

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE OFFICE OF
ADMINISTRATIVE HEARINGS
21 DHR 02993, 21 DHR 05122, 22 DHR 00915

<p>The Emmanuel Homes IV Eloise Dowtin Petitioner,</p> <p>v.</p> <p>NC Department of Health and Human Services, Division of Health Service Regulation Respondent.</p>	<p>FINAL DECISION</p>
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THIS MATTER was heard by Administrative Law Judge Stacey Bice Bawtinhimer on August 29-30, 2022, at the Office of Administrative Hearings in Raleigh, North Carolina. After considering a hearing on the merits held on the above-mentioned dates, arguments from counsel for both Parties, all documents in the record, including the Proposed Decisions, as well as all stipulations, admissions, officially noticed facts, and exhibits, the Undersigned issues the following Final Decision.

PROTECTIVE ORDER

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

APPEARANCES

For Petitioner: Philip A. Collins
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For Respondent: Bethany A. Burgon
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ISSUES

I. Type A1 Administrative Penalties: 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 1, 2021, notified Petitioner that it was upholding its June 16, 2021 imposition of three Type A1 Administrative penalties in the aggregate amount of \$6,000.00 against Petitioner.

II. Suspension of Admissions: 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 1, 2021, notified Petitioner that its June 16, 2021 Suspension of Admissions was upheld.

III. Revocation of License: 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 1, 2021, notified Petitioner that its June 16, 2021 Intent to Revoke Petitioner's license and Suspension of Admissions was upheld.

IV. Denial of Renewal of Licensure: 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 February 9, 2022, notified Petitioner that it was denying Petitioner's application for Renewal of Licensure.

BURDEN OF PROOF

The Parties acknowledged at the beginning of the hearing that Respondent bears the burden of proof by clear and convincing evidence that the "Type A1 Administrative Penalties" were properly assessed. N.C. Gen. Stat. § 150B-25.1(b). Petitioner has the burden to prove the facts pertaining to the issues of Suspension of Admissions, Revocation of License, and Denial of Renewal of Licensure by a preponderance of the evidence. N.C. Gen. Stat. § 150B-25.1(a). Because the Type A1 violations form the bases for the Suspension of Admissions, the Facility's License Revocation, and Denial of Renewal of its license, the validity of the Type A1 violations logically will be considered first in this decision.

STATUTES, RULES, AND REGULATIONS

(Including But Not Limited to)

N.C. Gen. Stat. §§ 122C-2, 122C-3, 122C-23, 122C-24, 122C-24.1, 122C-25, 122C-27
42 C.F.R. § 488.806; 42 C.F.R. § 488.825
10A NCAC 27C .0102; 10A NCAC 27D .0304, .5602
10A NCAC 27G .0201, .0202, .0203, .0208, .0209(e), .0303, .5601, 5603
10A NCAC 27E .0107; 10A NCAC 27F .0105

WITNESSES

For Petitioner: ***Case in Chief Witnesses***

Sha’Brittany Downtin, Chief Operations Officer (“COO” & former “QP”)
William Cook, Former Client
Carolyn Coleman, Former Employee
Teresa Redmond, Former Trainee
Robert “Bobby” Williams, Contract Maintenance Man
Eloise Downtin, RN, Executive Director (“CEO” & “Licensee”)

Rebuttal Witness

Sha’Brittany Downtin

For Respondent: ***Case in Chief Witnesses***

Keisha Douglas, Facility Compliance Consultant/Co-Surveyor
Wendy Boone, DHHS Assistant Section Chief

EXHIBITS¹ AND TRANSCRIPTS

For Petitioner (Pet’r Ex.): 2, 3, 4, 5 (including redactions on pages 45 and 47 of Resp’t Ex. E) & 6 (including redactions on pages 45 and 47 of Resp’t Ex. R)²

For Respondent³ (Resp’t Ex.): C, D, E (hearsay partially redacted⁴), F, G, H, I, J, K, M, N, O, P, Q, R (hearsay partially redacted), S, T, U, V, W, X, Y

Transcripts (“T page # : line #”): Transcript volumes 1 (pp. 1-253) and 2 (pp. 254-338) were received into evidence on October 11, 2022.

¹ Page numbers in the exhibits are listed by bates stamp if available; otherwise, by numerical page number starting from the first page of the actual exhibit excluding any separate exhibit number reference page.

² In two separate entries, on November 14, 2022, Petitioner filed redacted versions of Respondent’s Exhibits E (Statement of Deficiencies) and R (Statement of Deficiencies including Facility Plan of Correction). Petitioner’s redacted version of Resp’t Ex. E included additional redactions but excluded redactions of Respondent’s found on pp 45 & 72 of Resp’t Exs. E and R. This document is received as Petitioner’s Exhibit 5. In addition, Petitioner’s redacted version of Resp’t Ex. R included additional redactions but excluded redactions of Respondent’s found on pp 45 & 72 of Resp’t Ex. R. This document is received as Petitioner’s Exhibit 6.

³ Respondent’s Exhibits A & B were not filed in the record; however, official notice was taken of the applicable rules and statutes contained therein.

⁴ The unredacted hearsay statements in Respondent’s Exhibits E and R and Petitioner’s Exhibits 5 and 6 were not considered in rendering this Final Decision.

OFFICIALLY NOTICED FACTS

After an opportunity to be heard, and without objection from either Party, the following fact was officially noticed:

Guidance for Smaller Residential Settings Regarding Visitation, Communal Dining, Group and Outside Activities, issued on June 26, 2020, which can be found at the following link: <https://covid19.ncdhhs.gov/media/418/open>.

PROCEDURAL HISTORY

1. On July 6, 2021, Petitioner filed a Petition for Contested Case (“Petition”) in the Office of Administrative Hearings (“OAH”), which was assigned Case Number 21 DHR 02993, pursuant to which it appealed Respondent’s assessment of \$6,000.00 in three separate \$2,000.00 A1 Administrative penalties assessed against Petitioner for alleged rule violations in the operation of the Facility.

2. Case Number 21 DHR 02993 was originally assigned to Administrative Law Judge Michael C. Byrne. This case was dismissed with prejudice on September 27, 2021 because Petitioner failed to file a Prehearing Statement. It was subsequently reopened on June 29, 2022.

3. On November 30, 2021, Petitioner filed a second Petition, assigned case number 21 DHR 05122, which appealed Respondent’s issuance of a Notice of Revocation of Petitioner’s license to operate the Facility.

4. On March 10, 2022, Petitioner filed a third Petition, which was assigned case number 22 DHR 00915, which appealed Respondent’s Denial of License Renewal.

5. On April 25, 2022, Petitioner, through legal counsel, filed a Motion for Relief from Judge Byrne’s Order dismissing case file number 21 DHR 02993 along with an Affidavit of Eloise Downtin. Respondent responded on May 16, 2022.

6. After these Petitions were filed, on April 28, 2022, this Tribunal consolidated cases 21 DHR 05122 and 22 DHR 00915 based upon the Parties’ stipulation of consolidation filed on April 22, 2022.

7. On June 29, 2022, Judge Byrne issued an Order granting Petitioner’s Rule 60(b) motion in 21 DHR 02993 and vacating the Final Decision Order of Dismissal. The original petition was reopened on June 29, 2022.

8. After its reopening, case 21 DHR 05122 was consolidated with cases 21 DHR 02993 and 22 DHR 00915 by Joint Stipulation of the Parties filed on June 30, 2022.

9. After several reassignments, the consolidated cases were continued twice and ultimately reassigned to the Undersigned. A hearing was held on August 29 and 30, 2022.

10. After the hearing, the Parties filed their respective exhibits on September 9, 2022.
11. At the hearing, the Tribunal ruled that Respondent's Exhibit E "Statement of Deficiencies" and Exhibit R "Facility Plan of Correction" contained inadmissible hearsay statements. The Respondent was directed to redact all hearsay within the documents which did not fall under a hearsay within hearsay exception per Rule 805 of the Rules of Evidence. T pp 39:12-22; 142:3-13. Respondent did as requested but inadvertently failed to redact some of the hearsay in Respondent's Exhibits E and R.
12. As a result, Petitioner submitted its own redacted versions of these exhibits attached to Petitioner's Proposed Decision. For ease of reference, Petitioner's redacted versions were labeled Petitioner's Exhibit 5 and 6.
13. The Tribunal juxtaposed both Parties' proposed redactions in Respondent's Exhibits E and R. Petitioner's Exhibits 5 and 6 redacted all hearsay except for hearsay contained in pages 45 and 72 of Respondent's Exhibits E and R. Petitioner's Exhibits 5 and 6, combined with Respondent's redactions found on pages 45 and 72 of Respondent's Exhibits E and R, was considered in the drafting of this Final Decision.
14. Two volumes of transcripts were received on November 11, 2022.
15. Both Parties timely submitted Proposed Final Decisions on November 14, 2022.
16. Because the effect of the COVID-19 pandemic was raised by Petitioners and purportedly considered by Respondent, a Request for Response to Official Notice of DHHS Secretarial Orders and Guidance Regarding COVID-19 Restrictions for Residential Facilities was issued on November 16, 2021. As required by N.C. Gen. Stat. § 150B-30, the Parties were requested to file any objections, evidence, or arguments to dispute the above, or stating a lack of objections or argument thereto, on or before November 23, 2022. Respondent objected to official notice being taken of Secretarial Orders 1, 3, 5, and 6, but not, the Order entitled - "*Guidance for Smaller Residential Settings Regarding Visitation, Communal Dining, Group and Outside Activities*" ("*Guidance for Smaller Residential Settings*"). Petitioner filed no objection, however, because of Respondent's objections, only the *Guidance for Smaller Residential Settings* is officially noticed.
17. Thereafter, the record was closed, and the Final Decision was issued on December 7, 2022.

FINDINGS OF FACT

BASED UPON careful consideration of the sworn testimony of the witnesses presented at the hearing, the documents, exhibits received and admitted into evidence, Respondent and Petitioner's Proposed Decisions, and the entire record in this proceeding, the undersigned Administrative Law Judge makes the following Findings of Fact. In making these Findings of Fact, the Undersigned has weighed the evidence presented 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 witnesses, 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.

By necessity due to the nature of the case, the Finding of Facts in this decision contain statutory and regulatory references. The statute and rule violations must be comingled with the facts for context.

Therefore, to the extent that the foregoing Findings of Fact contain conclusions of law, or that these Conclusions of Law are findings of fact, they are intended to be considered without regard to their given labels. *Charlotte v. Heath*, 226 N.C. 750, 755, 40 S.E.2d 600, 604 (1946); *Peters v. Pennington*, 210 N.C. App. 1, 15, 707 S.E.2d 724, 735 (2011); *Warren v. Dep't of Crime Control*, 221 N.C. App. 376, 377, 726 S.E.2d 920, 923, *disc. rev. den.*, 366 N.C. 408, 735 S.E.2d 175 (2012); *Watlington v Rockingham Co. Department of Social Services*, COA17-1176 (2 October 2018).

PARTIES

Petitioner

1. The Emmanuel Home IV is licensed as a .5600A facility License Number MHL-092-654 and located at 303 Aqua Marine Lane, Knightdale, Wake County, North Carolina (the “Facility”). Resp’t Ex. C. The Facility is licensed for six clients. Resp’t Ex. C. At the time of the June 11, 2021 survey, five clients resided at the Facility. Resp’t Ex. F. The purpose of a .5600A facility is to provide “residential services to individuals in a home environment where the primary goal of these services is the care, habilitation, or rehabilitation of individuals who have a mental illness, a developmental disability or disabilities, or a substance abuse disorder, and who require supervision when in the residence.” 10A NCAC 27G .5601.

2. Eloise Dowtin is the owner of the Facility. T pp 264-283. Respondent issued a license to operate the Facility to Eloise Dowtin, and she is the named licensee (“Licensee” or “CEO” or collectively with the Facility the “Petitioner”) for the Facility. Resp’t Exs. C & D; T p 283. The licensee of a facility is responsible for the overall operation of the facility. N.C. Gen. Stat. §§ 122C-23; 122C-24.

3. In addition to being the owner and Licensee of the Facility, Eloise Dowtin is one of the “Qualified Professionals” managing the Facility. Ms. Dowtin is a Registered Nurse and holds a bachelor’s degree in nursing from North Carolina Central University. T p 259. She is certified as a medication aide trainer and brain injury specialist.

4. From 1996 to the present, Eloise Dowtin has been the Executive Director of ED Emmanuel Homes, LLC, a company that operates assisted living/group homes for individuals with mental health and/or substance abuse issues. The five Clients at the Facility during the Survey period all had mental health, medical, or substance abuse issues or a combination of these issues.

See Resp't Ex. E. All of them had been residing at the Facility from 4 to 8 years⁵ prior to the Survey and thus their treatment needs were well known to the Staff. Unlike other facilities, this Facility accepts high risk clients such as sex offenders, federal probationers, and individuals with severe disabilities that other facilities will not admit. T pp 159:21-24; 160:1-4.

5. Since 2004, the Facility has been in operation. Prior to these the penalties and adverse actions, it has only been assessed one penalty, for a racial fight between Clients, by Respondent and that penalty ultimately was rescinded. T pp 161:9-162:18. Since Eloise Dowtin opened her first group home in 2001, as Owner/Licensee she has only been assessed that penalty.

6. Since 2001, when Eloise Dowtin began operating mental health group homes, each of her facilities would have been inspected annually. N.C. Gen. Stat. § 122C-25(a). Likewise, since 2004, Respondent has inspected this Facility annually since its initial licensure without finding any deficiencies.

Respondent

7. The North Carolina Department of Health and Human Services, Division of Health Service Regulation, Mental Health Licensure and Certification Section (the "Agency" or "Respondent" or the "Department") is an agency of the State of North Carolina responsible for the licensure and regulation of mental health facilities in the State.

8. The Mental Health Licensure and Certification Section of the Division of Health Service Regulation inspects, licenses, and regulates mental health facilities in North Carolina pursuant to Chapter 122C of the North Carolina General Statutes.

9. Specifically, Respondent is tasked with regulating, inspecting, and licensing mental health facilities in North Carolina in keeping with the State of North Carolina's stated policy "to assist individuals with needs for mental health, developmental disabilities, and substance abuse services in ways consistent with the dignity, rights, and responsibilities of all North Carolina citizens . . ." and "to provide mental health, developmental disabilities, and substance abuse services through a delivery system designed to meet the needs of clients in the least restrictive, therapeutically most appropriate setting available and to maximize their quality of life." N.C. Gen. Stat. § 122C-2.

HISTORICAL FACTS PRIOR TO THE SURVEY⁶

The COVID-19 Pandemic

⁵ Admission dates: Client # 1 – 01/06/2014; Client # 2 – 10/18/14; Client # 3 – 09/06/2017; Client # 4 – 06/01/2014; and Client # 5 – 02/20/2013. Resp't Ex. E, pp. 13-14.

⁶ The Statement of Deficiencies (Resp't Ex. E) documents the information obtained during the Survey and the deficiencies cited during the Survey. The document is 76 pages, single spaced, at 8-10 point font. Each page is divided into two columns. The left column are the deficiencies, and the right column, adjacent to each deficiency, is for Petitioner to complete and explain its Plan of Correction (Resp't Ex. R). For ease of reference, Resp't Ex. R or Pet'r Ex. 6, which contain both the Statement of Deficiencies and Plan of Correction, are most frequently cited.

10. Because of the COVID-19 pandemic, long term care facilities like Petitioner's with clients in the high-risk category for serious complications from COVID-19 had restricted visitation and restricted outside activities for residents from June 26, 2020 to March 10, 2021.⁷

11. From December of 2020 through March of 2021, five staff members who worked for ED Emmanuel Homes, LLC, contracted COVID-19 and were unable to work for significant periods. Eloise Dowtin's daughter, Sha'Brittany Dowtin, office manager, Chief Operations Officer ("COO") and former Qualified Professional ("QP") of ED Emmanuel Homes, LLC, was out for this entire period due to complications from COVID-19.

