4, 2021 Survey and Violations

13. Ms. Nelson was assigned to conduct a complaint survey of the Facility in September 2021. During the survey, Ms. Nelson reviewed client records, facility documents and policies, and interviewed Facility staff and clients.

14. During the survey, Ms. Nelson took contemporaneous notes of her interviews and observations and documented her reviews of records in the non-disclosure file. (R. Ex. 24)

15. During the survey, Ms. Nelson reviewed records related to four of the Facility’s clients. (R. Ex. 25)

16. Respondent identified no deficiencies with respect to Client #1 and Client #2, two of the Facility’s then-current clients. (T Vol. 1, pp. 48-49)

17. Respondent used the events involving Deceased Client #3 (“DC #3”) as the primary focus of its survey and findings of the Facility’s violations. Respondent also used events regarding Former Client #4 (“FC #4”) for its survey findings.

18. DC#3 agreed to attend the Facility’s SAIOP program as a condition of federal probation. She had been using methamphetamine for various periods of time and with various levels of intensity since she was 13 years old. She also struggled with issues of significant trauma from sexual abuse as a teenager. Over the course of more than 20 years, she was able to maintain sobriety for various lengths of time, but in late 2020 she experienced another relapse. DC#3 was diagnosed with both mental health and substance use disorders, which were reflected multiple

times in the clinical record. DC #3 was discharged from SAIOP on March 25, 2021, for excessive absences and failing to engage in the program. DC#3 was 39 years old when she died from an overdose of fentanyl and methamphetamine on April 5, 2021. (P. Exs. 7, 13, 29-32; R. Exs. 6 and 8)

19. The findings of the October 4, 2021 Survey were recorded in a Statement of Deficiencies dated October 4, 2021. (R. Ex. 1)

20. Based upon the findings documented in the Statement of Deficiencies, Respondent cited Petitioner for a violation of V 266 – 10A NCAC 27G .4401 – SAIOP Scope. Respondent will cite by cross-reference separate rule violations into V 266 – 10A NCAC 27G .4401 – SAIOP Scope when those violations contribute to the Facility’s failure to provide services within its scope. Respondent cross-referenced the following violations identified by violation tag, rule citation, and title as follows:

- a. V 109 – 10A NCAC 27G .0203 - Competencies of Qualified Professionals and Associate Professionals
- b. V 112 – 10A NCAC 27G .0205 - Assessment and Treatment/Habilitation Service Plan
- c. V 268 – 10A NCAC 27G .4403 - SAIOP Operations

(R. Ex. 1). Respondent cited V 266 – 10A NCAC 27G .4401 – SAIOP Scope as a Type A1 Violation for serious neglect. (R. Ex. 1, p. 27)

V 112 – 10A NCAC 27G .0205 - Assessment and Treatment/Habilitation Service Plan

21. Respondent cited Petitioner for a deficiency under V 122 – 10A NCAC 27G .0205 – Assessment and Treatment/Habilitation Service Plan. Based on record reviews and interviews, Respondent determined that Petitioner failed to develop and implement strategies to meet the needs of the clients in treatment plans effecting DC #3 and FC #4. (R. Ex. 1, p.10)

22. The treatment plan must be reviewed at least annually. 10A NCAC 27G .0205(d)(4).

23. When a client is non-compliant with a treatment program, the treatment plan should be updated to include strategies being developed and implemented by the Petitioner’s treatment team to address the client’s non-compliant behaviors. (T Vol. 1, p. 86)

24. DC #3 began the SAIOP on December 16, 2020. (R. Ex. 5, p. 1)

25. DC #3’s treatment plan, in the form of a person-centered profile, was completed on December 21, 2020. (R. Ex. 8, pp. 1-15)

26. DC #3's treatment plan contained goals to address her substance use and mental health by attending SAIOP group, individual therapy, medication management, and use of mobile crisis as needed. DC #3's treatment plan contained various objectives and strategies to achieve the stated goals including education on maintaining a substance free lifestyle, and the frequency and duration of her SAIOP group meetings and individual therapy. (R. Ex. 1, p.11; R. Ex. 8, pp. 1-15)

