

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

**ANGELS ROYAL GARDENS,
Petitioner,**

v.

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

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: **Docket Nos.:**
: **OSAH-DCH-HFR-CLA-1627302-31-**
: **Howells**
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FILED
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INITIAL DECISION

I. Summary of Proceedings

Kevin Westray
Kevin Westray, Legal Assistant

Petitioner, Angels Royal Gardens, a previously licensed Community Living Arrangement, appealed the decision of the Department of Community Health, Healthcare Facility Regulation Division (“Department”) to impose a \$1202.00 fine for two alleged Initial Category I violations. Owner Morolake McDonnell and Director Tiffany Hutchinson appeared on behalf of Petitioner. Respondent was represented by Stacey Hillock, Esq. For the reasons set forth below, the actions of the Department are **AFFIRMED in part and REVERSED in part.**

II. Findings of Fact

1.

In July of 2015, Angels Royal Gardens was a licensed Community Living Arrangement (“CLA”).¹ On July 28, 2015, Jaqueita Farrell, a Compliance Auditor employed with the Department, attempted to conduct the annual inspection of Angels Royal Gardens located at 7752 Marabou Lane, Riverdale, Georgia. When she arrived she knocked on the door of the residence multiple times. Eventually, a young woman answered the door. Ms. Farrell identified

¹ Within the last few months, Angels Royal Gardens has converted its license from a community living arrangement to a personal care home. (Testimony of Elaine Wright; Testimony of Morolake McDonnell).

herself and explained why she was there. The young woman told Ms. Farrell to come in and “do what you need to do.” She told Ms. Farrell that she rented a room in the house and that she did not know where anything was. She also denied taking any medications or receiving any assistance from anyone at the residence. The young woman then walked away. (Testimony of Jaqueita Farrell; Exhibit R-2).

2.

While seated at the dining room table, Ms. Farrell called the owner of Angels Royal Gardens, Morolake McDonnell. Ms. McDonnell told Ms. Farrell that there were no residents in the facility and that she was out of town. Ms. Farrell asked Ms. McDonnell if she wanted to turn in the license for the Community Living Arrangement. Ms. McDonnell did not agree to turn in the license. (Testimony of Jaqueita Farrell).

3.

Ms. Farrell testified that Ms. McDonnell told her to leave the residence at least two times during the telephone conversation. At the hearing, Ms. McDonnell denied telling Ms. Farrell to leave the residence. Rather, she said that she was out of town and could not be there for the inspection. (Testimony of Jaqueita Farrell; Testimony of Ms. McDonnell).

4.

The young woman who answered the door is not staff for the facility. She is the cousin of Ms. McDonnell and was staying in the home while it was vacant. Ms. McDonnell asked her to stay in the home because it had previously been vandalized and she was concerned that it could be vandalized again if no one was living there. (Testimony of Ms. McDonnell).

5.

Because there was no staff present in the residence, Ms. Farrell could not conduct the inspection or review any records. Although the young woman told Ms. Farrell to “do what you need to do,” it is not the policy of the agency for compliance auditors to roam around licensed residences without a staff member to accompany them. Further, Ms. McDonnell acknowledged that any records that she had were in a locked filing cabinet and that she had the key. Thus, Ms. Farrell would not have been able to access them. (Testimony of Jaqueita Farrell; Testimony of Ms. McDonnell).

Rule Violations

6.

Ms. Farrell completed an inspection report citing two rule violations. She concluded that Petitioner violated rule 290-9-37-.31(1) because the owner or another staff member was not present and this prevented her from being able to conduct the inspection of the residence. She concluded that Petitioner violated rule 290-9-37-.31(2) because the owner or another staff member was not present and therefore she was unable to review the facility’s records. At the hearing, Ms. Farrell testified that she was unable to determine if there were any residents in care.² (Testimony of Jaqueita Farrell).

Sanction

7.