12. Also due to COVID-19, the Facility had staffing problems in the beginning of 2021. Everyone in the office contracted COVID except for Eloise Dowtin. T p 163:5-13. Sha'Brittany Dowtin, who plays a significant role as COO and formerly as a QP in the operation of the Facility, contracted COVID in December of 2020, was hospitalized, and did not return to work full time until the end of July 2021. T pp 163:14-17; 164:1-6; 216:5-12; T p 329:16-330:2.

13. The staff shortage imposed a significant hardship on Petitioner's ability to operate and manage the Facility. With respect to COVID's impact on personnel and training requirements, a Surveyor noted that: "[b]etween January-March 2021, she [the COO] and most of the office staff were not available to perform duties." Pet'r Ex. 5, p 11. The Survey also noted that COVID affected the staff's ability to respond to document inquiries during the Survey stating: "[s]taff had been busy, completed several different jobs and may not have had time during the course of this survey to look for the personnel records." Pet'r Ex. 5, p 12; *see also* Pet'r Ex. 6, p 73.

14. The credible testimonies of the CEO and COO evidenced that COVID-19 had significantly impacted their abilities to respond during the Survey and provide documentation requested by the Surveyors with respect to personnel records and quarterly Client financial accountings. On June 25, 2021, Petitioner provided supporting documentation on behalf of its Plan of Correction and acknowledged that Petitioner was "striving to get back into compliance after a hectic life-changing past year in 2020." Pet'r Ex. 2, bate stamp 0003.

15. In addition, the Survey documented the QP's report that: "[s]ince (coronavirus) COVID-19, none of the clients had unsupervised time – When the clients went to work, the facility's driver transported them." Pet'r Ex. 5, p 47. This corroborates the COO's and Licensee's testimonies that prior to the COVID-19 pandemic, all clients had some unsupervised time, even the registered sex offender Client #5, and that their treatment plans were changed to "no unsupervised time" during the pandemic for their protection from exposure to the coronavirus. T pp 177:23-178:14. This change in supervision is consistent with instructions for residential facilities issued by the Secretary of DHHS.

16. According to Wendy Boone, Respondent took into account the impact of the COVID-19 pandemic when assessing penalties and adverse actions against the Petitioner. T p 141:12-20 (acknowledging that other facilities had staffing shortages). Respondent produced no evidence of this assertion, and the severity of Respondent's adverse actions suggest otherwise.

⁷ See NCDHHS "Guidance for Smaller Residential Settings Regarding Visitation, Communal Dining, Group and Outside Activities" (June 26, 2020) <https://covid19.ncdhhs.gov/media/418/open> (last visited 11/28/2022).

PRELIMINARY MATTERS

Complaint and Annual Survey

17. Respondent conducts three types of surveys of licensed mental health facilities: annual, follow-up, and complaint. N.C. Gen. Stat. § 122C-25; T pp 20-21. This Survey, which began as a complaint investigation, became a combination complaint investigation and annual survey.

18. Former Facility employee Gabriel Robertson was identified at the hearing as the initial complainant and was the primary contact for the Surveyor. T p 281:1-18. Mr. Robertson worked as a Direct Care Staff member at the Facility. At the time, Mr. Robertson had some legal issues with Eloise Downton about his pay. In addition to Mr. Robertson, Mr. Robertson's girlfriend, the girlfriend's boss, and Client #1 filed complaints which triggered the Survey. T pp 233:21-234:1-6 (responding to cross-examination questions). Mr. Robertson had "pulled them [the Clients] into a room and told them [the Clients] what to say" to the Surveyor. T p 233:15-17.

19. In Respondent's "Client and Staff Identifier Worksheet" ("Identifier Worksheet"), Robertson is listed as Staff #4.⁸ On the Identifier Worksheet, his phone number, the Facility number, and the phone number of the Sonja Chappell ("QP") are the only phone numbers listed. Resp't Ex. F, p 2 or bate stamp 00003. Mr. Robertson was one of the first staff members interviewed by Surveyor Vaughn-Rhodes.

20. The exact substance of the complaints is unknown but what is known are the interview topics the Surveyor asked Mr. Robertson the second day of the Survey. After Surveyor Vaughn-Rhodes⁹ reviewed the Clients' records on April 22, 2021, Mr. Robertson was interviewed on April 23, 2021 about the off-site work, alcohol incident, out-of-date food, supervision of Clients, and Client #1's self-administration of insulin. Pet'r Ex. 5, pp 13-14, 20-21, 51 (review of client records 4/22/2021); 15, 16, 22, 35, 46 (interviews with Robertson). The CEO and QP were not interviewed until May 10-12, 2021 about these matters. Pet'r Ex. 5, pp 16-17.

21. Soon after the Survey began, Mr. Robertson stopped working for the Facility. Prior to his departure, Mr. Robertson was confronted by the COO about the out-of-date food cans left under the sink and the defective Sharps container. Mr. Robertson verbally threatened the COO. T p 281:7-13 (corroborating T of CEO about listening on the phone and threat made by Robertson to COO). After that confrontation, Mr. Robertson left the Facility but still had a pending legal matter with the Owner/Licensee. T p 281:14-15.

Complaint Substantiation

⁸ Gabriel Robertson's name is misspelled as "Staff #4 Gabe Richardson" on the Client and Staff Identifier List. See Resp't Ex. F, pp 4 & 6, bate stamps 00005 & 00007.

⁹ Surveyor India Vaughn-Rhodes interviewed Mr. Robertson on April 23, 2021. Ms. Douglas did not join the investigation until April 30, 2017.

22. According to the Initial Comments in the Statement of Deficiencies, the complaint investigation was substantiated (Resp't Ex. E, p 1, ¶ 1, 2nd sentence) but no information was provided to Petitioner nor this Tribunal about the complaint allegations or reasons for the complaint's substantiation. Although the identity of a complainant is supposed to be protected, this Survey appears to have been triggered by "bad faith" allegations on the part of a disgruntled employee and his compadres. Petitioner's inability to examine documentation of the complaint raises concerns about Petitioner's access to due process and ability to adequately defend Respondent's findings of "serious neglect" and "serious exploitation." This complaint resulted in severe consequences for Petitioner and ultimately revocation of the Facility's license.

Respondent's "Contributed to Serious Neglect of Client" Standard

23. In its Proposed Final Decision, Respondent repeatedly asserts that its adverse actions were necessary because the Facility's rule violations "contributed to the 'serious neglect' of clients." Res. Pro. Fin. Dec., Findings of Fact ¶¶ 23, 28, 35, 40, 49, 57, 65, 71, 77, 81, 89, 104, 124, 129, 131; Conclusions of Law ¶¶ 16 & 18. Respondent also contends that the offsite work situation resulted in "serious exploitation of the clients." *Id.* p 24 ¶ 14.

24. None of Respondent's notification of adverse agency actions used the phrases "contributed to the 'serious neglect' of clients" or resulted in "serious exploitation of the clients." Instead, the notifications state: administrative penalties were assessed for Petitioner's "rule violations" (Resp't Ex. T); admissions were suspended because Petitioner's rule deficiencies were "detrimental to the health and safety of the clients" (Resp't Ex. S); licensure was intended to be revoked because Petitioner's rule violations "endanger the health, safety, and welfare of clients" (Resp't Ex. V); Petitioner's license was revoked because of rule deficiencies (Resp't Ex. W).

25. Moreover, the standards of "serious neglect" or "serious exploitation" have no statutory authority. A Type A1 violation includes the phrase "death or serious physical injury." N.C. Gen. Stat. § 122C-24.1(a)(1). Negligence acts may cause "serious physical injury" but does not constitute neglect or abuse. For example, a resident may be seriously physically injured from a slip and fall accident which was neither caused by staff abuse or neglect. However, neither "serious physical injury," "serious neglect," nor "serious exploitation" is defined in the statute or rules. "Neglect" and "exploitation are defined in 10A NCAC 27C .0102(b)(9)&(17). While a physical injury may be serious or mild, there are no varying degrees of neglect or exploitation.

LICENSURE SURVEY

26. During a survey, a Facility Compliance Consultant (a "Surveyor") documents the investigation and compiles various records, including, but not limited to, surveyor worksheets, interview notes, photographs, client records, emails, correspondence, and other documents. T pp 20-21. These materials are stored in a Non-Disclosure File, which is maintained by Respondent as a record of the survey. T pp 22 & 110. The Non-Disclosure File includes all materials collected during a survey. T pp 22 & 110. Some of the documents from the Non-Disclosure File were admitted as exhibits at the hearing. However, none of the original interview notes were included with the Non-Disclosure File produced at the hearing. Therefore, it is impossible to compare the Surveyors' original interview notes with the typed versions in the Statement of Deficiencies to ensure the accuracy of the transposition.

Surveyors

27. On April 22, 2021, India Vaughn-Rhodes initiated the investigation. Later on April 30, 2021, Ms. Douglas was assigned to assist Ms. Vaughn-Rhodes with the Survey. Resp't Ex. F, p 1, bate stamp 0002. Notably, only Ms. Douglas testified at the hearing. Ms. Vaughn-Rhodes has since retired and did not testify. T p 21.

28. It is not clear from the Survey documentation or the testimony of Ms. Douglas¹⁰ which portions she conducted versus those completed by Ms. Vaughn-Rhodes. Based on Ms. Douglas' testimony, it appears that Ms. Vaughn-Rhodes conducted the majority of the Survey and "briefed [Ms. Douglas] on her findings." T p 21:17-20. When asked how the work of the Survey was divided: Ms. Douglas stated that "[w]e collaborated with each other, and she briefed me on her findings. I came in at a later date, and she [Vaughn-Rhodes]—we communicated her findings before I arrived." T p 21:19-21.

29. Ms. Douglas' testimony corroborates the testimonies of Eloise Dowtin and the COO that India Vaughn-Rhodes was the primary surveyor and the contact person. According to them, Surveyor Vaughn-Rhodes conducted her survey unlike other prior inspections. Surveyor Vaughn-Rhodes never personally met with the supervising QP or COO. T pp 162:19-163:4 (COO testifying that QP was told to remain in her vehicle and not go in the home; Surveyor Vaughn-Rhodes not showing up for scheduled appointments with COO).

30. Since this Survey initiated as a complaint survey, the Surveyor's deviation from the standard protocol is understandable. The Surveyor would want to exclude the supervising QP and COO when interviewing Clients and other Staff about potential exploitation and neglect of Clients. Surveyor Vaughn-Rhodes interviewed the Clients and Staff about Client #1's self-administering insulin on April 22, 2021; the alleged exploitation of Clients during off-site work and Client #5's alcohol incident on April 23, 2021. Pet'r Ex. 5, pp 15-16, 20-22, 35. The QP and CEO were interviewed about these matters over two weeks later on May 10-12, 2021. Pet'r Ex. 5, pp 16, 17, 35-36.

Survey Process

31. Generally during a survey, a surveyor is supposed to review Client and Facility records, conduct observations, and conduct interviews. T pp 20-21 (T of Douglas). During the course of a survey, if surveyors believe they have discovered a violation that may rise above the level of a standard deficiency as defined by statute, they contact their immediate supervisor, the team leader, to discuss. T p 114 (T of Boone). If it appears that there is an issue that rises to more than a standard deficiency, the team leader then contacts the branch manager. *Id.* The team leader and branch manager confer with the survey staff and determine whether the violation rises to the

¹⁰ The evidence did not show, nor did Ms. Douglas testify, as stated in Respondent's Proposed Final Decision that: "[d]uring the survey, [Ms. Douglas] took contemporaneous notes of her interviews and documented her reviews of records in the non-disclosure file (T1 p 22)." Resp't Pro. Fin. Dec. p 5, ¶ 20.

level of a Type A, Type A1, or a Type B violation based on its scope and severity. *Id.* Although Ms. Boone testified that this was the normal course of action during a survey, there was no evidence this occurred in this Survey.

32. If Respondent issues a Type A, Type A1, or Type B Violation based on the findings from the survey, Respondent orally informs a provider of the violation immediately as required by N.C. Gen. Stat. § 122C-24.1 during an “Exit Conference.” T p 115-116 (T of Boone). Respondent then requests a Plan of Protection from the provider pursuant to N.C. Gen. Stat. § 122C-24.1. T p 116 (T of Boone). An Exit Conference was held in this case on May 24, 2021 and Petitioner provided a Plan of Protection to the Surveyors at that conference.

Exit Conference – May 24, 2021

33. On May 24, 2021, an “Exit Conference” was held and the “Exit Participants” were both Surveyors, Eloise Downtin (CEO/License), and Sonja Chappell (QP). Resp’t Ex. F, pp 3 & 5, bates stamps 0004 & 0006.

34. According to the “Rule Violation and Client/Staff Identifier List,” the Surveyors found three Type A1 violations, tagged as V512, V291, and V289 along with the individual rule violations tagged as: V105, V106, V108, V109, V115, V118, V536, V537, V542, and V736. Resp’t Ex. F, bates stamps 00004-00007. During the Exit Conference, Petitioner offered two Plans of Protection and later an amended Plan on June 9, 2021 after a new deficiency was cited (incident reporting). Resp’t Ex. Q.

35. After the Exit Conference, the Licensee was to email additional documentation on May 25, 2021 to the Surveyors. The Survey exit date noted on the form was May 26, 2021. Resp’t Ex. F, pp 3 & 5, bates stamps 0004 & 0006.

Assessment of Administrative Penalties – June 8, 2021

36. After the “Exit Conference” on June 8, 2021, the Mental Health Licensure and Certification Quality Improvement Team determined the penalty amounts based on Respondent’s Penalty Matrix. Resp’t Ex. U, bates stamps 00011, 00013, & 00015. Respondent assessed a \$2,000.00 penalty for V512 (exploitation/harm of Clients #2, #3, & #5); \$2,000 penalty for V291-Operations (Client #5’s CPAP machine and nonreporting incident); and \$2,000 penalty for V289-Scope (combination of V512, V291, and all other 10 tagged rule violations). Based on Respondent’s penalty distribution of \$4,000.00 for both deficiencies tags V512 and V291, it is clear that the alleged exploitation of Clients #2, #3, & #5, along with two issues regarding Client #5, were the focus of the Survey. The other ten (10) individual rule deficiencies appear incidental since they were cumulatively fined \$2,000.00. The Penalty Matrix will be discussed later after a review of the various rule citations.

Survey Exit Date

37. The Survey began on April 22, 2021. Resp't Ex. F, p 1, bate stamp 0002. The Exit Date reported on Respondent's "Rule Violation and Client/Staff Identified List" is May 26, 2021. Resp't Ex. F, p 3 & 5, bate stamps 0004 & 0006.

38. Likewise, Respondent's "Matrix for Determination Penalty Amounts" ("Penalty Matrix") listed the Survey's Exit Date as May 26, 2021, as did the "Client and Staff Identifier Worksheet." Resp Ex U, bate stamps 00010, 00012, & 00014.

39. According to Respondent, the Survey Exit Date is June 11, 2021. T p 21: 22-24; Resp't Ex. E, p 1. The findings of the Survey were recorded in a "Statement of Deficiencies" ("Statement") and the Statement shows the Exit Date as June 11, 2021. Resp't Ex. E, p 1. All of the adverse agency notices indicated that the Survey was completed on June 11, 2021, and that was the "Exit Date." Resp't Exs. S, p 1; T, p 1; V, p 1; W, p 1; and X p 1.

40. The Exit Date is significant because the 23-day deadline for correcting citations begins to run after the Exit Date. If a facility fails to correct a Type A1 violation within 23 days, civil penalties up to \$1,000.00 per day can be assessed for each day the violation continues beyond the time specified for correction. N.C. Gen. Stat. § 122C-24.1(a)(1)(c). Respondent or its representative determine whether the deficiencies have been corrected. *Id.* In this case, neither Respondent nor its representative acknowledged any acceptable corrections of Petitioner's deficiencies.