27. DC #3 had excessive absences from the SAIOP. The Statement of Deficiencies lists 14 absences between December 25, 2020 and March 19, 2021. (R. Ex. 1 p. 13) However, despite being listed as absent, DC #3 was present on February 3, 2021. (R. Ex. 5, p.18)

28. In January 2021, DC #3's absences became more frequent, when she missed 4 sessions from January 15, 2021 – January 25, 2021. (R. Ex. 1, pp. 12-13)

29. Petitioner maintains a policy that states that clients may be required to restart the program in the event of six or more unexcused absences. (R. Ex. 8, p. 14)

30. DC #3 was discharged from the program, in part, due to her failure to meet the attendance requirements for the SAIOP. (P. Ex. 7, p. 6)

31. In addition to failing to address DC #3's poor attendance and lack of engagement in an update to the treatment plan, Respondent included in the Statement of Deficiencies, that Petitioner did not address DC #3's suspected relapse with an update to the treatment plan. (R. Ex. 1, p. 11)

32. Near the beginning of her treatment in the SAIOP, on December 23, 2020, DC #3 reported that "she had been sober for over a month but then recently slipped up and relapsed..." (R. Ex. 5, p. 2)

33. On March 22, 2021, three days before DC #3 was discharged from the SAIOP, in a service note dated March 23, 2021, Petitioner documented that "Collateral information reflects that client is actively using substances and is communicating to others that it is easy to falsify UDS testing since the procedure is not being observed." (P. Ex. 7, p. 5)

34. Also, on March 22, 2021, at 5:00 p.m., Facility staff called DC #3 to coordinate a random drug screen and were unable to reach her. At 7:43 p.m., Facility staff reached DC #3 by telephone. DC #3 informed Facility staff that she was out of town and could not make it to the clinic for the drug screen. (P. Ex. 7, p. 4)

35. Between the time DC #3's treatment plan was created on December 21, 2020, and when she was discharged on March 25, 2021, DC #3's treatment plan was not updated. (R. Ex. 8, pp. 1-15)

36. By the end of January 2021 when DC #3's absences became more frequent, DC #3's treatment plan should have been updated, and re-assessed on a regular basis, to include strategies being developed and implemented by the Petitioner's treatment team to address DC #3's excessive absences and lack of consistent engagement.

37. When DC #3's suspected relapse occurred at the time of discharge, Petitioner should have updated the treatment plan to include an assessment of the effectiveness, or lack thereof, of strategies that had been implemented by Respondent to address DC #3's substance use.

38. FC #4 was admitted to SAIOP on October 26, 2020 and discharged on February 15, 2021. (R. Ex. 1 p. 15)

39. FC #4's treatment plan, in the form of a Person-Centered Profile, was completed on November 11, 2020. (R. Ex. 14, p. 9.

40. FC #4 was discharged after successfully completing the program on February 15, 2021. (R. Ex. 14, pp. 3-4)

41. There is nothing in the record to indicate that FC #4 was ever non-compliant with the SAIOP, and, since FC #4 was discharged prior to the required annual review (November 10, 2021), there was no reason to update FC #4's treatment plan.

42. Petitioner was non-compliant with NCAC 27G .0205 by failing to update the treatment plan for DC #3 to include strategies being developed, implemented, and assessed by the Petitioner's treatment team to address DC #3's excessive absences and lack of consistent engagement. Petitioner was also non-compliant with NCAC 27G .0205 when it failed to update the treatment plan to include an assessment of the effectiveness, or lack thereof, of strategies implemented by Respondent to address DC #3's substance use.

