

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

MOUNT CARMEL ASSISTED LIVING,	:	Docket No.:
	:	
Petitioner,	:	OSAH- DCH-HFR-CLA-1701961-75-
	:	
v.	:	Walker
	:	
	:	
DCH, HEALTHCARE FACILITY	:	
REGULATION DIVISION,	:	
	:	
	:	
Respondent.	:	



FILED
OSAH
SEP 27 2016

Kevin Westray

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**ORDER DENYING PETITIONER’S MOTION TO VACATE ORDER OF
DISMISSAL**

I. BACKGROUND

On June 23, 2016, the Respondent, DCH, Healthcare Facility Regulation Division, (hereinafter “Respondent” or “Department”) issued a Notice of Intent to Impose Fine to the Petitioner, Mount Carmel Assisted Living (hereinafter “Mount Carmel” or “the facility”). The Department informed Mount Carmel that it intended to impose a fine of \$601.00 for a Category I violation of the Rules and Regulations for Assisted Living Communities, Ga. Comp. R. & Regs. 111-8-63.¹ Mount Carmel requested a hearing before the Office of State Administrative Hearings to contest the Department’s adverse action, and a hearing was scheduled for September 19, 2016.²

After the hearing was scheduled the Department modified its initial findings, reducing the proposed sanction from a Category I violation to a Category III violation. A Category III violation does not require that the facility pay a fine, but does mandate that it

¹ The rule states that assisted living facilities “must not restrict a resident’s free access to the common areas of the assisted living community or the specialized memory care unit or lock the resident into or out of the resident’s bedroom.” Ga. Comp. R. & Regs. 111-8-63-.17(7).

² Under the Administrative Procedure Act, the Office of State Administrative Hearings may determine “contested cases.” O.C.G.A. § 50-13-41(a). See also O.C.G.A. § 50-13-2(2) (defining a contested case as a proceeding “in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing.”).

submit an acceptable Plan of Correction to the Department. On August 30, 2016, the Department submitted a Motion to Withdraw the Adverse Action. Finding there was no longer a contested matter requiring a hearing under O.C.G.A. § 50-13-2(2) or Ga. Comp. R. & Regs. 616-1-2-.02, the undersigned issued an Order of Dismissal.

On September 7, 2016, Mount Carmel filed a pleading styled "Response to Respondent's Motion to Withdraw Adverse Action and Motion to Vacate Order of Dismissal." It requested that the Initial Decision and Order of Dismissal be vacated and the hearing be held as originally scheduled. The Department opposes Petitioner's motion to vacate the dismissal.

II. ANALYSIS

An assisted living facility that fails to comply with the licensing requirements contained in Ga. Comp. R. & Regs. 111-8-63-.01 *et seq.* is subject to administrative actions brought by the Department. Ga. Comp. R. & Regs. 111-8-63-.33. Administrative actions must "be initiated in compliance with the Georgia Administrative Procedures Act, O.C.G.A. § 50-13-1 *et seq.*, O.C.G.A. § 31-2-11 and the Rules and Regulations for General Licensing and Enforcement Requirements, Chapter 111-8-25." *Id.*

Depending on the nature of the administrative action, in some cases the Department must provide an assisted living facility with notice and the opportunity for hearing. See O.C.G.A. § 31-2-8(c); Ga. Comp. R. & Regs. 111-8-63-.33, 111-8-25-.05. O.C.G.A. § 31-2-8(c) states as follows:

[T]he department, subject to notice and opportunity for hearing, may take any of the following actions:

- (1) Refuse to grant a license; provided, however, that the Department may refuse to grant a license without holding a hearing prior to taking such action;
- (2) Administer a public reprimand;
- (3) Suspend any license for a definite period or for an indefinite period in connection with any condition which may be attached to the restoration of said license;

- (4) Prohibit any applicant or licensee from allowing a person who previously was involved in the management or control, as defined by rule, of any agency, facility, institution, or entity which has had its license or application revoked or denied within the past 12 months to be involved in the management or control of such agency, facility, institution, or entity;
- (5) Revoke any license;
- (6) Impose a fine, not to exceed a total of \$25,000.00, of up to \$1,000.00 per day for each violation of a law, rule, regulation, or formal order related to the initial or ongoing licensing of any agency, facility, institution, or entity, except that no fine may be imposed against any nursing facility, nursing home, or intermediate care facility which is subject to intermediate sanctions under the provisions of 42 U.S.C. Section 1396r(h)(2)(A), as amended, whether or not those sanctions are actually imposed; or
- (7) Limit or restrict any license as [the] Department deems necessary for the protection of the public, including, but not limited to, restricting some or all services of or admissions into an agency, facility, institution, or entity for a time certain.