TYPE A1 VIOLATIONS

41. Based on the findings documented in the Statement of Deficiencies, Respondent found three Type A1 Violations of the laws and rules governing the operation of mental health facilities. Resp't Ex. E. The three Type A1 Violations were cited in the following three rule areas:

1. Tag 512¹¹ Violation – 10A NCAC 27D .0304 – Harm, Abuse, Neglect, and Exploitation,
2. Tag 291 Collective Violations – 10A NCAC 27G .5603 – Operations; and
3. Tag 289 Collective Violations – 10A NCAC 27G .5601 – Scope

(Resp't Ex. E).

42. The Statement of Deficiencies gives each set of violations a "Tag" number as indicated above.

TAG 512

Type A1 Violation of 10A NCAC 27D .0304 – Protection from Harm, Abuse, Neglect, and Exploitation

¹¹ This identifier and all other numbers labeled as such are the ID Prefix Tags referenced in the Statement of Deficiencies and Facility's Plan of Correction.

43. The most serious alleged rule violation here is the allegation that Petitioner “exploited” its Clients by having them work off-site with its Contract Maintenance Man. *See* Pet’r Ex. 5, pp 57-64. Because of the gravity of this claim and the fact that it permeates the entire case, it will be addressed first. Without the exploitation determination, Respondent would have had significant difficulty justifying its severe sanctions against Petitioner. Giving due regard to the expertise of Respondent, and based on reliable and substantial evidence, as explained below, the Undersigned finds no merit to Respondent’s accusation that Petitioner exploited and/or neglected its Clients.

44. Respondent cited Petitioner with a Type A1 Violation based on its finding that the CEO/Licensee “exploited” three clients at the Facility by having them work outside the Facility at the CEO’s house and other locations but allegedly only paid them \$20.00 for their work. T pp 92:15-97:5.

45. “Exploitation” is defined as “the use of a client’s person or property for another’s profit or advantage or breach of a fiduciary relationship through improper use of a client’s person or property including situations where an individual obtains money, property, or services from a client from undue influence, harassment, deception, or fraud.” 10 NCAC 27C .0102.

46. Because there were no records or documents to review, in making this determination, Ms. Vaughn-Rhodes had to rely solely on interviews. Co-Surveyor Douglas did not testify about her involvement, if any, in this interview process.

Investigation Process

47. Ms. Vaughn-Rhodes interviewed three clients (Clients #2, #3, and #5), Eloise Dowtin (CEO/Licensee), Sha’Brittany Dowtin (COO), Sonya Chappell (QP), Robert Louis Williams (Contract Maintenance Man), Staff #4 (Robertson) and #6 along with some unnamed individuals who were identified as the DHSR Construction Supervisor, and Local Groundwater Protection & Wells Manager. Pet’r Ex. 5, pp 14-16, 46-47, 49-50, 57-64; Resp’t Ex. E p 45.

48. Although the credibility of the Clients’ statements during the interview process should have been suspect even to Surveyor Vaughn-Rhodes, as they all were diagnosed with serious mental illnesses,¹² she clearly believed the Clients’ accounts over the statements of the CEO, COO, QP, and maintenance man. Also, the unnamed Construction Supervisor and Local Groundwater Protection Manager would have had no personal knowledge of the types of work the Clients purportedly did. Despite this, based on the information obtained from the Clients and these unrelated individuals, Ms. Vaughn-Rhodes concluded that the Clients were underpaid, worked in dangerous conditions, and were therefore exploited. Of these interviewees, only the CEO/Licensee, the COO, and Mr. Williams testified at the hearing. Because none of the other individuals testified at the hearing, their statements were redacted from the Statement of Deficiencies and Plan of Correction as inadmissible hearsay.

¹² Client #2 diagnosed with schizoaffective disorder and other medical conditions; Client #3 diagnosed with bipolar and antisocial personality disorder as well as other medical conditions; and Client #5 diagnosed with manic schizophrenia and other medical conditions. Resp’t Ex. E p 58.

49. The reliability of Ms. Vaughn-Rhodes' interview notes is also suspect because she misrepresented actions of and misquoted statements made by Mr. Williams. Mr. Williams denied saying that he "had seen the clients partying, drinking, eating the food at the house and laying around on the ground" as she reported. Pet'r Ex. 5, p 61. Moreover, Ms. Vaughn-Rhodes "twisted what he said" and he did not "end[] the interview by refusing to answer any more questions" as she wrote. T p 251:2-15. Instead, Mr. Williams credibly testified that during the Survey an employee of Respondent (Ms. Vaughn-Rhodes) called him while he was working on the electricity at a friend's house in Kinston. He told her it was the wrong time to call but she insisted on talking even though he was in the middle of an electrical job, so he needed to hang up the phone. T pp 250:19-251:7. No one from the agency ever called him back. T p 252:6-10. Ms. Vaughn-Rhodes did not testify to rehabilitate her version of this interchange.

Description of Off-Site Work

50. The credible description of the off-site work came from Mr. Williams and Eloise Dowtin. Clients #2, #3, and #5 occasionally accompanied Mr. Williams when he did maintenance work for ED Emmanuel Homes, LLC. T p 174:9-15. Mr. Williams is seventy-four (74) years old and a retired electrician. The Clients asked to work with Mr. Williams because they wanted money to buy cigarettes¹³. T p 249:15-16 (T of CEO about her refusal to buy them cigarettes). Mr. Williams often cooked for them when they did yard work. T p 251:20-23. These off-site work excursions were some of the only times that the Clients could leave the Facility or interact outside because of the COVID restrictions.

51. The type of tasks the Clients engaged in with Mr. Williams involved sweeping the floor, changing light bulbs, taking the trash out, gardening, and handing Mr. Williams tools. T pp 174:1-18; 249:3-15. The Clients would only be with him for an hour or two and no more. T p 250:1-4. The Clients did not engage in strenuous labor and given their mental and physical disabilities were unable to do much work. T p 276:4-6. Because of his health problems, most of the time Client #5 would lie on the ground and smoke cigarettes. T p 177:13-19.

52. The Clients would also engage in tasks such as sweeping the floor or emptying the trash at Eloise Dowtin's office. T p 306:2-4. Sometimes they would come to her home, rake leaves, sweep the floor, and take the trash out to the front. T p 306:2-4. Most of the time they just sat around the grill or laid on the deck. T p 306:13-15. Because of his physical health problems, Client #3 never did any work but was still paid. T p 275:8-15.

53. Eloise Dowtin did not profit or take advantage of the Clients. Moreover, she did not breach her fiduciary relationship with the Clients through the use of their services. Instead, Ms. Dowtin paid them for the time spent with Mr. Williams whether they did any work or not. T p 277:12-15. Though she admitted that she did not document the money the Clients received for their work, Ms. Dowtin credibly testified that she paid them between \$20 and \$35 for a time period of two to three hours whether or not they did any actual work. T p 306:10-15.

54. Before the Survey began, the Clients were not asking for outside work because they had received their stimulus checks from the CARE Act which they used to buy their cigarettes.

¹³ Smoking is prohibited inside facilities licensed under Chapter 122C. N.C. Gen. Stat. § 122C-6.

Because of the Survey, Clients are no longer allowed to do odd jobs for Ms. Dowtin or Mr. Williams. T p 278:10-14.

55. 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. Respondent failed to meet its burden by clear and convincing evidence that Petitioner “exploited” or otherwise “neglected” Clients #2, #3, and #5. Respondent acted erroneously in its assessment of a Type A1 administrative penalty of \$2,000 pursuant to 10A NCAC 27D .0304 Protection from Harm, Abuse, Neglect or Exploitation (V512), and the penalty should be reversed. Moreover, for purposes of the other administrative adverse actions, Petitioner has shown by a preponderance of the evidence that Petitioner did not engage in “exploitation” or otherwise harm, abuse, or “neglect” Clients #2, #3, and #5.

TAG 291

Type A1 Collective Violation of 10A NCAC 27G .5603 - Operations (Tag V291)

56. Respondent assessed a Type A1 Violation of 10A NCAC 27G .5603 against Petitioner. According to Respondent, the Facility failed to “coordinate services with other qualified professionals responsible for treatment/habilitation” of Client #5, which constituted a violation of 10A NCAC 27G .5603. Pet’r Ex. 5, p 51. “Coordination [of client services] shall be maintained between the facility operator and the qualified professionals who are responsible for treatment/habilitation or case management.” 10A NCAC 27G .5603.

Client #5’s CPAP Machine

57. This violation is based on Petitioner’s failure to follow up with Client #5’s primary care physician about his Continuous Positive Air Pressure Machine (“CPAP”) machine and Petitioner’s failure to report to Client #5’s federal probation officer about an alleged alcohol incident involving Client #5.

58. As an initial matter, Client #5 was admitted to the Facility on February 20, 2013. He had lived at the Facility for over 8 years without incident. Client #5 was resistant to taking his medications as prescribed. Resp’t Ex. G, p. 3. He also had not used his CPAP machine for over two years because the mask “bothered” him. Pet’r Ex. 6, pp 53-54; T p 280:14-20. Client #5 had undergone two sleep studies on 12/14/20 and 02/14/21 indicating he had moderate sleep apnea and should use a CPAP machine. Pet’r Ex. 5, p 52.

59. After his February appointment, on February 19, 2021, Dr. Sison issued an order for CPAP headgear/tubing for Client #5. According to the QP, Petitioner did not receive this order. Pet’r Ex. 6, p 54. Afterwards, on February 25, 2021, the QP emailed Client #5’s primary care physician regarding the client’s sleep study and whether he issued an order for equipment. Pet’r Ex. 6, p 52.

60. Prior to the Survey, the Facility had tried to fix Client #5’s existing CPAP machine because it was not working properly. During that time, Gresham Lake Medical Supply (“Gresham Lake”), which normally serviced Client #5’s CPAP machine, had shut down because of COVID

so the Facility could not get the necessary supplies to fix it. As soon as Gresham Lake reopened, Client #5 was taken back to the doctor in April 2021, got another order, and received his new CPAP machine. T pp 310:5-25; 326:12-327:18; Pet'r Ex. 5, p 54. The Survey investigation was also helpful in probing Gresham Lake to promptly provide the CPAP machine. T p 327:16-18.

61. Even with the new CPAP machine, Client #5 frequently did wear it as prescribed. Because of this, the Facility took him back to his physician who discussed with him the consequences of not wearing his CPAP. His physician prescribed an order saying it could be used on an "as needed basis" (PRN). T p 311:4-11. The Facility's corrective actions occurred while the Survey was pending. T pp 311:11-18, 327:14-18; Pet'r Ex. 2, p 92.

62. Respondent contends that Petitioner's conduct with respect to Client #5's CPAP machine constituted "serious neglect." T p 86:17-23. "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); Resp't Ex. B. According to Client #5's own physician, he does not need the CPAP machine all the time and can elect to use it on an "as needed basis." T p 280:14-20. While there was a delay and lack of follow-through by the QP in obtaining the replacement CPAP machine, in light of the closure of the medical supply company due to COVID-19, Client #5's refusal to use his machine whether functional or not, and the fact that its usage was prescribed "as needed," and Petitioner's corrective occurred before the Survey Exit Date, Petitioner's failure to timely coordinate Client #5's services did not constitute neglect. There was no evidence that Petitioner neglected Client #5 or that he suffered any harm from the delay.

63. Petitioner did delay in coordinating services for obtaining a functioning CPAP machine for Client #5, but that delay was affected by matters outside Petitioner's control and Client #5 was not harmed by Petitioner's dilatory action. Moreover, Petitioner diligently took prompt action to remedy this deficit. Respondent failed to consider Petitioner's corrective actions before the end of the Survey; therefore, an administrative penalty of \$2,000.00 is not warranted.

64. Petitioner has shown by a preponderance of the evidence that Petitioner's conduct with respect to Client #5's CPAP machine did not constitute neglect.

Failure to Coordinate with Client #5's Probation Officer

65. According to the Statement of Deficiencies, on allegedly one occasion, just before the Survey in April 2021, Client #5 had consumed alcohol off-site. Pet'r Ex. 5, pp 54-55. Respondent determined that Petitioner's failure to report this incident to Client #5's probation officer evidenced the Facility's failure to coordinate services with other individuals responsible for his treatment/habilitation. This incident was also cited collectively in Tag 289, *infra*, for the Facility's failure to adequately supervise Client #5.

66. Respondent asserts that an interview with the Facility's QP revealed that Client #5 consumed alcohol off-site because he was not supervised in April of 2021. Pet'r Ex. 5, pp 54-56; T p 51, 81. Contrary to this assertion, the Surveyor documented on the Statement of Deficiencies that: "[a]t the time of the incident she [QP] had not been at work and was unavailable." Pet'r Ex. 5, pp 54-55. The COO was at the Facility and interacted with Client #5. The COO did not smell any alcohol on his person. T pp 181:17-182:4. The fact that another staff member reported Client

#5 had thrown up in the bathroom also did not alert her that Client #5 had been drinking. Client #5 often threw up due to his medications. T p 182:5-13. Based on the COO's history with him over the years and her interaction with Client #5 on that day, he did not appear to be intoxicated to her. Since she could not substantiate Client #5's consumption of alcohol, the COO did not report the incident to his probation officer. T p 183:5-7.

67. 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). The Licensee was fined for not reporting the incident to Client #5's probation officer, not for Client #5's alleged intoxication. The QP was not on-site at the time and deferred the incident to the COO who, after investigation, did not substantiate alcohol consumption by Client #5. Respondent has failed to prove by clear and convincing evidence that the QP or the COO were required to report an unsubstantiated incident of alcohol consumption or how the failure of nonreporting would constitute neglect.

68. Moreover, Petitioner has shown by a preponderance of the evidence that Petitioner's conduct with respect to this alleged incident did not constitute neglect.

TAG 289

Collective Violations Tag 289 – 10A NCAC 27G .5601 – Scope

69. Respondent cited by cross-reference ten (10) separate rule violations into 10A NCAC 27G .5601 ("V289 Scope") because those individual violations allegedly contributed to the harm, abuse, neglect, or exploitation of clients. T p 29, 147. The ten cited deficiencies were:

1. V105 – 10A NCAC 27G .0201 – Governing Body Policies
2. V107 – 10A NCAC 27G .0202 – Personnel Requirements
3. V108 – 10A NCAC 27G .0202 – Personnel Requirements
4. V109 – 10A NCAC 27G .0203 – Competencies of Qualified Professionals and Associate Professionals;
5. V115 – 10A NCAC 27G .0208 – Client Services
6. V118 – 10A NCAC 27G .0209(c) – Medication Requirements
7. V290 – 10A NCAC 27D .5602 – Supervised Living Staff;
8. V536 – 10A NCAC 27E .0107 – Training on Alternatives to Restrictive Interventions;
9. V542 – 10A NCAC 27F .0105 – Client's Personal Funds; and
10. V736 – 10A NCAC 27G .0303 – Location and Exterior Requirements

Resp't Ex. E.

70. Based on Respondent's findings of non-compliance, detailed in tags V105, V107, V108, V109, V115, V118, V290, V512, V536, V537, V542, and V736, Respondent assessed a \$2,000.00 Type A1 Violation against the Facility for purportedly failing to comply with its obligation under 10A NCAC 27G .5601 to provide the care and habilitation of individuals residing

at the Facility. Because these rule violations were cross-referenced into a “collective violation,” each deficiency will be reviewed.

Tag V105 – 10A NCAC 27G .0201 – Governing Body Policies

71. Respondent cited Petitioner for a deficiency under 10A NCAC 27G .0201 – Governing Body Policies. Pet’r Ex. 5, pp 1-5. “The governing body responsible for each facility or service shall develop and implement written policies for” eighteen specific subject areas, including safety precautions and requirements.” 10A NCAC 27G .0201. This rule functions to ensure that all mental health facilities throughout the State meet uniform standards of practice. T p 24. Respondent found the Facility noncompliant with 10A NCAC 27G .0201 by its failure to implement its previously developed written blood borne pathogens policy. Pet’r Ex. 5 pp 1-5.