V 268 – 10A NCAC 27G .4403 - SAIOP Operations

43. Respondent cited Petitioner for a deficiency under V 268 – 10A NCAC 27G .4403 – SAIOP Operations. Based on record reviews and interviews, Respondent determined that Petitioner failed to complete discharge plans for DC #3 and FC #4. (R. Ex. 1, p. 28; 10A NCAC 27G .4403(g))

44. 10A NCAC 27G .4403(g) requires that before discharge, the program shall complete a discharge plan and refer each client who has completed services to the level of treatment or rehabilitation as specified in the treatment plan.

45. A discharge plan is important because it identifies the services a client received and the progress or lack thereof that a client made during treatment. A discharge plan is also important in that it provides the agency to whom a client is being referred the "pertinent information so that there is a continuation of treatment or at least some continuity between where the client was and where the client's going, to better address whatever those needs are at the time." (T Vol. 1, p. 75)

46. On March 22, 2021, the following occurred:

- a. "Collateral information reflects that [DC #3] is actively using substances and is communicating to others that it is easy to falsify UDS testing since the procedure is not being observed." (P. Ex. 7, p. 5)

- b. DC #3 failed to make herself available for a drug screen. (P. Ex. 7, p. 4)
- c. DC #3 was made aware that she was going to be discharged from the SAIOP and referred to a higher level of care. Id.
- d. DC #3 stated to Petitioner that she “feels her mental health issues need to be addressed and that she needs stabilization with her medications.” Id.
- e. Petitioner encouraged DC #3 to contact mobile crisis management to be linked for mental health stabilization and Petitioner confirmed that DC #3 had the correct contact information for mobile crisis management. Id.

47. DC #3 was discharged from the SAIOP on March 25, 2021. Petitioner did not prepare a discharge plan for DC #3. (R. Ex. 1, p. 28)

48. The record does not indicate that Petitioner tried to link DC #3 with an inpatient treatment program, nor does the record indicate that, other than making sure that DC #3 had the correct contact information, Petitioner did anything to ensure that DC #3 connected with mobile crisis management. The record does indicate that DC #3’s probation officer had arranged inpatient treatment at Pardee Hospital. (R. Ex. 21, p. 44; R. Ex. 23, p. 4)

49. Petitioner failed to coordinate necessary services for DC #3 at the time of her discharge when it did not link DC #3 to an inpatient treatment provider and ensure DC #3’s contact with mobile crisis management despite being aware of DC #3’s suspected relapse, her lack of engagement with the SAIOP, her expressed need to address mental health and medication issues, and Petitioner’s decision to refer DC #3 to higher level of care,.

50. FC #4 was discharged from the SAIOP after successfully completing the program on February 15, 2021. Petitioner did not prepare a discharge plan for FC #4. (P. Ex. 1, p. 28)

51. Petitioner was non-compliant with 10A NCAC 27G .4403 when it failed to prepare discharge plans for DC #3 and FC #4.

V 109 – 10A NCAC 27G .0203
Competencies of Qualified Professionals and Associate Professionals

52. Respondent cited Petitioner for a deficiency under V 109 – 10A NCAC 27G .0203 – Competencies of Qualified Professionals and Associate Professionals. (R. Ex. 1, pp. 2-3) Based on record reviews and interviews, Respondent determined that three of the Facility’s former staff and the current qualified professional failed to demonstrate knowledge, skills and ability required by the population served. (R. Ex. 1, p. 2)

53. “Competence shall be demonstrated by exhibiting core skills including: (1) technical knowledge; (2) cultural awareness; (3) analytical skills; (4) decision-making; (5) interpersonal skills; (6) communication skills; and (7) clinical skills.” 10A NCAC 27G .0203(d).

54. Examples of non-compliance cited by Respondent include:
- a. Former Qualified Professional (QP) #2 failed to update DC #3's treatment plan despite DC #3's multiple absences from the program, suspected relapses, and a documented need for a higher level of care;
 - b. Former QP #2 failed to link and coordinate services for DC #3 at discharge;
 - c. Former Therapist #2, Former Therapist #3, and Former QP #2 failed to document interventions or coordination of care regarding the treatment needs of DC #3;
 - d. The Director/QP failed to demonstrate appropriate knowledge of the population she served when she failed to timely and appropriately sign a letter regarding DC #3's treatment at ACS.

