

BEFORE THE
DEPARTMENT OF DEVELOPMENTAL SERVICES
STATE OF CALIFORNIA

In the Matter of:

H & R HOME CARE FACILITY #1
846 Herman Street
Stockton, California 95206,

Appellant,

vs.

VALLEY MOUNTAIN REGIONAL
CENTER,

Regional Center.

OAH No. 2011120793

PROPOSED DECISION

Administrative Law Judge (ALJ) Marilyn A. Woollard, State of California, Office of Administrative Hearings (OAH), conducted a review of the above-referenced matter pursuant to Title 17, California Code of Regulations sections 56061, subdivision (a)(1), 56064 and 56065.¹

Appellant H & R Home Care (appellant or H&R) is represented by its administrator, Lourdes C. Fernandez.

Valley Mountain Regional Center (VMRC or regional center) is represented by its Executive Director, L. Paul Billodeau.

On December 27, 2011, OAH notified appellant and VMRC that the appeal had been received, and requested that the parties submit specific documents as required by section 56064, subdivisions (a) through (c), within 15 days.

On January 12, 2012, OAH received responsive documents from VMRC (the appeal file, identified as Exhibits 1 through 10), with a letter from Mr. Billodeau dated January 10, 2012.

¹ Unless otherwise indicated, all “section” references are to Title 17 of the California Code of Regulations.

On January 13, 2012, OAH received responsive documents from appellant.²

On January 26, 2012, the ALJ determined that additional information on which to base a decision was needed from VMRC. By order dated January 26, 2012, VMRC was ordered to provide a letter indicating the date on which the hearing in this matter convened, as required by 56062, subdivision (b)(2); and (2) a copy of any audio tapes, recordings, or transcripts made of the hearing, and to provide this information by February 10, 2012.

On February 21, 2012, OAH staff contacted VMRC to determine whether a response to the January 26, 2012 Order had been sent to OAH. Following inquiry from OAH administrative staff, on February 24, 2012, VMRC requested additional time to comply with this order and requested that it be given until Monday, March 5, 2012, to comply.

On February 24, 2012, OAH administrative staff attempted unsuccessfully to contact Ms. Fernandez at the telephone number provided by appellant to determine her response to the requested extension of time. An unidentified woman advised OAH staff that Ms. Fernandez was no longer at this number, verified as the number provided by appellant. This information was later determined to have been erroneous.

By Order dated February 27, 2012, VMRC's request for an extension to comply with the January 26, 2012 Order until March 5, 2012, was granted. Appellant was ordered to provide OAH the name of its current administrator and of the current mailing address and telephone number for its current administrator.

On March 5, 2012, Ms. Fernandez verified her contact information as appellant's administrator.

On March 6, 2012, OAH received VMRC's response to the January 26, 2012 Order, by pleading entitled "Motion to Dismiss Appeals Process." In this pleading, VMRC acknowledged its failure to conduct a hearing on the appeal as required by section 56062. As a consequence, VMRC wrote that it: "'in good faith', chooses to vacate the appeal and retract the corrective action plan."

Ms. Fernandez was given an opportunity to respond to this motion, but did not file a response on appellant's behalf.

On March 9, 2012, the record closed and the matter was submitted for decision.

² The documents filed by the parties were substantially identical, except that VMRC provided a copy of the parties' October 14, 2010 Admissions Agreement regarding consumer D.F.

FACTUAL FINDINGS

1. On October 14, 2010, VMRC and appellant entered into an Admission Agreement (Agreement) for D.F., a consumer in his early 50s, to reside in appellant's Facility No. 1. Pursuant to agreement sections 2, subdivision (h) and 37, subdivision (b) "[a]ssistance in obtaining emergency health care for temporary illness or injury," and "assistance with medical appointments" were included in the basic services appellant was to provide to D.F.

2. On June 6, 2011, D.F. complained of chest pains several times while attending his day program. Day program staff contacted appellant with this information. D.F. later walked 1.6 miles to the emergency room (ER) at St. Joseph's Medical Center (St. Joseph's) and again complained of chest pains. He was released later that day and walked home to appellant's facility, a distance of over three miles.