72. Specifically, while on site, Surveyors observed a Sharps Container with an “opening [that] was large enough for someone to stick their hand through it.” (T p 25). The Sharps Container presented a hazard to clients, as “one of the individuals could stick their hand in it and become punctured or injured.” T p 25. This Sharps Container was used to dispose of insulin needles. T p 168:17-22.

73. Prior to the Survey, on March 16, 2021, a new Sharps Container had been ordered and was at the Facility. T p 169:4-14; Pet’r Ex. 2 p. 32. Surveyor Vaughn-Rhodes knew that a new Sharps Container was already in the Facility. T p 169:17-19; *see* Resp Ex E p 5 (stating CEO “stated she purchased an approved container to dispose of needles.”).

74. Complainant Gabriel Robertson was the primary contact for Surveyors during the inspection. T p 281:1-18. Mr. Robertson knew about the defective Sharps Container. After learning that the old Sharps Container was still being used, the COO confronted him about it. After being asked about it, Mr. Robertson threatened the COO. T p 281:7-13 (corroborating T of CEO about listening on the phone overhearing threats made by Robertson to COO). That was the last day he worked for the Facility. T p 281:14-15. The evidence is suggestive, but not definitive, that Mr. Robertson may have been responsible for not replacing the defective Sharps Container with the new one. Regardless though, the defective Sharps Container was removed and replaced soon after it was discovered before the end of the Survey period.

75. In addition, as part of Petitioner’s Plan of Correction, an annual blood borne pathogen training was completed by all Staff members on May 26, 2021, again before the end of the Survey. T p 171:16-255, Pet’r Ex. 2 pp 21-30. Certificates for this training were provided to Respondent with the Supporting Documents submitted for the Informal Conference. Pet’r Ex. 2 pp 21-30.

76. Despite Petitioner’s corrective actions, Respondent determined that the Facility was noncompliant with 10A NCAC 27G .0201 which contributed to the “serious neglect” of Clients. Pet’r Ex. 5, pp 1-5; T p 26. The Undersigned disagrees. No Client or Staff were injured because of the defective Sharps Container, a replacement container had already been ordered, and the defective one was replaced before the end of the Survey. Moreover, all Staff members were retrained in blood borne pathogens before the end of the Survey.

77. Respondent failed to prove by clear and convincing evidence that the Facility was noncompliant with its written blood borne pathogens policy or that the Facility actions contributed to the “neglect” of Clients. This violation was improperly cross-referenced into the Type A1 Violation of Tag 289.

Tags V107 – 10A NCAC 27G .0202(a)-(g) – Personnel Requirements (Personnel Records) Missing Personnel Records: Facility Driver and Staff #6

78. Respondent cited Petitioner for a deficiency under all of 10A NCAC 27G .0202(a)-(g) – Personnel Requirements. Pet’r Ex. 5 pp 7-8. This rule serves to ensure that employees of mental health facilities who provide care or services to clients are qualified. T p 27.

79. However, only subsections .0202(b), .0202(c), and .0202(e) are relevant for Tag V107. Subsection .0202(b) requires facilities to “ensure that the director, each staff member or any other person who provides care or services to clients on behalf of the facility: (1) is at least 18 years of age; (2) is able to read, write, understand and follow directions; (3) meets the minimum level of education, competency, work experience, skills and other qualifications for the position; and (4) has no substantiated findings of abuse or neglect listed on the North Carolina Health Care Personnel Registry.” 10A NCAC 27G .0202(b).

80. Subsection .0202(c) requires facilities to ensure “that all applicants for employment disclose any criminal conviction.” 10A NCAC 27G .0202(c). Subsection .0202(e) requires facilities to maintain a file “for each individual employee indicating the training, experience and other qualifications for the position, including verification of licensure, registration or certification.” 10A NCAC 27G .0202(e).

81. According to Respondent, Petitioner failed to maintain written job descriptions and required personnel records for two staff members – the Facility’s Driver and Staff #6. Pet’r Ex. 5 pp 20-21; T pp 27-28. During the Survey period, the personnel records for Staff #6 and the Facility Driver could not be located. Pet’r Ex. 5, p 7. Other than some training documentation, Respondent presented no other evidence that the contents of the records of Facility Driver or Staff# 6 failed to meet the requirement of rules 10A NCAC 27G .0202(c) or 10A NCAC 27G .0202(c).

82. Prior to the Survey, two of the Facility’s paychecks had been stolen and used for fraudulent purposes. Along with the paychecks, some personnel files went missing. The personnel file for Staff #6 was one of the files that was lost. T pp 273:6-23; 274:7-11. However, by June 25, 2021, the personnel files for both Staff #6 and the Facility Driver had been located and this deficiency was corrected. Pet’r Ex. 6, p 9. Also, as an additional corrective measure, Petitioner now maintains personnel records in a locked room. T p 274:2-6.

83. Although the Licensee violated rule 10A NCAC 27G .0202(b) by not maintaining the records on-site at the time of the Survey, prior to upholding the penalty on October 1, 2021, Respondent did not consider that the deficiency had been corrected. Moreover, this deficiency did not contribute to the neglect of any Clients. Respondent should have reversed the cross-reference of this deficiency in Tag 289 and Petitioner should not have been fined for this violation.

Tag V108 – 10A NCAC 27G .0202(f)-(i) – Personnel Requirements (Training)

84. Respondent cited Petitioner for a deficiency under 10A NCAC 27G .0202(f)-(i) – Personnel Requirements, Pet'r Ex. 5, pp 8-12, specifically for violations of subsections .0202(f), .0202(g), and .0202(h). Facilities are required to maintain documentation of continuing education for employees. 10A NCAC 27G .0202(f). Required training includes "training on client rights and confidentiality," "training to meet the [treatment] needs of the client," and "training in infectious diseases and bloodborne pathogens." 10A NCAC 27G .0202(g). At least one staff member who has completed basic first aid and cardiopulmonary resuscitation training is required to be "available at all times when a client is present." 10A NCAC 27G .0202(h). This rule functions to ensure that staff are properly trained and to protect the "health and safety of the clients." T p 29.

85. During the Survey, Surveyors reviewed all available, on-site records. Record review and interviews revealed that the Facility failed to maintain required records and produce evidence of all required trainings for four of the seven audited paraprofessional staff members, identified as Staff #3, #5, #6, and the Facility's Driver during the Survey period. Pet'r Ex. 5 pp 8-12.

86. Staff #3's file only lacked documentation of her CPR and first aid training. Pet'r Ex. 5, p 11. When Respondent could not locate training in the records for Staff #3 for her CPR and first aid training, she received certification for retraining on May 20, 2021. Prior to the Informal Conference, the training documentation was provided to Respondent. Pet'r Ex. 2, p 42. Staff #6 and the Facility Driver's training documentation were provided when their files were located as discussed *supra*.

87. Staff #5's personnel record was lacking all training documentation. Pet'r Ex. 5, p 10. Staff #5 was hired on April 5, 2021, a few weeks before the Survey began and left before the Survey Exit Date. Pet'r Ex. 6, p 10. Despite repeated phone calls to Staff #5, the Facility was unable to obtain his training documentation. This was the only personnel deficiency that Petitioner was unable to correct.

88. As the Licensee, Eloise Dowtin was responsible for ensuring that all Staff were properly trained, and that the Facility maintained records of those trainings. At the hearing, Ms. Douglas testified that these particular training records were not provided to Surveyors at any point during the Survey period. T p 29. Although all the training records had not been provided during the Survey period, except for Staff #5, all Staff had been properly trained. Staff #5 only worked for Petitioner for a few weeks and was not able to meet all his training requirements during those few weeks because of other work obligations. Pet'r Ex. 5, p 10. Moreover, Staff #5 did not return repeated inquiries for his existing training documentation.

89. The CEO credibly testified that all Staff are trained in medication administration within a few days of them being employed. T p 288:2-9. The QP was trained for medication administration as of April 22, 2021, the beginning date of the Survey, and her current training certificate dated June 21, 2021 was provided with the Plan of Correction. T p 289:6-290:24; Pet'r Ex. 3, bates stamp 00058. The training certifications expire after one year and all Staff would be retrained around the expiration of their annual certificates. T pp 291-292. Moreover, the Surveyors

asked for the Staff's "current training," which was provided, not the Staff's "prior training." T p 320:13-21.

90. According to the COO, because of Staff unavailability during the COVID-19 pandemic, the CEO and QP were maintaining the operation of the Facility. Pet'r Ex. 5, p 11. This meant that training documentation, which should have been printed by the Staff and turned into the corporate office, did not occur. Also, because of COVID-19, some Staff took training online and did not turn in their documentation. Pet'r Ex. 5 p 11.

91. By June 25, 2021, except for Staff #5, all Staff's certificates of training completion were available and included in the Plan of Correction. Pet'r Ex. 6 pp 10-11. Petitioner acknowledged in its Plan of Correction that "there was discrepancy in the supervision of Personnel files and that the Facility corrected this by hiring a Program Director to assist the HR/Training Coordinator with the Personnel Requirements." Pet'r Ex. 5, p 11.

92. Although Petitioner failed to maintain on-site documentation of all current training for its Staff as required by 10A NCAC 27G .0202, this deficiency was partially remedied. Proper maintenance of training documentation in personnel records is important to ensure that staff are properly trained, even for Staff #5 despite the fact he worked for only a short period with the Facility.

93. Even though the Facility did not maintain and update all Staff personnel records, Respondent has failed to show how this deficiency contributed to the "neglect" of Clients. The Facility's partial non-compliance with 10A NCAC 27G .0202(f)-(i) did not contribute to the "neglect" of client care and should not have been cross-referenced into the Type A1 Violation of V289 – 10A NCAC 27G .5601 – Scope.

Tag V115 – 10A NCAC 27G .0208 – Client Services Nutritious Meals and Client #1's Food Log

94. Respondent cited Petitioner for failing to comply with 10A NCAC 27G .0208. Pet'r Ex. 5, pp 20-30. Facilities that are required to "serve or prepare meals for clients shall ensure that the meals are nutritious." 10A NCAC 27G .0208(c). Respondent asserts that the Facility failed to ensure meals were nutritious for five of five clients at the Facility. Pet'r Ex. 5, pp 20-30.

95. While on site during the Survey, Surveyors observed the kitchen and food preparation areas of the Facility. Pet'r Ex. 5, p 21. The Facility maintained a total of three combination refrigerator-freezer units. Pet'r Ex. 5, p 21. Surveyors observed "rotten food in the freezer" and packages of food "where the expiration dates were worn off." Resp't Ex. P, pp 32-43; T p 43. The Facility had several¹⁴ sugary cereals for breakfast and packaged meals on site. T p 43. On the days the Surveyors were there, the Facility did not have any fresh fruit on site. T p 43.

¹⁴ Contrary to Respondent's Proposed Final Decision, Ms. Douglas did not testify that the Facility had a "large supply of sugary cereal." Resp't Pro. Fin. Dec. p 9, ¶ 46.

96. In this deficiency citation, the Surveyor focused primarily on the nutritional needs of Clients #1 and #5. Client #5 was admitted to the Facility on February 20, 2013. Pet'r Ex. 5, p 14. Client #5 was considered "pre-diabetic" based on his A1C levels. Resp't Ex. L. Accordingly, eating a balanced, nutritious diet is important to prevent Client #5 from developing Type 2 Diabetes. Resp't Ex. L. There is no evidence that Client #5 did in fact develop diabetes, was at substantial risk, or was otherwise neglected from the meals served at the Facility.

97. Client #1 was admitted to the Facility on January 6, 2014. Pet'r Ex. 5, p 13. He had resided at the Facility for 7 years prior to the Survey. Client #1's diagnoses included Type 2 Diabetes. Resp't Ex. H. As a diabetic, Client #1's diet is important in managing his condition. Resp't Ex. H; T p 43. Respondent asserted that: "Client #1's health care providers required him to maintain a daily food log detailing his food consumption." Resp't Ex. H; Resp't Ex. M; T p 44.

98. Contrary to Respondent's assertion, Client #1's "Person Centered Profile" (Treatment Plan) did not require Client #1 to maintain a daily food log. Resp't Ex. G, pp 1-6. His medication regiment and physician's notes also did not require that Client #1 maintain a food log. Resp't Ex. H. The only reference to the "maintenance of a daily food log" is on some "Food Intake Forms" which do not even include Client #1's name. *See* Resp't Ex. M (no customer name on any page). Ms. Douglas testified that she understood these were Client #1's food logs but did not testify as to how she gained that understanding or if it was accurate. T p 81:2-22 (referring to Resp't Ex. M with no consumer [client] named).

99. With respect to the food log, the COO credibly testified that she created the food log for other reasons not for Client #1. During COVID, Client #1's nutritionist "recommended he keep an intake log on his food intake, and so the staff helped¹⁵ him" become aware of foods that can increase his blood sugar using the same food log form previously created by the COO. T p. 184:2-13; Resp't Ex. R, p. 18. There is no documentation in the record that Client #1's physician required or even recommended that he keep a food log. *See* Resp't Exs. E, H, G, and M. Despite this, Respondent asserts that the failure of the QP to maintain a food log contributed to "neglect" of Client #1's nutritional needs and demonstrated the QP's lack of knowledge, skills, and abilities.

100. In addition, Respondent asserts that Client #1's elevated blood sugars over 300 is evidence of "serious neglect" due to poor nutritional monitoring. Resp't Pro Fin. Dec. p. 9-10, ¶¶ 48 & 49. In Respondent's Non-Disclosure file is a note from Client #1's physician, Dr. Sison. Resp't Ex. H. In his note, Dr. Sison writes that the QP is to "call Dr. Sison if greater than 400" and specified that he was to be notified if Client #1's "Blood Glucose [was] over 400 x 3 consecutive checks or lower than 70 x 3 consecutive checks." Resp't Ex. H, p 8. The Surveyors knew this because Dr. Sison's note was in Client #1's medical records, which they reviewed. If Dr. Sison is not concerned about Client #1's blood sugar levels over 300, nor should the Respondent. Consistent with Dr. Sison's opinion, Client #1's blood sugar levels over 300 do not evidence "neglect" of his nutritional monitoring.

101. Even if some spoiled or expired food was at the Facility, Respondent offered no evidence that any Client had consumed such food or were neglected because of its existence. Respondent failed to show by clear and convincing evidence that the Facility failed to provide

¹⁵ Based on Resp't Ex. N, pp 1-2, Client #1 is literate and should be able to write his own food logs.

nutritious meals to its Clients or were required to maintain a food log for Client #1. Petitioner did not violate 10A NCAC 27G .0208 or contribute to the neglect of any Clients' nutritional needs, and Respondent should not have cross-referenced this alleged violation into the Type A1 Violation of V289 – 10A NCAC 27G .5601 – Scope.

Tag V118 – 10A NCAC 27G .0209(c) – Medication Requirements

102. Respondent cited Petitioner for failing to comply with 10A NCAC 27G .0209(c) – Medication Requirements. Pet'r Ex. 5, pp 30-36. This rule sets forth the requirements for the administration of medications by facilities. 10A NCAC 27G .0209(c). This rule serves to ensure that physician's orders for prescribed medications are followed and that all staff are properly trained in medication administration. T p 45. The rule states as follows:

(c) Medication administration:

- (1) Prescription or non-prescription drugs shall only be administered to a client on the written order of a person authorized by law to prescribe drugs.
- (2) Medications shall be self-administered by clients only when authorized in writing by the client's physician.
- (3) Medications, including injections, shall be administered only by licensed persons, or by unlicensed persons trained by a registered nurse, pharmacist or other legally qualified person and privileged to prepare and administer medications.
- (4) A Medication Administration Record (MAR) of all drugs administered to each client must be kept current. Medications administered shall be recorded immediately after administration. The MAR is to include the following:
 - (A) client's name;
 - (B) name, strength, and quantity of the drug;
 - (C) instructions for administering the drug;
 - (D) date and time the drug is administered; and
 - (E) name or initials of person administering the drug.
- (5) Client requests for medication changes or checks shall be recorded and kept with the MAR file followed up by appointment or consultation with a physician.

10A NCAC 27G .0209(c).