(R. Ex. 1 pp. 2-3; T Vol. 1, p. 19)

55. Petitioner's issues concerning its failure to update DC #3's treatment plan to include strategies being developed and implemented to address DC #3's non-compliant behaviors are addressed in preceding paragraphs 21 - 42.

56. Petitioner's issues concerning its failure to link and coordinate services for DC #3 at discharge are addressed in preceding paragraphs 43 - 51.

57. Petitioner failed to provide documentation of what actions it took to respond to DC #3's excessive absences and suspected relapse and failed to prepare a discharge plan. (T Vol. 1, p. 20)

58. Petitioner was cited due to it taking seven (7) business days to issue a letter of support that was requested by DC #3's probation officer after DC #3 had been discharged from the SAIOP. (R. Ex. 1 p. 3)

59. Ms. Nelson's review of the emails between staff members regarding the letter for DC #3 showed that the SAIOP team members disagreed with how Ms. Tewell felt the letter should be written. (T Vol. 1, p. 22; R. Ex. 12)

60. The SAIOP team recommended a higher level of care for DC #3. Ms. Tewell disagreed and requested that "person-centered" language be used and suggested that the letter state that DC #3 receive a "different level" of care. (T Vol. 1, pp. 22-23)

61. The SAIOP team further questioned Ms. Tewell on her insistence of using "different level of care." (R. Ex. 12, p. 9)

62. Ms. Tewell received the initial draft of the letter on Thursday, March 25, 2021 with no context whatsoever. Following her Friday morning (9:34 a.m.) request for more information

and editing access to the draft, she did not receive a response until Friday afternoon (1:06 p.m.). Ms. Tewell returned a revised and signed version on Monday, March 29, 2021 at 10:43 a.m. The SAIOP team then made no attempt to contact Ms. Tewell regarding the letter for four more days (Friday, April 2, 2021). Ms. Tewell signed the final version the same day. (P. Exs. 9, 10, and 11; R. Exs. 10 and 11) Therefore, the finalization of the letter took six business days.

63. Ms. Tewell testified that the SAIOP team delayed the support letter being sent out. (T Vol. 1, p. 160 - 161)

64. All three staff members providing care to DC #3 were terminated on April 28, 2021, for failing to maintain therapeutic boundaries and inappropriate and unprofessional conduct. ACS further stated that it had lost confidence in the ability of FS #3, FS #4, and FS #5 to comply with procedures. Additionally, in terminating each staff member ACS informed them that their status would be updated to state “ineligible for rehire” with ACS, ncgCARE, or any other affiliated facilities. (R. Ex. 16)

65. Ms. Tewell understood the termination of the SAIOP team members was due to a loss of confidence. When asked to explain, Ms. Tewell testified, “[l]oss of confidence would mean that there was evidence to show that their service delivery could not be trusted and that it was too much of a risk to continue to allow them to practice independently.” (T Vol. 1, p. 154)

66. Petitioner was non-compliant with 10A NCAC 27G .0203 when it failed to demonstrate knowledge, skills and ability required for the treatment of DC #3 by failing to update DC #3’s treatment plan to include strategies being developed, implemented, and assessed to address DC #3’s non-compliant behaviors, failing to link and coordinate services for DC #3 at discharge, and delaying finalization of the letter of support for DC #3’s probation officer.