....

In addition to the actions detailed in O.C.G.A. § 31-2-8(c), the Department also may direct that an assisted living facility prepare a written Plan of Correction. Ga. Comp. R. & Regs. 111-8-25-.06(6). Mount Carmel maintains that the Department also must provide notice and an opportunity for a hearing prior to requiring it to submit a Plan of Correction.

A. Plan of Correction does not require an Administrative Hearing

Mount Carmel asserts that because the Department's decision to modify the proposed sanction fails to resolve the underlying dispute regarding the residents' access to the facility's common areas, it is entitled to a hearing. However, as O.C.G.A. § 31-2-8(c) makes clear, it is not the substance of the alleged rule violation, but the nature of the proposed adverse action, which entitles an assisted living facility to notice and a hearing. Because in this case the Department has chosen not to take any of the adverse actions listed in O.C.G.A. § 31-2-8(c), it may proceed without providing Mount Carmel with

notice and the opportunity for a hearing. Instead, pursuant to Ga. Comp. R. & Regs. 111-8-25-.06(6):

The facility may offer an explanation or dispute the findings of violations in the written plan of correction, so long as an acceptable plan of correction is submitted within ten (10) days of the facility's receipt of the written report of inspection. If the initial plan of correction is unacceptable to the department, the facility will be provided with at least one (1) opportunity to revise the unacceptable plan of correction. The facility shall comply with the plan of correction accepted by the department.

See also Ga. Comp. R. & Regs. 111-8-63-.10(2) (allowing assisted living facility ten days after receiving inspection report to submit a "written statement explaining its disagreement and any evidence supporting the disagreement," and clarifying that the Department will submit a revised report if it is in agreement).

B. Plan of Correction is not equivalent to a Public Reprimand

Mount Carmel next argues that, because both a survey report and a Plan of Correction must be posted in the facility, the Department's action is equivalent to the imposition of a Public Reprimand that would require notice and the opportunity for a hearing. Petitioner's argument is not persuasive. In contrast to the requirement that a survey report and Plan of Correction be posted, a Public Reprimand must not only be posted for a period of ninety days, but during that period the assisted living facility must *actively* advise individuals seeking services of the Public Reprimand. Ga. Comp. R. & Regs. 111-8-25-.05(1)(a).


C. Requiring Plan of Correction is not violation of due process clause

Finally, Mount Carmel argues that it is entitled to a hearing because the Department has imposed an undue burden upon the facility under the due process clause of the state or federal constitution. See Couch v. Parker, 280 Ga. 580, 582 (2006) ("This state has long recognized that the right to be heard in matters affecting one's life, liberty, or property is one of the essential elements of due process of law.") (quotation omitted).

Given that Mount Carmel requested the undersigned administrative law judge stay the requirement that it submit a Plan of Correction to the Department,³ it remains unclear whether it has attempted to dispute the alleged violations. See Ga. Comp. R. & Regs. 111-8-25-.06(6). Accordingly, Mount Carmel has not demonstrated that it has exhausted all available administrative remedies. See Ga. Dep't of Behavioral Health & Developmental Disabilities v. United Cerebral Palsy of Ga., Inc., 298 Ga. 779, 786 (2016) (“Under longstanding Georgia law, the failure of plaintiffs to exhaust their available administrative remedies ordinarily precludes judicial relief.”). Moreover, administrative law judges are “not authorized to resolve constitutional challenges to statutes or rules.” Ga. Comp. R. & Regs. 616-1-2-.22(3).

As there is no statutory or regulatory authority mandating that the Department provide an assisted living facility notice and opportunity for a hearing prior to submitting a Plan of Correction, Petitioner’s Motion is **DENIED**.

SO ORDERED, this 26 day of September, 2016.



RONIIT WALKER, ALJ

³ (See Response to Respondent’s Motion to Withdraw Adverse Action and Motion to Vacate Order of Dismissal).