103. Respondent asserts that Petitioner did not comply with 10A NCAC 27G .0209(c) because Petitioner failed to ensure that medications were properly administered and documented on the Medication Administration Records ("MAR") of Clients #3 and #5. Furthermore, Respondent cited Petitioner with a deficiency because Client #1 self-administered insulin without a documented physician's order allowing him to do so.

Medication Administration Records ("MAR")

104. With respect to the MARs, Respondent asserts that because the Facility Staff used different notations on the MAR form denoting the administration of medications. Use of these notations, purportedly evidence that Petitioner failed to ensure that five of eight Staff members demonstrated skills and competency regarding medication administration. Pet'r Ex. 5.

105. The MAR document "is initialed once medications are given to a client." T p 45. The MAR should note the time of administration, the type of medication administered, and the amount of medication administered, including over-the-counter medications. T pp 45-46.

106. While the Facility's Staff reviewed and initialed Clients' MARs as required, the Staff failed to go "by the legend that was on the back of the MAR." T p 47-48. Because the Facility's Staff failed to use the right form of notation, Respondent contends that they improperly completed MARs for Clients and that indicated a lack of complete training regarding medication administration for each Staff member.

107. Use of a "legend's" notation method is not mandated by any rule. Moreover, the Surveyors noted that the "legend's" notation was "misused" only on 4 occasions: twice on April 17, 2021 (8 a.m. and 10 p.m.) and twice on April 18, 2021 (8 a.m. and 10 p.m.). *See* Pet'r Ex. 5 p 34. In addition, Client #1's MAR contained one discrepancy regarding dosage of a medication used to treat Schizophrenia. T p 47. Notably, the fact that the Facility had only one discrepancy regarding medication dosages of all the MARs' doses reviewed is commendable.

108. Respondent also cite Petitioner for failure to adequately train Staff in medication administration. All of the Facility's Staff are trained in medication administration within a few days of them being employed. T p 288:2-9. All the Staff had completed training for medication administration before the Survey and their current retraining certificates were provided with the Plan of Correction. T pp 289-291; Pet'r Ex. 3, bates stamps 00058-00065.

Client # 1 Self-Administering Insulin

109. When Surveyor Vaughn-Rhodes interviewed Staff, including Robertson, on April 22, 2021, she was told that Client #1 self-administered his insulin on a daily basis. Pet'r Ex. 5, p 35; *but compare* T p 46 (T of Douglas said discovered when reviewed Client #1's MAR). A record review of Client #1's MARs and medical records revealed no order from a physician permitting self-administration. Client #1's self-administration of insulin absent a physician's written order would constitute a violation of 10A NCAC 27G .0209(c)(1).

110. Client #1 had self-administered his insulin since he was admitted to the Facility on January 6, 2014 and had been self-medicating many years prior. T p 283:18-24; Pet'r Ex. 5, p. 13. When asked to produce a physician's note allowing this, the original physician's order had been archived and Petitioner was unable to locate it for the Surveyor. Within 3 days, Petitioner obtained another physician's order stating that Client #1 could self-administer his insulin. T p 286:2-287:16; Pet's Ex. 3 (order dated May 27, 2021).

111. Moreover, historically, the treatment of Client #1 has been problematic for the Facility. Since January 14, 2021, the Facility sought to discharge Client #1 because of his "unstable glucose levels, dietary restrictions based on his beliefs, and failure to cooperate with the medical

care team recommendations by his physician and staff.” Pet’r Ex. 4. Client #1’s discharge date was scheduled for March 1, 2021, but his guardian was unable to find him an alternative placement. T pp 317-319:18. The CEO informed Ms. Elliot at the Informal Conference about the Facility’s discharge and transfer attempts for Client #1. T p 320:8-12.

112. The Undersigned finds that Respondent has failed to prove by clear and convincing evidence that the Facility was noncompliant with 10A NCAC 27G .0209(c) or that its actions contributed to the neglect of any Clients. Respondent improperly cross-referenced this alleged violation into the Type A1 Violation of V289 – 10A NCAC 27G .5601 – Scope.

Tag V290 – 10A NCAC 27G .5602 – Supervised Living Staff

113. Respondent cited Petitioner for failing to comply with 10A NCAC 27G .5602(b) Supervised Living Staff which states as follows:

(b) A minimum of one staff member shall be present at all times when any adult client is on the premises, except when the client's treatment or habilitation plan documents that the client is capable of remaining in the home or community without supervision. The plan shall be reviewed as needed but not less than annually to ensure the client continues to be capable of remaining in the home or community without supervision for specified periods of time.

10A NCAC 27G .5602(b).

114. During the Survey, records review and interviews purportedly revealed that Petitioner “failed to implement three of five clients’ treatment plan [sic] regarding unsupervised time in the community” because Clients #2, #3, and #5 were allowed to work off-site without proper supervision. Pet’r Ex. 5, p 44. These were the same Clients which Respondent found were being “exploited” by the Facility. *See* discussion of Tag 512 above.

115. A treatment plan should detail each individual client’s goals and treatment needs and should also identify the party responsible for ensuring the goals and needs are met. T p 69. Treatment plans are to be authored by a facility’s qualified professional, but several interested parties should provide input. T p 69. Clients residing in .5600A facilities are permitted unsupervised time only if it is approved by their treatment team. T p 75. As previously found, during the COVID-19 pandemic¹⁶, all Clients at the Facility had no unsupervised time and their treatment plans reflected this.

116. Client #2’s diagnoses included Schizoaffective Disorder, Cannabis Use, and Alcohol Use. Resp’t Ex. G. He was admitted to the Facility on October 18, 2014. Pet’r Ex. 5, p 14. Client #2’s January 16, 2021 treatment plan provided for no unsupervised time aside from transportation to and from his psychosocial rehabilitation program. Pet’r Ex. 5, p 44. The unsupervised transportation time was to occur in fifteen-minute increments. Resp’t Ex. G. Prior to

¹⁶ *See infra* footnote 7.

the pandemic, Client #2 had discretionary unsupervised time as allowed by his probation officer and attorney, but his unsupervised time was rescinded due to COVID-19. T p 302:5-22.

117. Client #3's diagnoses included Bipolar Disorder, Polysubstance Use, Hepatitis B, Diabetes, and Antisocial Personality Disorder. He was admitted to the Facility on September 6, 2017. Resp't Ex. E. p 14. Client #3 was also on federal probation for a past offense. Resp't Ex. G. Based on an assessment tool completed by his treatment team, Client #3's November 19, 2020 treatment plan provided for no unsupervised time aside from transportation to and from his psychosocial rehabilitation program. Resp't Ex. G. The unsupervised transportation time was to occur in fifteen-minute to thirty-minute increments. Resp't Ex. G. Like Client #2, Client #3 had unsupervised time in his prior treatment plan, but his unsupervised time was rescinded due to COVID-19. T pp 302:23-303:3.

118. Client #5 was on federal probation and was registered as a sex offender. Resp't Ex. L. Client #5's treatment plan stated that Client #5 had "no unsupervised time at the home/community." Resp't Ex. G. Client #5's November 19, 2020 treatment plan also indicated that because he was a registered sex offender, he should "ALWAYS be monitored." Resp't Ex. G. Like Clients #2 and #3, Client #5 had unsupervised time granted by his probation officer, but his unsupervised time was rescinded due to COVID-19. T pp 303:18-303:8. Off-site, he and the others were supervised by Mr. Williams, a contract employee, or the Facility Driver. T pp 304:18-304:14.

119. During interviews with the Surveyors, Eloise Downtin explained that Clients #2, #3, and #5 routinely assisted the Facility's contract maintenance man with other projects off site. T pp 75-76. During these off-site work projects, a Staff member was present when Clients were with Mr. Williams, usually Carlester Groome, the vocational person, or the Facility Driver. T pp 278:5-9, 304:18-304:14. Eloise Downtin had met with the Clients' probation officer(s), guardian, and/or attorney(s) for approval of the off-site work.

120. With respect to Client #5, the registered sex offender, Eloise Downtin met with Client #5's probation officer "on a monthly basis sometime every two to three weeks because Client #5 was having a lot of behavior outbreaks." T pp 276:20-278:4. Both Client #5's attorney and probation officer deferred to the CEO's discretion about giving him something "hands on" to do. T p 278:1-4. Working odd jobs outside the Facility helped with Client #5's behavior and the behavior of the other Clients. When off-site work stopped, there was an increase in violence in the Facility because the Clients did not have the outlet of getting out and doing things physically. Clients #2, #3, and #5 also enjoyed the off-site work because it enabled them to buy cigarettes. T p 278:15-24.

121. The credible evidence proves that Petitioner complied with 10A NCAC 27G .5602, properly implemented Client #2's, #3's, and #5's treatment plans by proving supervision of the Clients during off-site work, and that Petitioner did not contribute to the "neglect" of any Clients. Respondent failed to prove by clear and convincing evidence that Petitioner failed to supervise Client #2, #3, and #5 in accordance with their treatment plans. Respondent improperly cross-referenced it into the Type A1 Violation of V289 – 10A NCAC 27G .5601 – Scope. Pet'r Ex. 5, pp 44, 46-50; Resp't Ex. E, p 45.

Tag V536 – 10A NCAC 27E .0107 – Training on Alternatives to Restrictive Interventions

122. Respondent cited Petitioner for failing to comply with 10A NCAC 27E .0107 which requires all facilities to train all staff regarding alternatives to restrictive interventions. Staff are required to “demonstrate competence by successfully completing training in communication skills and other strategies for creating an environment in which the likelihood of imminent danger of abuse or injury to a person with disabilities or others or property damage is prevented.” 10A NCAC 27E .0107(b). The rule further requires that such training be competency-based, and a refresher training must be completed annually. 10A NCAC 27E .0107(d)-(e). In addition, such training must be documented. 10A NCAC 27E .0107(h). The required training serves to teach staff members about de-escalation techniques to avoid physical harm. T p 54.

123. Respondent asserts that Petitioner failed to comply with 10A NCAC 27E .0107 because it failed to ensure that Staff #5 and #6 were fully trained in alternatives to restrictive interventions. Pet’r Ex. 5, p 67. Record review and interviews conducted during the Survey revealed that Petitioner had no records evidencing Staff #5’s and #6’s completion of the alternatives to restrictive intervention training before the Survey period closed. Pet’r Ex. 5 pp 67-68; T pp 54 & 57. Staff #6’s files were located by the COO on June 23, 2021 and produced to Respondent. Pet’r Ex. 6 p 67. As explained above, Petitioner was not able to produce any documents evidencing Staff #5’s completion of any training. T p 57.

124. Despite Petitioner’s partial noncompliance with the training documentation, there was no evidence that because of one missing personnel file that the Facility failed to maintain a safe and orderly facility in accordance with 10A NCAC 27E .0107 or that its noncompliance contributed to the “neglect” of clients. Respondent improperly cross-referenced it into the Type A1 Violation of V289 – 10A NCAC 27G .5601 – Scope. Pet’r Ex. 5, p 70.

Tag V542 – 10A NCAC 27F .0105 – Clients’ Personal Funds

125. Respondent cited Petitioner for failing to comply with 10A NCAC 27F .0105 – Clients’ Personal Funds. The rule prescribes several requirements for managing clients’ personal monies, including maintaining adequate financial records of all transactions, providing each client with a quarterly accounting statement. 10A NCAC 27F .0105. This rule serves to protect the clients’ financial interests by requiring each facility to keep records and provide a quarterly financial statement. T p 60; Resp’t Ex. 3, p 40.

126. The CEO, Sha’Brittany Dowtin, was responsible for managing the Clients’ personal funds and for providing quarterly accounting statements of their personal funds. T p 221:16-21. Between January and March of 2021, Sha’Brittany Dowtin suffered from brain fog and sensitivity to light as a result of contracting COVID-19. T p 329:16-p 330:2.

127. During the Survey, Sha’Brittany Dowtin provided Surveyor Vaughn-Rhodes with the financial records that she had and informed the Surveyor that she had been out of the office for months so her spread sheets on Excel needed updating. T pp 221:22-222:6. Surveyor Vaughn-Rhodes “seemed to understand” that the CEO was in the process of updating her documentation

and spread sheets. T pp 221:22-222:6. The CEO also mistakenly thought her quarterly reporting had come due “within that time frame.” T p 222:1-10.

128. Respondent also asserts that Petitioner failed to account for the Clients’ stimulus checks received through the CARES Act. Sha’Brittany Dowtin credibly testified that Surveyor Vaughn-Rhodes did not ask her to produce accounting statements for stimulus funds and that it was unclear to her whether stimulus funds qualified as personal funds since the stimulus funds were sent directly to Clients, not Petitioner, for disbursement. T p 223:16-23.

129. Because such funds had never been issued before, when the Clients’ stimulus checks were received, Sha’Brittany met with the Clients’ guardians and asked how they would like to proceed. T pp 222:23-223:12. For the three Clients on federal probation, she met with their probation officer to determine disbursement schedules and she completed accounting statements reflecting this. Respondent proffered no evidence of any mishandling of the Clients’ funds. There is no evidence that the Clients’ guardians, attorneys, families, or probation officers have complained about the CEO’s accounting of the Clients’ regular funds or stimulus monies.

130. Although the quarterly accounting statements were delayed, there was no evidence of misuse or mismanagement of the Clients’ funds. Nor is there any clear and convincing evidence that because of the untimely quarterly accounting that Petitioner failed to maintain a safe and orderly facility in accordance with 10A NCAC 27F .0105 or that this action contributed to the “neglect” of clients. Respondent improperly cross-referenced it into the Type A1 Violation of V289 – 10A NCAC 27G .5601 – Scope. Pet’r Ex. 5, p 73.

Tag V736 - 10 NCAC 27G .0303 - Location and Exterior Requirements (V736)

131. Respondent cited Petitioner for failing to comply with 10A NCAC 27G .0303(c) – Location and Exterior Requirements. “Each facility and its grounds shall be maintained in a safe, clean, attractive and orderly manner and shall be kept free from offensive odor.” 10A NCAC 27G .0303(c). This rule functions to ensure that clients reside in a safe and clean home. T p 64; Pet’r Ex. 5, pp 73-76.

132. The items listed in the Statement of Deficiencies were mainly cosmetic, e.g., stained flooring, stained ceiling, rusty air vents, disrepair of furniture, etc. Review of the photo of the “exposed electrical outlet” shows it simply needed a screw tightened. *See* Resp’t Ex. P, p 2.

133. During the COVID-19 pandemic, Petitioner had difficulty finding a contractor to come out and do the repairs on the Facility. Mr. Williams, the Contract Maintenance Man, had been sick and could not do the work. T p 313:1-8. Ms. Dowtin testified that she was finally able to hire a contractor after going through eight to ten contractors. T p 312:17-25. The maintenance and repair items identified by the Surveyors were addressed within two weeks of the Exit Conference. T p 193:6-15. Although advised of the repairs, Respondent did not send anyone out to inspect the repairs. T p 194:3-5. Respondent did not otherwise acknowledge Petitioner’s corrective actions with respect to this cited deficiency.

134. Respondent failed to prove by clear and convincing evidence that Petitioner failed to maintain a safe and orderly facility in accordance with 10A NCAC 27G .0303 or that Petitioner's actions contributed to the "neglect" of clients. Respondent improperly cross-referenced it into the Type A1 Violation of V289 – 10A NCAC 27G .5601 – Scope. Pet'r Ex. 5, p 76.

Tag V109 – 10A NCAC 27G .0203 – Competencies of Qualified Professionals

135. Respondent cited Petitioner for failing to comply with 10A NCAC 27G .0203 – Competencies of Qualified Professionals. "Qualified professionals and associate professionals shall demonstrate knowledge, skills and abilities required by the population served." 10A NCAC 27G .0203(b). Qualified professionals demonstrate this required competence by exhibiting several qualities, including technical knowledge, cultural awareness, analytical skills, decision-making, and clinical skills. 10A NCAC 27G .0203(d).