V 266 – 10A NCAC 27G .4401 – SAIOP Scope

67. Respondent cited Petitioner with a violation V 266 – 10A NCAC 27G .4401 – SAIOP Scope based on Petitioner’s failure to provide services within its scope. (R. Ex. 1, p. 18)

68. 10A NCAC 27G .4401 sets the scope of a SAIOP as follows:

- (a) A SAIOP program is one that provides structured individual and group addiction treatment and services that are provided in an outpatient setting designed to assist adults or adolescents with a primary substance-related diagnosis to begin recovery and learn skills for recovery maintenance.
- (b) Treatment support activities may be adapted or specifically designed for persons with physical disabilities, co-occurring disorders including mental illness or developmental disabilities, pregnant women, chronic relapse and other homogenous groups.
- (c) Each SAIOP shall be a structured program, which includes the following services: (1) Individual counseling; (2) group counseling; (3) family counseling; (4) strategies for relapse prevention, which incorporate community

and social supports; (5) life skills; (6) crisis contingency planning; (7) disease management; (8) service coordination activities; (9) biochemical assays to identify recent drug use (e.g. urine drug screens).

Id.

69. The rule violations found in tag V 109 – 10A NCAC 27G .0203 - Competencies of Qualified Professionals and Associate Professionals, tag V 112 – 10A NCAC 27G .0205 - Assessment and Treatment/Habilitation Service Plan, and tag V 268 – 10A NCAC 27G .4403 - SAIOP Operations discussed Supra were cross-referenced into tag V 266 – 10A NCAC 27G .4401 – SAIOP Scope because they all contributed to Petitioner’s failure to provide services within its scope.

70. Petitioner was non-compliant with 10A NCAC 27G .4401 when it failed to provide services within its scope by failing to update DC #3’s treatment plan to include strategies being developed, implemented, and assessed to address DC #3’s non-compliant behaviors, failing to link and coordinate services for DC #3 at discharge, and delaying finalization of the letter of support for DC #3’s probation officer.

October 25, 2021 Type A1 Violation & Administrative Penalty

71. Respondent determined that Petitioner’s violations resulted in serious neglect, and by letter dated October 25, 2021, Respondent notified Petitioner of a Type A1 Violation of 10A NCAC 27G .4401 SAIOP Scope and imposed an Administrative Penalty in the amount of \$5,000.00. (R. Ex. 2)

72. Respondent did not base its finding of serious neglect on the fact that DC #3 died. (T Vol. 1, p. 75)

73. The record before this Tribunal does not indicate a causal connection between the Petitioner’s failure to provide the necessary services to DC #3 and an impact to the mental or physical health and well-being of DC #3.

Evidentiary Issues

74. Mr. Blackburn, on behalf of Petitioner’s parent company, ncgCARE, conducted an internal investigation to determine if Petitioner was neglectful in the death of DC #3 due to Ms. Tewell’s handling of the execution of the support letter for DC #3’s probation officer. Mr. Blackburn’s investigation concerned only a small portion of those allegations investigated by Respondent. Also, there is nothing in the record to indicate that Mr. Blackburn considered the definition of neglect set forth in 27 NCAC 27C .0102(b)(17) when making his conclusions. (P. Ex. 12, pp. 28-32) As a result of the preceding, the Undersigned did not give any weight to the investigation conducted by Mr. Blackburn, or the conclusions contained in the report resulting from the investigation.

75. During the course of the contested case hearing, Petitioner produced a set of documents it contended were the staffing notes related to DC #3 and FC #4. (P. Ex. 34) Petitioner's Exhibit 34 was not disclosed as part of the pretrial order mandating the parties exchange exhibits prior to trial. Ms. Tewell testified that during the survey she did not have access to the notes contained in Petitioner's Exhibit 34. (T Vol. 1, p. 155) Mr. Riehl testified that in preparation for trial the week before he was able, through the assistance of ncgCARE's IT department, to locate the "missing" staffing notes. (T Vol. 1, pp. 184-86) The notes contained in Petitioner's Exhibit 34 are not signed. (P. Ex. 34) Petitioner did not present a witness that could testify that they authored the notes or the exact date the notes were created. As a result of the preceding, the Undersigned did not give any weight to the notes contained within Petitioner's Exhibit 34.