Elaine Wright is employed by the Department. She is the director of the Personal Care Home Program, which is also responsible for Community Living Arrangements. She testified

² In her report, Ms. Farrell stated that “DD was the only one in the home.” DD was the designation she used to refer to the woman who answered the door and let her into the home. She also stated that she “told Staff A that although there were no residents, the staff files need to be reviewed and other facility records.” Thus, it appears, at least for the purpose of completing her report, Ms. Farrell believed that there were no residents in care. (Ex. R-2; Testimony of Jaqueita Farrell).

that Department has the authority to impose various sanctions for rule violations. For example, the Department can administer a public reprimand, prohibit persons in management or control, suspend a license, revoke a license, or impose a civil penalty fine. Based on the two rule violations, the Department decided to sanction Petitioner by imposing a civil penalty fine. The Department decided that the two rule violations constituted two initial Category I violations and sought to fine Petitioner \$601.00 for each violation, for a total amount of \$1202.00. The Department determined that the inability to inspect the home and its records posed an “imminent threat” or a “possible threat” to any residents that may have been there or could have been admitted the next day. Ms. Wright further explained that if the Department is prevented from completing an inspection it has no opportunity to determine if there are persons in care. It would not know whether there may be residents hidden in a closet or locked up somewhere in the facility. (Testimony of Elaine Wright; Ex. R-1).

Notice of Fine and Appeal

8.

By letter, dated January 29, 2013, the Department notified Petitioner of its intent to impose a \$1201.00 fine for two initial Category I violations. Attached to the notice was the investigative report listing the violations. On or about September 21, 2015, Petitioner requested a hearing to contest the imposition of a fine. (Exs. R-1, R-6).

III. Conclusions of Law

1.

The Department seeks to impose a fine against Petitioner for alleged violations of licensing rules. Accordingly, the Department bears the burden of proof. Ga. Comp. R. & Regs.

616-1-2-.07(1). The standard of proof is a preponderance of the evidence. Ga. Comp. R. & Regs. 616-1-2-.21(4).

2.

The Department has the authority to classify and license community living arrangements. O.C.G.A. § 31-2-4(d)(8). A community living arrangement is a “residence . . . that undertakes through its ownership or management to provide or arrange for the provision of daily personal services, supports, care, or treatment exclusively for two or more adults who are not related to the owner or administrator by blood or marriage.” Ga. Comp. R. & Regs. 290-9-37-.05(g); *see also* O.C.G.A. § 31-2-4(d)(8).

3.

The Department alleged that Petitioner violated two provisions regarding Community Living Arrangements. Specifically, the Department alleged that Petitioner violated rule 290-9-37-.31(1) when it prevented Ms. Farrell from conducting the inspection of the residence and violated rule 290-9-37-.31(2) when it failed to make its records available for inspection. As noted in the Findings of Fact, Ms. McDonnell was not present when Ms. Farrell arrived for the annual inspection. Nor was there any staff member present when Ms. Farrell arrived. Further, according to Ms. Farrell, Ms. McDonnell told her to leave the premises. Even if the undersigned does not credit Ms. Farrell’s testimony that she was told to leave the premises, which appeared credible, Petitioner’s failure to be present or have a staff member present prevented Ms. Farrell from inspecting the residence and Petitioner’s records. Accordingly, this tribunal concludes that Petitioner’s actions violated rules 290-9-37-.31(1) and (2).

4.

In general, the Department has the authority to sanction a licensee, upon a finding that the licensee has, failed to comply with its rules. Ga. Comp. R. & Regs. 111-8-25-.04. Further, the Department has the specific authority to sanction a licensee when the licensee “[f]ailed or refused, without legal cause, to provide the department with access to the premises subject to regulation or information pertinent to the initial and continued licensing of the facility.” *Id.* When the Department determines that a licensee has violated any of its rules, it may impose any one or more of the following sanctions:

- (a) Administer a Public Reprimand,
- (b) Suspend any License,
- (c) Prohibit Persons in Management or Control,
- (d) Revoke any License,
- (e) Impose a Civil Penalty Fine, or
- (f) Limit or Restrict any License.

Ga. Comp. R. & Regs. 111-8-25-.05(1)(a)-(f). Here, the Department chose to impose a civil penalty fine in the amount of \$1202.00. The Department asserts that Petitioner violated two provisions of the Community Living Arrangement rules, which amounted to initial Category I violations.

5.

A Category I violation is:

A violation or combination of violations of licensing requirements which has caused death or serious physical or emotional harm to a person or persons in care or *poses an imminent and serious threat or hazard to the physical or emotional health and safety of one or more persons in care.*

Ga. Comp. R. & Regs. 111-8-25-.05(e)(1)(i) (emphasis added). The regulations do not define the term “persons in care.” However, a “Resident” is defined as “any non-family adult living in a Community Living Arrangement and receiving services, supports, care, or treatment.” Ga. Comp. R. & Regs. 290-9-37-.05(ee). Thus, it would seem that in the context of a Community Living Arrangement, a resident receiving services, supports, care or treatment would be considered a “person in care.” “Imminent” is also not defined by the regulations; however, one dictionary defines it as follows: “likely to occur at any moment; impending.” Webster’s Encyclopedic Unabridged Dictionary of the English Language 957 (1996). Another dictionary defines it as “about to occur; impending.” American Heritage College Dictionary 679 (3d. ed. 1997).