136. During the Survey, Respondent found that both of the Facility's Qualified Professionals failed to demonstrate the knowledge, skills, and abilities required for the population served as required by this rule. Pet'r Ex. 5, p 13. At that time, the Facility had two acting Qualified Professionals: Eloise Downtin (CEO/Licensee) and Sonja Chappell (QP). Ms. Chappell began employment with the Facility as the Office Manager but served as a Qualified Professional for the two years preceding the Survey. Pet'r Ex. 5, p 13. Eloise Downtin is and was at that time a licensed Registered Nurse with many years of experience.

137. Respondent finding that these QPs were incompetent was based on some of the violations previously cited and discussed *supra* which are: allowing Clients #2, #3, and #5 to travel off-site and perform odd jobs; issues with Clients' MARs form completion; failure to investigate or report Client #5's alcohol incident; failure to complete daily food logs for Client #1; and failure to timely follow up on Client #5's CPAP machine.

138. Based on the same reasoning stated earlier about these alleged violations in this Final Decision, the Undersigned finds that Respondent failed to prove by clear and convincing evidence that the Qualified Professionals did not demonstrate the knowledge, skills, and abilities required for the population served or that their competence contributed to the "neglect" of the Facility's Clients. Respondent improperly cross-referenced it into the Type A1 Violation of V289 – 10A NCAC 27G .5601 – Scope. Pet'r Ex. 5, p 19.

Calculations of Type A1 Administrative Penalties

139. Respondent uses a Penalty Matrix for calculating administrative penalties for Type A, Type A1, and Type B Penalties. The Penalty Matrix is supposed to consider statutory factors in determining penalty amounts.

The Penalty Matrix

140. Respondent's Penalty Matrix used multiple factors to calculate the three \$2,000.00 penalties assessed to Petitioner. Using the Penalty Matrix, Respondent assigns points for five subcategories: 1. level of harm; 2. efforts to correct; 3. reasonable diligence; 4. prior violation with assessed penalties; and 5. number of clients affected. *See* Resp't Ex. U. It is unclear which statutory

or regulatory authority Respondent has used to develop its descriptions of subsections “Efforts to Correct” or “Reasonable Diligence” in the Matrix.

141. These points are subtotaled and correspond to the penalty amounts for each violation which range from \$500.00 to \$10,000.00 for facilities¹⁷ with six or fewer clients, like this Facility. A total score of 6-10 equates to a \$500.00 penalty; 11-14 to \$1,000.00; 15-18 to \$2,000.00 and so on. *See* Resp’t Ex. U, p 2.

142. To illustrate, provisions from the Penalty Matrix used for one penalty is shown below. Respondent completed separate Penalty Matrixes for each Type A1 penalty, but the scoring was identical for all. Below are the rubrics for the subsections labeled: Level of Harm; Efforts to Correct; and Reasonable Diligence. Resp’t Ex. U, pp 1-2.

Level of Harm	
Substantial risk that serious physical harm, abuse, neglect or exploitation will occur = 5	
Actual serious physical harm, abuse, neglect or exploitation without substantial risk for client death = 10	10
Actual serious physical harm, abuse, neglect or exploitation with substantial risk for client death = 15	
Client death without substantial risk for further serious physical harm, abuse, neglect or exploitation = 20	
Death to client with substantial risk for serious physical harm, abuse, neglect or exploitation to others = 25	
Death with substantial risk for further client death = 30	
Subtotal	10

Efforts to Correct	
Provider voluntarily responded to violation with corrective measure(s) which resulted in correction of the violation(past corrected) = 0	
Provider voluntarily responded to violation with corrective measure(s) which will not result in a correction of the violation= 1	
Provider voluntarily responded to violation with corrective measure(s) which did not result in a correction of the violation and had a negative impact upon the correction of current violation = 2	
Provider has identified the specific violations but has not responded to date to the specific violation with corrective measure(s) = 3	
Provider has not identified the specific violation = 4	4
Subtotal	4

Reasonable Diligence	
Facility did not comply with immediate notification to the Secretary upon the death of a client that occurred within seven days of physical restraint or seclusion of the client = 2	
Facility did not comply with notification to the Secretary within three days of the death of a client resulting from violence, accident, suicide or homicide = 2	
Facility did not initiate an investigation into the death, abuse, or neglect of a client within the facility = 2	
Facility did not notify HCPR all allegations of abuse, neglect, etc. (G.S. 131E-256) against any unlicensed person in the facility = 2	
Subtotal	0

143. For each of Petitioner’s three Type A1 penalties, Respondent assigned 10 points for “Level of Harm”; 4 points for “Efforts to Correct”; 0 points for “Reasonable Diligence”; 1

¹⁷ Penalty amounts for facilities with 7 or more clients range from \$1,000.00 to \$20,000.00. N.C. Gen. Stat. § 122-24.1(a)(1).

point for the “number of clients affected” (range of 1-9); and 0 points for previous violations. These numbers totaled 15 points, a point range which fell within a \$2,000.00 penalty for each of the Type A1 Violations. *See* Resp’t Ex. U.

144. In determining administrative penalties, Respondent is required to consider Petitioner’s efforts to correct and reasonable diligence. N.C. Gen. Stat. § 122C-24.1(c). Respondent gave Petitioner no credit for its corrective efforts. Instead, Respondent gave Petitioner the highest number of points (4) for not “identify[ing] the specific violation.” Resp’t Ex. U, p. 1. Also, Respondent gave Petitioner no credit for its “Reasonable Diligence.” Respondent proffered no evidence at any time during the Survey, after the Survey, and prior to Acting Chief’s Elliot’s final Informal Conference Response, that Respondent revisited the points assigned on its Penalty Matrixes for Tags 512, 291, or 291.

145. Based on the Undersigned’s assessment of the rule violations, for rule deficiencies in Tags V291 and V512 the assigned points would have been as follows: 0 points for “level of harm” because there was no actual serious physical, abuse, neglect or exploitation that occurred; 0 points for effort to correct because the Facility corrected all the violations; and 0 points for the number of clients affected (range of 1-9) because no clients were affected. The Reasonable Diligence subsection is undecipherable, so no points will be assigned to that section. The points totaled 0, which fell beneath the total score needed for a penalty which must be 6-10 points.

146. Petitioner did have deficiencies within Tag 289 with respect to Personnel Requirements tagged as V107, V108, and V536 (maintenance of personnel files on site; training documentation) and Client Personal Funds tagged as V542 (maintenance of documentation of Client’s personal funds). However, none of these deficiencies had “substantial risk that serious physical harm, abuse, neglect or exploitation would occur or did occur.” These three out of ten deficiencies represented 33% of the deficiencies cited in Tag 289.

147. Based on the Undersigned’s assessment of these 3 rule deficiencies for Tag V289, the assigned points are as follows: 0 points for “level of harm” because there was no substantial risk that neglect did or will occur; 0 points for effort to correct because the Facility corrected all the violations; and 1 point for the number of clients affected (range of 1-9). The points totaled 1, which falls below the total score of 6-10 points needed for any penalty.

The Suspension of Admissions Letter (“Suspension Letter”)

148. On June 16, 2021, the same day the Penalty Letter was issued, Ms. Elliot issued a “Suspension of Admissions” Letter (“Suspension Letter”). The Suspension Letter states that “documented violations indicate that conditions in the facility are found to be *detrimental* to the health and safety of the clients.” Resp Ex. S, p 1 (emphasis added).

149. Respondent can suspend a license for two reasons. First, Respondent *may*, but is not required, to suspend the admission of new clients to a licensed facility “where the conditions of the facility are *detrimental* to the health or safety of the clients” for a period of time determined by Respondent and this suspension shall remain in effect until the conditions or circumstances are satisfactorily corrected. N.C. Gen. Stat. § 122C-23(g) (emphasis added). In making this determination, Respondent is required to consider the “degree of sanctions necessary to ensure

compliance” with rule violations and the “character and degree of impact of the conditions” at the facility on the health or safety of the clients. N.C. Gen. Stat. § 122C-23(g)(1) & (2).

150. Second, in the alternative, Respondent *may*, but is not required, to suspend a license if it finds that there has been a “substantial failure to comply” with any applicable statute or rule. N.C. Gen. Stat. § 122C-24(a). In this case, Respondent chose the former reason. Because of Petitioner’s corrective actions and Petitioner’s Plan of Correction (dated June 11, 2021), by June 16, 2021, Petitioner was in “substantial” compliance with the rules; therefore, Respondent could not have suspended the Facility’s admissions on this basis.

151. According to Respondent’s Suspension Letter, the “Suspension of Admissions is to continue until conditions are documented to meet approved inspection status.” Resp’t Ex. S, p 1. Respondent’s suspension continued indefinitely despite Petitioner’s corrections and there is no evidence what conditions would have met approved inspection status.

152. Respondent did not adequately consider the “degree of sanctions necessary to ensure compliance.” Respondent used all sanctions available to it. Moreover, even though Petitioner corrected the deficiencies, Respondent continued the Suspension.

153. Like the Penalty Letter, the Suspension Letter also included a notice of appeal rights and Petitioner’s right to request an Informal Conference, but the deadline was 20 days not 30 days. Resp’t Ex. S, p 2. Petitioner timely appealed.

Intent to Revoke Licensure Letter (“Intent to Revoke”)

154. The Intent to Revoke Licensure Letter (“Intent to Revoke”), also dated June 16, 2021, and based on the same agency findings, states that the rule violations “*endanger* the health, safety, and welfare of the clients in your facility.” Resp’t Ex. V, p 1 (emphasis added). On the same day, for the very same rule deficiencies which were found to be “*detrimental*,” these deficiencies have now risen to the level of “*endanger*.”

155. The term “endanger” is not defined by N.C. Gen. Stat. § 122C-3 or 10A NCAC 27C .0102. The rule says only if Petitioner’s failure to comply with the rules “*endangers* the health, safety or welfare” of the Facility’s Clients can Respondent revoke the license. 10A NCAC 27G .0405(d) (emphasis added). Both rule violations and endangering clients are required for a license revocation under this statute.

156. In the alternative, like a suspension, Respondent *may*, but is not required to, revoke a license only if it finds that there has been a “substantial failure to comply” with any applicable statute or rule. N.C. Gen. Stat. § 122C-24(a). Respondent did not state this as a basis for its Intent to Revoke Petitioner’s license. Nor could it because of Petitioner’s prior corrective actions and June 11, 2021 Plan of Correction. Even by June 16, 2021, Petitioner was in “substantial” compliance with the rules.

157. Based on the Intent to Revoke, Petitioner was once again given an opportunity to demonstrate compliance with licensing laws and rules for retention of the Facility’s license. Resp’t Ex. V, p 2. This documentation must have been submitted within ten (10) calendar days following

the mailing of the June 16, 2021 notice and had to include a written statement and any supporting documents the Petitioner wished the Respondent to review prior to making a final decision. The letter detailed that:

The written statement may be in the form of a Plan of Correction, which should include: (a) measures in place to correct the deficiencies, (b) measures in place to prevent reoccurrence of the problem(s), and (c) who is monitoring and how often to ensure the problems will not re-occur. Please send your written statement and/or plan of correction, and any supporting documents to: Wendy Boone, Eastern Branch Manager NC Division of Health Service Regulation, Mental Health Licensure and Certification Section, 2718 Mail Service Center Raleigh, NC 27699-2718.

Resp't Ex. V, p 2.

158. Because of the Intent to Revoke letter, Petitioner's compliance period shrank from 23 days to 10 days. Despite this, in addition to the Plans of Protection previously submitted on May 24 and June 9, 2021, Petitioner timely submitted a Plan of Correction within 10 days on June 25, 2021 in response to the Statement of Deficiencies and Intent to Revoke letter. Resp Ex. R.

Efforts to Correct Deficiencies

Before the Survey Exit Date

Two Plans of Protection and One Amended Plan of Protection

159. On May 24, 2021, the QP and CEO submitted two Plans of Protection ("Protection Plan(s)") stating the immediate action the Facility would take or had taken to ensure the safety of the Clients in its care. Resp Ex. Q, pp 1-3. The Protection Plan was amended on June 9, 2021 to include corrections for rule violation 10A NCAC 27G .5603 pertaining to Client #5's CPAP machine and incident reporting to probation officer. Resp't Ex. Q, p 4.

Licensee's Efforts to Correct Citations After the June 11, 2021 Date

Plan of Correction Dated June 25, 2021

160. Respondent argues in its Proposed Final Decision that Petitioner was required to complete all corrective action before the June 11, 2021 "Exit Date". Resp't Fin. Pro. Dec. p 7, ¶¶ 32-33; p 8, ¶ 34 (all stating "The survey was conducted for April 22, 2021 to June 11, 2021, or approximately seven weeks. T p 57. At no point did Petitioner provide these documents to Respondent. (T p 55-57)"); p 8, ¶ 39 (stating personnel and training records not provided by the "exit date of June 11, 2021. (T p 29)"); *see also* pp 12-13, ¶ 69; p 13, ¶ 70 (no training records provided); p 13, ¶¶ 74 & 76 (no supplemental financial records or quarterly accounting provided).

161. The Statement of Deficiencies notified the Facility in writing that if the Type A1 Violations were not corrected within twenty-three days, an additional administrative penalty of

\$500.00 per day would be imposed for each day the Facility remained out of compliance beyond the twenty-third day. Pet'r Ex. 5, p 43; T p 115.

162. Even if Petitioner did not provide all documentation prior to the Survey Exit Date, Petitioner still had 23 days to correct the violations after the Survey Exit Date. A facility is expected to have implemented all corrective measures on or before the twenty-third day following a survey. T p 140. According to Wendy Boone, the 23-day time period for compliance is borrowed from a federal regulation and begins to run from the exit date of a survey. T p 142. Using the June 11, 2021 as the Exit Date, the deadline for Petitioner's implementation was July 6, 2021 (the 23rd day was July 5, 2021 a holiday). Before July 6, 2021, Petitioner had provided three Protection Plans, a Plan of Correction, and corrected all but one deficiency. Pet'r Ex. 6, p 1.

163. Certainly by August 18, 2021, there was no immediate jeopardy to the facility's patient health or safety. Only if there is "*immediate jeopardy* to the [Facility's] patient health or safety . . . [can Respondent] terminate the [Facility's] provider agreement no later than 23 days from the last day of the survey if the *immediate jeopardy* has not been removed by the [Facility.]" 42 C.F.R. § 488.82 (emphasis added). "Immediate jeopardy" is defined as "a situation in which the provider's noncompliance with one or more requirements of participation has caused, or is likely to cause serious injury, harm, impairment, or death to a patient(s)." 42 C.F.R. § 488.805. Respondent proffered no evidence that any of Petitioner's deficiencies had caused or were likely to cause serious injury, harm, impairment or death to any Client or that after Petitioner's corrective actions, the Facility's Clients were in immediate jeopardy of serious injury, harm, impairment or death.

164. Respondent asserts that Petitioner's Plan of Correction was defective because it "failed to specify detailed corrective measures, failed to specify who was responsible for each corrective measure, and failed to propose to correct the violations within the required 23-day timeframe. (T p 140)." Resp't Pro. Fin. Dec. p 19, ¶ 120. Even if the Plan of Correction did not meet the specificity requirements of Respondent, as described *infra*, with the exception of one staff training record, most, if not all, of the cited deficiencies had been corrected within the 23 days.

165. Moreover, Respondent offered Petitioner additional deadlines beyond the Survey Exit Date and 23rd day for corrective action and the provision of supporting documentation through its June 16, 2021 Penalty Letter (30 days), Suspension Letter (20 days), Intent to Revoke Letter (10 days), and October 1, 2021 Notice of Revocation (60 days). *See* Resp't Exs. T, S, V, & W. During this time, Respondent did not ask for any additional information from the Licensee "to make a determination of whether to uphold the actions that were taken, rescind the actions, or come to some agreement of what we will do with the actions that were taken." T p 135:17-23 (T of Boone). The simultaneous issuance of the Penalty, Suspension, and Intent to Revoke letters suggests that licensure revocation was a foregone conclusion. The behavior of Respondent's Acting Chief at the Informal Conference foreshadowed her predetermination to revoke Petitioner's license.