CONCLUSIONS OF LAW

1. The Office of Administrative Hearings (OAH) has jurisdiction over the parties and the subject matter pursuant to Chapters 122C and 150B of the North Carolina General Statutes.

2. All parties have been correctly designated and there is no question as to misjoinder or nonjoinder. All parties received notice of hearing as required by N.C.G.S. §150B-23.

3. To the extent that the Findings of Fact contain Conclusions of Law, and vice versa, they should be so considered without regard to their given labels. Charlotte v. Heath, 226 N.C.750, 755, 440 S.E.2d 600, 604 (1946).

4. A court, or in this case an administrative Tribunal, need not make findings as to every fact that arises from the evidence and need only find those facts which are material to the settlement of the dispute. Flanders v. Gabriel, 110 N.C. App. 438, 440, 429 S.E.2d 611, 612, aff'd, 335 N.C. 234, 436 S.E.2d 588 (1993).

5. Petitioner has the burden of proving by a preponderance of the evidence that Respondent has deprived Petitioner of property, ordered her to pay a fine or civil penalty, substantially prejudiced Petitioner's rights and has 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. N.C. Gen. Stat. § 150B-25.1(a).

6. Respondent has the burden of proving by clear and convincing evidence that the person who was fined actually committed the act for which the fine or penalty was imposed. N.C. Gen. Stat. § 150B-25.1(b)

7. N.C. Gen. Stat. § 122C-1 *et seq.* authorizes Respondent to license, inspect, and regulate mental health facilities in the State of North Carolina.

8. Pursuant to N.C. Gen. Stat. § 122C-24.1, Respondent is authorized to assess administrative penalties against mental health facilities for violations of relevant federal and State laws, rules, and regulations of adult care homes.

9. The October 4, 2021 Statement of Deficiencies (R. Ex. 1) and the evidence during the hearing of this matter demonstrated that Petitioner violated 10A NCAC 27G .4401 because Petitioner failed to provide services within the scope of its program.

10. Respondent made the decision that the failure by Petitioner to comply with 10A NCAC 27G .4401 was appropriately cited as a Type A1 violation, because the violations identified resulted in serious neglect of clients.

11. At the time the violation at issue in this matter was cited, N.C. Gen. Stat. § 122C-24.1 defined a Type A1 level violation as any violation of law or rules applicable to mental health facilities which results in death or serious physical harm, abuse, neglect, or exploitation. N.C. Gen. Stat. § 122C-24.1(a)(1).

12. “‘Neglect’ means the failure to provide care or services necessary to maintain the mental or physical health and well-being of the client.” 10A NCAC 27C.0102(17)

13. The record before this Tribunal does not indicate a causal connection between the Petitioner’s failure to provide necessary services to DC #3 and an impact to the mental or physical health and well-being of DC #3. Additionally, the death of DC #3 was not the basis of Respondent’s determination that Petitioner’s failures resulted in serious neglect.

14. Respondent met its burden of proving by clear and convincing evidence that the Petitioner committed the acts upon which Respondent could impose a penalty. However, Petitioner has met its burden of proving by a preponderance of the evidence that Respondent substantially prejudiced Petitioner’s rights and acted erroneously and failed to act as required by rule or law when Respondent cited the Petitioner with a Type A1 violation and ordered Petitioner to pay a civil penalty in the amount of \$5,000.00.

15. At the time the violation at issue in this matter was cited, N.C. Gen. Stat. § 122C-24.1 defined a Type A2 level violation as any violation of law or rules applicable to mental health facilities which results in substantial risk that death or serious physical harm, abuse, neglect, or exploitation will occur. N.C. Gen. Stat. § 122C-24.1(a)(1a).

16. A preponderance of the evidence is that Petitioner’s violation of 10A NCAC 27G .4401 is properly cited as a Type A2 violation due to the substantial risk that serious neglect to Petitioner’s clients will occur because of the violations of Petitioner.