6.

“It is axiomatic that when that when the language of a statute is plain and susceptible of but one construction, the courts have no authority to place a different construction on the statute, but must apply it according to its own terms.” *Kirk v. Lithonia Mobile Homes, Inc.*, 181 Ga. App. 533, 535-36 (1987) (citations omitted). Similarly, courts employ the same rules of statutory interpretation when construing agency regulations. *Upper Chattahoochee Riverkeeper, Inc. v. Forsyth County*, 318 Ga. App. 499, 502 (2012).

7.

Although the judicial branch affords deference to an agency’s interpretation of its rules, such deference at this level of review is prohibited. *Id.*; *Longleaf Energy Assocs. v. Friends of the Chattahoochee, Inc.*, 298 Ga. App. 753, 768 (2009) (holding that the hearing before an ALJ is *de novo* and the facts and law must be considered anew without affording any deference to the

agency's decision). Finally, when the language of a regulation is not ambiguous deference to an agency interpretation is unwarranted. *Christensen v. Harris County*, 529 U.S. 576, 588 (2000).

8.

Here, in order to establish a Category I violation, the violation or combination of violations must have: (1) caused death or serious physical or emotional harm to a person or persons in care or (2) pose an imminent and serious threat or hazard to the physical or emotional health and safety of one or more persons in care. Ga. Comp. R. & Regs. 111-8-25-.05(1)(e)(1)(i). Respondent asserts that it is under the second prong of the regulation that it based its decision. That portion of the regulation is written in the present tense. Specifically, it states that the violation “poses an imminent and serious threat or hazard . . . to one or more persons in care.” *Id.* (emphasis added). Under the plain language of the regulation, the violation or violations must pose an impending threat to a person currently in care. The Department presented no evidence that Petitioner's violations posed an imminent threat to any persons in care. In fact, the Department presented no evidence that there were any persons in care. To the contrary, the evidence at the hearing was that there were no persons in care.

9.

The Department asserts that when it is prevented from conducting an inspection, such a violation is a Category I violation because it is unable to determine if there are persons in care and that poses a “possible threat” to residents who may be “locked up” in a room or who may be admitted the next day. That is simply not how the regulation is written. The language of the regulation cannot be read to include a theoretical threat to unknown or future residents.

10.

The Department's concern about what may be happening within the residence when it is unable to complete an inspection is a valid concern. However, the Department has other sanctions and other means to address that concern. For example, if the staff or owner of a Community Living Arrangement fails or refuses to provide the Department with access to the premises, the Department can suspend the residence's license indefinitely until the inspection can be conducted. Ga. Comp. R. & Regs. 111-8-25-.05(1)(b) Furthermore, if the Department has legitimate concerns that persons in care are at risk, the Department can obtain an inspection warrant. Ga. Comp. R. & Regs. 111-8-25-.12. Alternatively, if the Department wanted the refusal to allow an inspection to be subject to a Category I fine, then it could easily do so by adding a third alternative to Category I violations.³

11.

To be clear, this tribunal has concluded that Petitioner's actions violated two provisions regarding Community Living Arrangements. Further, the Department has the authority to sanction Petitioner for those violations. However, as written, rule 111-8-25-.05(e)(1)(i) does not provide the Department the authority to impose a Category I fine when there is no evidence of a person or persons in care.

³ For example, the Department could amend the regulation defining Category I violations as follows:

A violation or combination of violations . . . which has caused death or serious physical or emotional harm to a person or persons in care or poses an imminent and serious threat or hazard to the physical or emotional health and safety of one or more persons in care [or prevents the auditor or surveyor from conducting an inspection or reviewing any books, records, papers or other information related to the licensing of the residence.]

See Ga. Comp. R. & Regs. 111-8-25-.05(1)(e)(1)(i) (alteration not in original).

IV. Decision

In accordance with the foregoing Findings of Fact and Conclusions of Law, the Department's determination that Petitioner violated two rules regarding Community Living Arrangements is **AFFIRMED**. However, the Department's decision to impose a fine of \$1202.00 is **REVERSED**.

SO ORDERED, this 18th day of February, 2016.

A handwritten signature in black ink, appearing to read "Stephanie M. Howells", written over a horizontal line.

STEPHANIE M. HOWELLS
Administrative Law Judge