The Informal Conference - August 18, 2021

166. Respondent offered, and Petitioner requested, an Informal Conference to seek settlement of the Parties disputes. An Informal Conference was held on August 18, 2021. Resp't

Ex. X. In attendance on behalf of Petitioner were Eloise Dowtin (CEO/Licensee), Sha’Brittany Dowtin (COO), Sonya Chappell (QP), and Christine Layton (executive assistant). In attendance for Respondent were Michiele Elliot (Acting Chief), Wendy Boone (Eastern Branch Manager), and Keisha Douglas (Co-Surveyor). T pp 267:13-268:1. Surveyor Vaughn-Rhodes did not attend.

167. At that time, Michiele Elliot was the Acting Chief of DHHS’ Mental Health Licensure & Certification Section, but she has since retired. T pp 131:23-132:1. Ms. Elliot previously signed all the adverse agency letters and would, after the meeting, on October 1, 2021, sign the Response to the Informal Conference, Notice of Revocation of License, and Denial of Renewal letters. *See* Resp’t Exs. S, T, V, W, X, & Y. Acting Chief Elliot led the Informal Conference meeting.

168. Prior to the Informal Conference, Respondent had already received Petitioner’s Plans of Protection (Resp’t Ex. Q), Petitioner’s “Plan of Correction” (Resp’t Ex. R); and met with the CEO and QP at the Exit Conference on May 24, 2021. Resp’t Ex. F. Also, on July 8, 2021, Petitioner had mailed Supporting Documentation of its Plan of Correction. Resp’t Ex. F; Pet’r Ex. 2.

The Purpose of an Informal Conference

169. The purpose of the Informal Conference is “the opportunity for the licensee to present information that they are in compliance and able to achieve and maintain compliance so that, again, we would not move forward with the revocation process.” T p 135:13-17 (T of Boone). At the Informal Conference, Respondent is supposed to thoroughly review the information the provider has submitted. T p 135:1-23 (T of Boone). Often [Respondent] will request additional information that the provider can submit following the informal conference to make a determination of whether to uphold the actions that were taken, rescind the actions, or come to some agreement of what we will do with the actions that were taken.” T p 135:17-23 (T of Boone).

Petitioner’s Informal Conference

170. At Petitioner’s Informal Conference, Respondent did not provide Petitioner an opportunity to present information; refused to review Petitioner’s documentation; and did not ask for any supplemental documentation.

171. Prior to the Informal Conference, Petitioner had mailed Supporting Documentation for its Plan of Correction to Respondent to be reviewed before the conference. At the beginning of the meeting, Acting Chief Elliot called Eloise Dowtin “incompetent.” Eloise Dowtin had worked as a licensed Registered Nurse in North Carolina for more 20 years¹⁸ and successfully operated group homes since 2001, with only one penalty¹⁹ which was rescinded. T pp 166:6-10; 260:1-20.

¹⁸ Eloise Dowtin testified she received her B.S. in nursing and R.N. license after high school. T p 259:11-15. Afterwards, she worked 14 years as an inpatient lead nurse, 5 or 6 years in labor and delivery, a number of years as an infusion nurse, and a period of time as a college head nurse. While still an R.N., she worked full time in the operation of group homes in 2001. *See* T pp 261:25-262:20.

¹⁹ A penalty was assessed because of a racial fight inside the home. T p 162:6-18. After the Facility hired someone from the State to develop a diversity curriculum and train staff on that curriculum the fines were reduced and eventually taken away. T p 162:10-18.

Multiple staff members and a former client testified to Ms. Dowtin's competence and inspirational impact on their personal lives and careers. T pp 235-247. Even Petitioner's legal counsel was in "awe" of her. T p 333:6-7. Neither Ms. Douglas nor Ms. Boone disputed Ms. Elliot's disrespectful behavior.

172. When asked about receipt of the Facility's Supporting Documentation, Michiele Elliot said that Respondent had not received Petitioner's supporting documents prior to the Informal Conference. Although Petitioner had previously mailed the documents, Petitioner also brought a "big box" with a copy of the supporting documents to the conference, but Michiele Elliot refused to copy or review the documents. T pp 166:8-25; 268:7-269:1. During the meeting, when the COO tried to direct Ms. Elliot through the documents, Ms. Elliot stated that there was not enough time. T pp 167:7-22; 268:2-22. Ms. Elliot did not testify at the hearing. Neither Keisha Douglas nor Wendy Boone refuted the COO's recollection of Ms. Elliot's actions and statements during their testimonies. *See* T pp 18-105 (T of Douglas); T pp 106-154 (T of Boone).

173. Although Ms. Elliot did not testify, her hearsay statement was admissible because Ms. Elliot was acting as a representative of Respondent and her statements recounted by the COO concerned a matter within the scope of her employment during the existence of Respondent's relationship with Petitioner. As such, her hearsay statements fall within the exception of an admission by a party-opponent. N.C. Gen. Stat. § 8C-1, Rule 801(d).

174. Ms. Elliot's refusal to even look for Petitioner's documentation contravened the purpose of an Informal Conference which was to allow Petitioner the opportunity "to present information that they are in compliance and able to achieve and maintain compliance so that [Respondent] would not move forward with the revocation process." Ms. Elliot's attitude towards Eloise Dowtin and Ms. Elliot's refusal to consider the Supporting Documentation indicated that she had already predetermined the outcome of the Informal Conference and decided to revoke the Facility's license regardless of any corrective action taken by Petitioner.

Response to Informal Conference - October 1, 2021

175. On October 1, 2021, Ms. Elliot responded to the Informal Conference ("Informal Conference Response") by notifying Petitioner that after reviewing the "information provided during the meeting [Informal Conference] and the corrective actions taken by your agency," Respondent was upholding the three Type A1 violations and penalties as well as its Intent to Revoke License. Resp't Ex. W. No appeal rights were included in the Informal Conference Response.

176. Ms. Elliot's statements in her Informal Conference Response that Respondent reviewed Petitioner's Supporting Documentation is contrary to the evidence in this case. The CEO and COO's credible testimony that the documentation was not reviewed at the Informal Conference was not refuted by Respondent's witnesses. Significantly, neither Ms. Boone nor Ms. Douglas testified that the documentation was reviewed *after* the Informal Conference.

177. Despite Petitioner's corrections of the deficiencies, Ms. Elliot still upheld the Intent to Revoke Licensure, the Suspension of Admissions, and the three penalties totaling \$6,000.00.

Resp't Ex. X. On the same day she issued her Response, not surprisingly, Ms. Elliot notified Petitioner of the revocation of the Facility's license. Resp't Ex. W.

Revocation of Licensure - October 1, 2021

178. After the Informal Conference, and even though all the deficiencies, albeit one, had been corrected on October 1, 2021, Respondent notified Petitioner that it was revoking the Facility's license (the "Revocation Letter"). According to the Revocation Letter, Petitioner's license was revoked because of its failure to comply with the licensing rules in N.C. Gen. Stat. §§ 122C Article 2 (licensing rules) and Article 3 (client's rights) as stated in the June 11, 2021 Statement of Deficiencies. Resp't Ex. W, pp 1-2.

179. Unlike Respondent's Intent to Revoke letter which determined revocation was necessary because the alleged deficiencies "*endangers* the health, safety or welfare" of the Facility's Clients, the Revocation Letter used a different basis for revocation. Here, Respondent revoked licensure because of the Facility's rule deficiencies.

180. As stated previously, Respondent may revoke or suspend a license only if it finds that there has been a "*substantial* failure to comply" with any applicable statute or rule. N.C. Gen. Stat. § 122C-24(a) (emphasis added). Based on Petitioner's Supporting Documentation (not considered by Respondent), Plan of Correction, and three Plans of Protection, by October 1, 2021, Petitioner was "substantially" compliant with all rule deficiencies.

181. Like its predecessors, the Revocation Letter advised Petitioner of its right to appeal the decision and right to request an informal conference. The deadline in the Revocation Letter was within 60 days of the mailing of the letter. Resp Ex. W, p 2. Like Respondent's other adverse agency actions, Petitioner timely appealed the licensure revocation.

Denial of "Renewal of Licensure" Letter ("Renewal Denial") - February 2, 2022

182. The Facility's license renewal was denied on February 2, 2022 as untimely filed. *See* Resp't Ex. Y. On February 2, 2022, Acting Chief Elliot issued to Petitioner a "Denial of Renewal of Licensure" Letter ("Renewal Denial") advising that the Facility's license was denied for renewal because it was untimely. Resp't Ex. Y. Like its predecessors, this letter contained an appeal notice and right for the Licensee to request an Informal Conference. The deadline for both actions was 30 days. Resp't Ex. Y.

183. Contrary to the Renewal Denial's assertions of untimeliness, the Facility's renewal application was timely filed. In December 2021, after encountering initial difficulties in accessing the online portal for the licensee renewal application, with the assistance of DHHS' IT specialists, the COO timely submitted the application and payment. T p 194:6-24. At the hearing, Respondent stated that, per N.C. Gen. Stat. § 122C-24.1(k), the renewal license was denied because Petitioner had outstanding penalties, not because of untimeliness. T pp 144:16-145:4.

184. Even though the Administrative Penalties were appealed, the existence of the penalties also adversely affected Petitioner's ability to renew its license for this Facility and will continue to do so if these adverse actions are upheld. N.C. Gen. Stat. § 122C- 24.1. However, the

statute also states that “fines and penalties for which an appeal is pending are exempt from consideration for nonrenewal.” N.C. Gen. Stat. § 122C-24.1(k.).

185. Petitioner’s appeal of the penalties in case file number 21 DHR 02993 had been dismissed on September 27, 2021 and subsequently reopened on June 29, 2022. Because of the lapse of time prior to reopening, at the time of the renewal application, Petitioner did have outstanding penalties which were not considered exempt. The reopening of Petitioner’s appeal, however, now made those penalties exempt.

186. It is undisputed that Petitioner timely appealed all of Respondent’s adverse actions by filing contested case petitions in the Office of Administrative Hearings. *See* Procedural History *supra*, which is referred to and incorporated herein by reference.

SUMMARY

187. Respondent has failed to prove by clear and convincing evidence that Petitioner committed the statutory and rule violations cited in the Statement of Deficiencies or that Petitioner should be assessed three Type A1 Administrative Penalties in the amount of \$2,000.00 each, an aggregate of \$6,000.00.

188. Petitioner proved by a preponderance of the evidence that the Facility’s Clients were not neglected, exploited, or otherwise harmed. Petitioner acted with “reasonable diligence” in light of the staffing and document management problems caused by the effect of the unprecedented COVID-19 pandemic. Moreover, there was no “substantial risk,”²⁰ meaning substantial certainty, that based on the cited deficiencies that the Facility’s Clients would in the future be neglected or exploited and such potential neglect/exploitation required “immediate action” by Respondent while Petitioner was correcting the citations. In addition, the efforts of Petitioner to correct the cited violations and its documentation of these corrections were not properly factored in Respondent’s adverse decisions. N.C. Gen. Stat. § 122C-24.1(c)(5).

189. Petitioner proved by a preponderance of the evidence that Petitioner has not substantially failed to comply with the applicable statutes/rules, and that any noncompliance of the statutes/rules was not detrimental or endangered the health, safety, or welfare of the Clients in its Facility. Petitioner proved by a preponderance of the evidence that Respondent’s adverse agency actions, detailed in the Suspension of Admissions, Intent to Revoke, Revocation, and Renewal Denial letters, deprived Petitioner of property, substantially prejudiced Petitioner’s rights, and that Respondent exceeded its authority or jurisdiction, acted erroneously, and failed to act as required by law or rule.

CONCLUSIONS OF LAW

1. To the extent the Findings of Fact contain conclusions of law, or the Conclusions of Law are findings of fact, they should be considered without regard to their given labels.

²⁰

As defined by N.C. Gen. Stat. § 122C-24.1(a)(2b).

2. This Final Decision incorporates and reaffirms the conclusions of law contained in the previous Orders issued in this consolidated contested case.

3. The Office of Administrative Hearings has personal and subject matter jurisdiction over this contested case pursuant to Chapters 122C and 150B of the North Carolina General Statutes.

4. The Parties received proper notice of the hearing in this matter. All Parties have been correctly designated and there is no question as to misjoinder or nonjoinder.

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

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

7. Petitioner has the burden of proving by a preponderance of the evidence that Respondent's suspension, revocation, and renewal denial of its license deprived Petitioner of Petitioner's property or substantially prejudiced Petitioner's rights *and* Respondent 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-23 (emphasis added).

Type A1 Violations and Administrative Penalties

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 governing facilities that provide mental health, developmental disabilities, and substance abuse services.

Various Nature of Violation and Administrative Penalties

9. The type of penalty assessed is important because the penalties and remedies are based on three types of violations. Violations are classified in accordance with the nature of the violations as either a Type A1 Violation, Type A2 Violation, or Type B Violation. N.C. Gen. Stat. § 122C-24.1.

10. A "Type A1 Violation" is defined by statute as "a violation by a facility of the regulations, standards, and requirements set forth in Article 2 or 3 of this Chapter or applicable State or federal laws and regulations governing the licensure or certification of a facility *which results* in death or serious physical harm, abuse, neglect, or exploitation." N.C. Gen. Stat. § 122C-24.1(a)(1). (Emphasis added).

11. A Type A2 Penalty is assessed for a violation of rules or regulations 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) (emphasis added). *Substantial risk* means the risk of an

outcome that is substantially certain to materialize if immediate action is not taken. N.C. Gen. Stat. § 122C-224.1(a)(2B) (emphasis added).

12. A Type B Penalty is assessed for a violation of rules or regulations which is *detrimental* to the health, safety, or welfare of any client, but does not result in substantial risk that death or serious physical harm, abuse, neglect, or exploitation will occur. N.C. Gen. Stat. § 122C-24.1(a)(2) (emphasis added).

13. All three Penalty types require Respondent to:

1. Orally and immediately inform the facility of the violation and the specific findings;
2. Require a written plan of protection regarding how the facility will immediately abate the violation in order to protect clients from further risk or additional harm;
3. Within 15 working days of the investigation, send a report of the findings to the facility; and,
4. Require a plan of correction to be submitted to the Department based on the written report of the findings that the facility will take to achieve and maintain compliance.

N.C. Gen. Stat. §§ 122C-24.1(a)(1)(a, a1, b, &c); 122C-24.1(a)(1a)(a-d); (2)(a-d).

14. In assessing the appropriateness of the penalty amounts, two issues must be addressed: (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. N.C. Gen. Stat. § 122C-24.1(f). The factors for consideration are:

- (1) There is substantial risk that serious physical harm, abuse, neglect, or exploitation will occur, and this has not been corrected within the time specified by the Department or its authorized representative;
- (2) Serious physical harm, abuse, neglect, or exploitation, without substantial risk for client death, did occur;
- (3) Serious physical harm, abuse, neglect, or exploitation, with substantial risk for client death, did occur;
- (3a) A client died;
- (3b) A client died and there is substantial risk to others for serious physical harm, abuse, neglect, or exploitation;
- (3c) A client died and there is substantial risk for further client death;
- (4) The reasonable diligence exercised by the licensee to comply with G.S. 131E-256 and other applicable State and federal laws and regulations;
- (5) Efforts by the licensee to correct violations;
- (6) The number and type of previous violations committed by the licensee within the past 36 months; and
- (7) The number of clients or patients put at risk by the violation.

N.C. Gen. Stat. § 122C-24.1(c).

15. Generally, the death of a client and/or risk of further client death are factors for consideration for all cases, but those factors were not relevant to this case.

16. The factors relevant to this case that Respondent was required to consider are: 1. was there a *substantial risk* that serious physical harm, abuse, neglect, or exploitation *will occur*; 2. serious physical harm, abuse, neglect, or exploitation *without substantial risk for client death did occur*; and 3. serious physical harm, abuse, neglect, or exploitation *with substantial risk for client death did occur*.