17. On October 25, 2021, Respondent imposed a penalty of Five Thousand Dollars (\$5,000.00) for violation of 10A NCAC 27G .4401. (R. Ex. 2) As concluded above, Respondent acted erroneously and failed to act as required by rule or law when it imposed a penalty of Five Thousand Dollars (\$5,000.00) for violation of 10A NCAC 27G .4401.

18. Pursuant to N.C. Gen. Stat. § 122C-24.1(a)(1a), for a Type A2 violation, Respondent may or may not assess a penalty taking into consideration the compliance history, preventative measures, and response to previous violations by the facility.

19. N.C. Gen. Stat. § 122C-24.1(f) requires the Undersigned to address two issues in administrative appeals of penalties: (1) the reasonableness of the amount of the penalty, and (2) the degree to which each factor listed in N.C. Gen. Stat. § 122C-24.1(c) was evaluated.

20. Respondent uses a penalty matrix for determining the financial amount of a type A1 or A2 penalty. (T Vol. 1, p. 270) The penalty matrix takes into account the factors from the statute. Points are assigned based on those factors, and then, based on the points and the size of the facility, there is a monetary amount determined for the penalty. (T. Vol. 1 pp. 77-79) The point system and rubric satisfy the requirements of N.C. Gen. Stat. § 122C-24.1(c) & (f).

21. N.C. Gen. Stat. § 122C-24.1(f) allows the Undersigned to recommend that a penalty be adjusted when the Undersigned has found that the penalty imposed was unreasonable.

22. The imposition of a Five Thousand Dollar (\$5,000.00) penalty against the Petitioner for violation of 10A NCAC 27G .4401 is unreasonable because it is premised on the conclusion that Petitioner's violations resulted in serious neglect of a client. As concluded above, Petitioner's violations resulted in a substantial risk that serious neglect of a client will occur.

23. After making an adjustment to Respondent's rubric, set forth in Respondent's Exhibit 3, to properly reflect the level of harm constituting 5 points rather than 15, the total score is 10. A total score of 10 justifies the imposition of a Five Hundred Dollar (\$500.00) penalty against the Petitioner for a type A2 violation of 10A NCAC 27G .4401.

DECISION

Based on the foregoing Findings of Fact and Conclusions of Law, the Undersigned hereby determines that Respondent's decision to impose a Five Thousand Dollars (\$5,000.00) penalty for a Type A1 violation shall be SET ASIDE. Petitioner shall be cited with a type A2 violation and is hereby ordered to pay a Five Hundred Dollar (\$500.00) administrative penalty.

NOTICE OF APPEAL

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

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 the county where the person aggrieved by the administrative decision resides, or in the case of a person residing outside the State, the county where the contested case which resulted in the final decision was filed. **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. Admin. Code 03.0102, and the Rules of Civil Procedure, N.C. General Statute 1A-1, Article 2, **this Final Decision was served on the parties as indicated by 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.

IT IS SO ORDERED.

This the 12th day of September, 2022.



David F Sutton
Administrative Law Judge

CERTIFICATE OF SERVICE

The undersigned certifies that, on the date shown below, the Office of Administrative Hearings sent the foregoing document to the persons named below at the addresses shown below, by electronic service as defined in 26 NCAC 03 .0501(4), or by placing a copy thereof, enclosed in a wrapper addressed to the person to be served, into the custody of the North Carolina Mail Service Center who subsequently will place the foregoing document into an official depository of the United States Postal Service.

Nathan A. Kottkamp
Williams Mullen
nkottkamp@williamsmullen.com
Attorney for Petitioner

Joel L. Johnson
Williams Mullen
jljohnson@williamsmullen.com
Attorney for Petitioner

William Foster Maddrey
NC DOJ
wmaddrey@ncdoj.gov
Attorney for Respondent

This the 12th day of September, 2022.



Viktoriya Tsuprenko
Paralegal
N. C. Office of Administrative Hearings
1711 New Hope Church Road
Raleigh, NC 27609-6285
Phone: 984-236-1850