17. Respondent must also consider the “reasonable diligence” exercised by the licensee to comply with applicable statutes and regulations; efforts by the licensee to correct violations; and the number and type of previous violations committed by the licensee within the past 36 months. N.C. Gen. Stat. § 122C-24.1(c)(1, 2, 3, 4, 5, 6). It is undisputed that Petitioner had no prior violations within the past 36 months. *See* Resp’t Ex. U.

Type A1 Violations Assessed Against Petitioner

18. On June 16, 2021, Respondent assessed Petitioner the following penalties: (1) Two Thousand Dollars (\$2,000.00) for a Type A1 Violation of 10A NCAC 27D .0304; (2) Two Thousand Dollars (\$2,000.00) for a Type A1 Violation of 10A NCAC 27G .5601; and (3) Two Thousand Dollars (\$2,000.00) for a Type A1 Violation of 10A NCAC 27D .5603. Resp’t Ex. T. After an Informal Conference and reconsideration of the penalties, these penalties were “upheld” by Respondent on October 1, 2021. Resp’t Ex. X.

Tag 512 - Neglect and Exploitation

Type A1 Violation of 10A NCAC 27D .0304 Neglect and Exploitation

19. In the first and most egregious assessment, Petitioner is accused of violating rules which resulted in the neglect and exploitation of Clients, not for serious physical harm or abuse.

20. “Exploitation” is defined as “the use of a client’s person or property for another’s profit or advantage or breach of a fiduciary relationship through improper use of a client’s person or property including situations where an individual obtains money, property or services from a client from undue influence, harassment, deception or fraud.” 10A NCAC 27C .0102(b)(9).

21. “Neglect” is defined as “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(b)(17). Although Respondent repeatedly accuses Petitioner of “serious neglect,” there is no definition of “serious neglect” in the statute or rules. There are no degrees of “neglect.”

22. Based on the foregoing Findings of Fact, Petitioner did not subject Clients to exploitation, require them to perform work for the Contract Maintenance Man, or underpay them. The Owner/Licensee did not benefit through improper use of Clients’ service, take advantage of them, or breach her fiduciary relationship to them in any manner. Moreover, Petitioner’s actions

in this regard did not constitute neglect of the Clients. This conduct was not cited appropriately as a Type A1 Violation of 10A NCAC 27D .0304 and did not result in exploitation or neglect of the Clients as defined by 10A NCAC 27C .0102(b)(9).

23. Respondent's citation of a Type A1 Violation of 10 NCAC 27D .0304 was not supported by clear and convincing evidence and the penalty assessment should be reversed. Respondent deprived Petitioner of property, substantially prejudiced Petitioner's rights, and exceeded its authority or jurisdiction, acted erroneously, and failed to act as required by law or rule when assessing the Type A1 Violation of 10A NCAC 27D .0304.

Collective Violations - Tags 291 And 289

24. Respondent assessed Petitioner penalties for two collective violations tagged as 291 and 289. These "Collective Violations" cross-referenced a number of alleged rule deficiencies which are analyzed in the Findings of Fact above.

Tag 291 - Operations

Type A1 Violation of 10A NCAC 27G .5603 – Operations

25. Respondent cited Petitioner for this collective violation under Tag 291 because Petitioner purportedly failed to meet Client #5's treatment needs and failed to coordinate services with his probation officer.

26. Based on the foregoing Findings of Fact, Petitioner did not subject Client #5 to neglect by failing to repair his existing CPAP machine or by the delay in obtaining him a new CPAP machine. Petitioner's decision not to notify Client #5's probation officer of a suspected, but unsubstantiated, incident involving alcohol consumption was reasonable in light of the circumstances at the time. Respondent wrongfully cited Petitioner with noncompliance with 10A NCAC 27G .5603 and erroneously issued a Type A1 Violation. Even though, there was a delay replacing Client #5's CPAP, Petitioner did not neglect Client #5 or subject him to substantial risk or that serious neglect would occur to him in the future.

27. Respondent's citation of a Type A1 Violation of 10 NCAC 27G .5603 was not supported by clear and convincing evidence and the penalty assessment should be reversed. Respondent deprived Petitioner of property, substantially prejudiced Petitioner's rights, and exceeded its authority or jurisdiction, acted erroneously, and failed to act as required by law or rule when assessing the Type A1 Violation of 10A NCAC 27G .5603.

Tag 289 - Scope

Type A1 Violation of 10 NCAC 27G .5601 – Scope

28. Tag 289 is a collective violation assessed for the alleged deficiencies of Petitioner's failures: to provide Clients with nutritional meals, with proper supervision in according with their treatment plans, proper management of Client's personal funds and maintenance, with proper

maintenance of Staff personnel records and training documentation, and to maintain the interiors and exterior of the Facility.

29. Based on the foregoing Finding of Fact, Petitioner did not neglect its Clients or subject them to substantial risk of future neglect because of these deficiencies. Admittedly, Petitioner was unable to provide training documentation for one personnel file despite multiple attempts. At best, Petitioner's failure to maintain personnel files and training records could be considered potentially *detrimental* to the health, safety, or welfare of the Clients since it did not result in neglect or substantial risk of future neglect and warrant a Type B violation. N.C. Gen. Stat. § 122C-24.1(a)(2). However, despite that one unresolved deficiency, Petitioner did meet the Clients' mental health treatment needs. Respondent wrongfully cited Petitioner with noncompliance with 10A NCAC 27G .5601 and erroneously assessed Petitioner with a Type A1 Violation.

30. Respondent's assessment of a Type A1 Violation of 10 NCAC 27G .5601 is not supported by clear and convincing evidence and the penalty assessment should be reversed. Respondent deprived Petitioner of property, substantially prejudiced Petitioner's rights, and exceeded its authority or jurisdiction, acted erroneously, and failed to act as required by law or rule when assessing the Type A1 Violation of 10A NCAC 27G .5601.

Penalty Assessment

31. Even if, *arguendo*, Petitioner's failure to maintain personnel files and training records should have resulted in administrative penalties, Respondent failed to properly assess the penalties because it failed to consider Petitioner's reasonable diligence in trying to comply with the rules and Petitioner's efforts to correct the deficiencies. N.C. Gen. Stat. § 122C-24(f)(4) & (5).

32. Respondent uses a Penalty Matrix ("Matrix") for determining the financial amount of that penalty. The Matrix purports to take into account the factors from the statute, but unlike the statute, the Matrix delineates subsections entitled "Efforts to Correct" and "Due Diligence" into specific line-item descriptions which do not align with any statutory or regulatory authority. *See* Resp't Ex. U, bates stamps 000010, 00012, 00015.

33. At the conclusion of the Survey, the Statement of Deficiencies advised Petitioner that it had 23 days to correct the individual deficiencies. Pet'r Ex. 5, pp 12, 19, 30, 36, 50, 69, 73, & 76. Respondent contends that the Survey Exit date was June 11, 2021.

34. For the Collective Violation Tag V291 and Tag V512 (exploitation), the Statement of Deficiencies advises Petitioner that it had 23 days to correct the individual deficiencies and adds that a \$500.00 a day per day fine will be imposed for every day of noncompliance beyond the 23rd day. Pet'r Ex. 5, pp 43, 56-57, & 63-64.

35. When advised of the Survey results on May 24, 2021, Petitioner with due diligence took immediate efforts to correct the cited deficiencies starting with multiple Plans of Protection and a Plan of Correction. By June 25, 2021, all the citations were corrected except for the

production of training records for one personnel file and Petitioner was reasonably diligent in trying to obtain that file.

36. Respondent's June 16, 2021 Intent to Revoke Letter, included a "**Notice of Opportunity to Demonstrate Compliance with Licensing Laws and Rules**." Resp't Ex. V, p. 2 (emphasis in original). Based on that "Notice," once again Respondent gave Petitioner an opportunity to request an Informal Conference and to show compliance with all lawful requirements for retention of its license. *Id.* Petitioner attended an Informal Conference on August 18, 2021. Again, at that time, all cited deficiencies had been corrected except one.

37. Regardless, the Acting Chief of DHHS refused to even consider Petitioner's Supporting Documentation and predetermined her final decision to revoke Petitioner's license. Despite knowing that Petitioner had diligently corrected all deficiencies but one and Petitioner was in compliance with all relevant rules and statutes, on October 1, 2021, the Acting Chief upheld the revocation, suspension of admissions, and all three administrative penalties. Resp't Ex. X.

38. Respondent's failures to consider the reasonable diligence exercised by Petitioner to comply with the rules and Petitioner's corrective efforts were erroneous, improper procedure, and violative of Respondent's statutory mandates.

Suspension of Admissions

39. Respondent may suspend the admission of any new clients to a licensed mental health facility where the conditions of the facility are *detrimental* to the health or safety of the clients. Respondent must consider "(1) [t]he degree of sanctions necessary to ensure compliance with this section and rules adopted to implement this subsection, and (2) [t]he character and degree of impact of the conditions at the facility on the health or safety of its clients." N.C. Gen. Stat. § 122C-23(g).

40. By certified letter dated June 16, 2021, Respondent imposed a Suspension of Admissions against Petitioner, requiring Petitioner to suspend all admissions to the Facility effective immediately. T p 118. Respondent's decision to suspend admissions was based on its finding that the Facility was operating in violation of the statutes, rules, and regulations governing mental health, developmental disabilities, and substance abuse facilities and services. Resp't Ex. E.

41. Based on the deficiencies identified during the Survey, the Undersigned concludes that, with the exception of one personnel file training documentation, Petitioner complied with the licensure statutes and rules. Petitioner's failure to obtain the training records of one employee who worked only a few weeks at the Facility was not detrimental to the health and safety of the Clients.

42. Petitioner has met its burden by a preponderance of the evidence that Respondent's June 16, 2021 decision pursuant to N.C. Gen. Stat. § 122C-23(g) to suspend all new admissions to the Facility and its subsequent October 1, 2021 decision to uphold that suspension should be reversed. Respondent's imposition of the Suspension of Admissions deprived Petitioner of property, substantially prejudiced Petitioner's rights, and Respondent exceeded its authority or jurisdiction, acted erroneously, and failed to act as required by law or rule.

Revocation of Petitioner's License

43. Respondent may revoke a license to operate a mental health facility where “the Secretary finds that there has been a *substantial failure* to comply with any provision of this Article or other applicable statutes or any applicable rule adopted pursuant to these statutes.” N.C. Gen. Stat. § 122C-24(a) (emphasis added). Such failure to comply must also *endanger* the health, safety or welfare of the individuals in the facility.” 10A NCAC 27G .0405(d) (emphasis added).

44. Respondent is required to give written notice to the licensee of the revocation of its license. The licensee then has sixty (60) days to appeal the revocation by filing a petition for contested case hearing with the Office of Administrative Hearings (“OAH”). If the notice of revocation is appealed within that timeframe, the revocation is automatically suspended until a decision on the revocation is made by OAH. 10A NCAC 27G .0405(d).

45. By letter dated October 1, 2021, Respondent notified Petitioner that it was revoking its license to operate the Facility. Resp’t Ex. W. That decision was based on Respondent’s finding that Petitioner had “failed to comply with the provisions of North Carolina General Statutes,” specifically, Articles 2 and 3 of Chapter 122C of the North Carolina General Statutes. Resp’t Ex. W. Respondent revoked Petitioner’s license based solely upon its findings of deficiencies in its Survey. Respondent erroneously failed to consider Petitioner’s Plans of Protection and Plan of Correction, both of which indicated timely corrective action.

46. Moreover, Respondent’s Acting Chief refused to review Petitioner’s Supporting Documentation at the Informal Conference, which evidenced correction of all deficiencies except production of one training record. Respondent’s refusal to even consider Petitioner’s documentation thwarted the very purpose of the Informal Conference which is “the opportunity for the licensee to present information to show that they are in compliance and able to achieve and maintain compliance so that, again, we would not move forward with the revocation process.” T p 134:13-17 (T of Assistant Section Chief Boone).

47. On November 30, 2021, Petitioner filed a Petition for Contested Case Hearing appealing the Notice of Revocation. This appeal suspended the revocation of Petitioner’s license until completion of the contested case. 10A NCAC 27G .0405(d).

48. As concluded above, although Petitioner failed to provide all documentation during the Survey period, and still cannot produce one personnel file, Petitioner has *substantially* complied with the provisions of Articles 2 and 3 of Chapter 122C of the North Carolina General Statutes.

49. Petitioner’s minor deficiencies and incomplete record keeping did not endanger the health, safety, and welfare of the residents in the Facility.

50. Petitioner met its burden to show by a preponderance of the evidence that Respondent’s decision to revoke Petitioner’s license to operate the Facility pursuant to N.C. Gen. Stat. § 122C-24(a) was improper. Respondent deprived Petitioner of property; otherwise substantially prejudiced Petitioner’s rights; and Respondent exceeded its authority or jurisdiction;

acted erroneously; failed to use proper procedure; and failed to act as required by rule or law when it issued the Notice of Revocation on October 1, 2021.

Denial of Renewal of Petitioner's License

51. By letter dated February 2, 2022, Respondent informed Petitioner that it was not renewing its license to operate based on outstanding penalties for which no appeal was pending. N.C. Gen. Stat. § 122C-24(k).

52. At the time of the renewal denial, Petitioner's appeal of the penalties in case number 21 DHR 02993 had been dismissed on September 27, 2021. This dismissal removed the penalties' exempt status. However, as this decision was later reversed for excusable neglect on June 29, 2022, the Final Decision issued on September 27, 2021 was vacated.

53. Respondent was required to deny renewal of the Facility's license in February of 2022 because the penalties appeal in case 21 DHR 02993 had been dismissed. However, once the Final Decision in 21 DHR 02993 was vacated, the penalties' exempt status was restored as the contested case process was no longer complete. 10A NCAC 27G .0405(d). At that time, Respondent should have reversed its decision to deny renewal of Petitioner's license until the end of the contested case.

54. Petitioner met its burden to show by a preponderance of the evidence that Respondent's decision to deny renewal of Petitioner's license to operate the Facility pursuant to N.C. Gen. Stat. § 122C-24(a) was improper. Respondent did deprive Petitioner of property; otherwise substantially prejudiced Petitioner's rights; exceeded its authority or jurisdiction; acted erroneously; failed to use proper procedure, and failed to act as required by rule or law when it issued the Renewal Denial on October 1, 2021.

55. The assessment of Type A1 penalties and Respondent's adverse licensure actions are reversed and shall not be used as grounds to deny the issuance of a new license, renew a license, revalidate an enrolled provider in the Medicaid or NC Health Choice programs for any owner, principal, or affiliate of The Emmanuel Home IV. N.C. Gen. Stat. § 122-23(e1) & (e3). Respondent shall immediately renew Petitioner's license.

FINAL DECISION

BASED UPON the foregoing Findings of Fact and Conclusions of Law, the Undersigned makes the following Final Decision:

1. The Type A1 violation in 10A NCAC 27D .0304 Protection from Harm, Abuse, Neglect or Exploitation (V512) issued on June 16, 2021 and Respondent's Assessment of a \$2,000.00 penalty is **REVERSED**.

2. The Type A1 violation in 10A NCAC 27G .5602 Supervised Living for Adults with Mental Illness-Scope (V289) issued on June 16, 2021 and Respondent's Assessment of a \$2,000.00 penalty is **REVERSED**.

3. The Type A1 violation in 10A NCAC 27G .5603 Supervised Living for Adults with Mental Illness-Operations (V291) issued on June 16, 2021 and Respondent's Assessment of a \$2,000.00 penalty is **REVERSED**.

4. The Intent to Revoke License issued on June 16, 2021 is **REVERSED**.

5. The Suspension of Admissions issued on June 16, 2021 is **REVERSED**.

6. The Revocation of the Facility's license issued on October 1, 2021 is **REVERSED**.

7. The Denial of Renewal of Licensure for The Emmanuel Home IV issued on February 2, 2022 is **REVERSED** and Respondent is **ORDERED** to immediately renew Petitioner's license to operate The Emmanuel Home IV.

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 7th day of December, 2022.



Stacey Bice Bawtinheimer
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.

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This the 7th day of December, 2022.



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