3. On August 8, 2011, VMRC issued a Technical Support Plan (TSP), dated August 1, 2011, with a finding of "substantial inadequacy" by appellant for breaching its "duty to provide adequate care, access to emergency resources and transportation to and from medical appointments." This constituted a substantial inadequacy as defined by section 56054, subdivision (a)(1) (conditions posing a threat to the consumer's health and safety that are not considered an immediate danger), and violated various provisions of the Agreement.

The specific conduct alleged that breached the standard of care was that: (1) D.F. complained of chest pain at the day program; appellant was contacted but D.F. remained at the day program without follow-up by appellant; and (2) D.F. "had to transport himself to ER. RSP [appellant] learned that consumer was at ER and did not follow-up to determine if consumer would be admitted or sent home. Consumer was sent home and had to transport himself."

Under the Corrective Action Plan (CAP), the TSP provided that appellant "will develop a plan to address cited deficiencies in standard of care."

4. On August 25, 2011, Ms. Fernandez wrote to VMRC Liaison Tumboura Hill to request reconsideration and review of the substantial inadequacy finding, based upon her explanation of events and a statement she had obtained from Cheryl Heaney-Ordez, RN, MSN, Director of St. Joseph's Emergency Services. Ms. Fernandez stated that the day program was responsible to provide first aid to D.F. and had informed her that D.F. was on his way home. Ms. Fernandez explained that she had her staff call to make an appointment with D.F.'s doctor, but that D.F. chose not to go home, but to go to the ER. Ms. Fernandez went to the ER to see D.F. that day after being informed he was there. She asserted that D.F. had a right to choose to walk home instead of asking the ER nurse to contact the facility. For these reasons, there was no substantial inadequacy. Ms. Fernandez advised Ms. Hill that the CAP

“is to improve our communication with other parties who is involve [sic] in the case and to check the status of the consumers’ while they are under there [sic] care.”

In her August 22, 2011 letter, Director Heaney-Ordez confirmed that Ms. Fernandez came to the ER where she informed the Charge Nurse that D.F. was one of appellant’s clients “and to please call when the patient was ready to be returned home.” The Charge Nurse provided this information to the primary nurse assigned to D.F.; however, when D.F. was ready to go, the primary nurse was busy with another patient and a different nurse discharged D.F. Ms. Fernandez later called the ER upset that D.F. had been discharged and allowed to walk home.

5. On September 12, 2011, Ms. Fernandez filed an appeal of the Citation for Substantial Inadequacy regarding this incident with VMRC’s Executive Director Mr. Billodeau. Ms. Fernandez included attachments to help explain the June 6, 2011 incident with D.F. These documents included her letter to Ms. Hill, the letter from Director Heaney-Ordez, and the CAP. Ms. Fernandez stated: “I should not be cited for Substantial Inadequacy because this incident happened in the day program, consumer was not under our care and consumer is [sic] the community settings.”

6. On October 17, 2011, VMRC denied appellant’s appeal. In his October 17, 2011 letter, Mr. Billodeau agreed that Ms. Fernandez reasonably relied on the day care program administrator to transport or make transportation arrangements for D.F. to the ER. When this did not occur, D.F. walked 1.6 miles to the ER. Mr. Billodeau did not find any substantial justification for appellant’s failure to transport D.F. home from the ER, however, and he concluded that appellant could not delegate her duty to transport after medical treatment by leaving a message with the Charge Nurse. D.F. walked a distance of over three miles to reach the facility. A substantial inadequacy existed because there was a threat to D.F.’s health and safety due to appellant’s failure to transport him after medical treatment and appellant failed to provide the consumer with care and supervision while he received medical treatment at the ER.

7. On November 4, 2011, Ms. Fernandez filed an appeal from VMRC’s decision affirming the finding of substantial inadequacy as set forth in Mr. Billodeau’s October 17, 2011, letter. Ms. Fernandez disputed certain facts and conclusions contained in this letter. For example, Ms. Fernandez asserted that she did supervise D.F. while he was at the ER, that he was conscious when she left the ER, that she left after being informed that D.F. would be tested and observed for several hours, that she was in communication with his nurse, and that transportation home was available for him. She reiterated that D.F. had chosen to walk home and that the consumers all have her personal cell phone number. Ms. Fernandez attached a handwritten letter from D.F. which stated, in pertinent part: “I decided to walk home on my own when I left the hospital.”

8. In his January 10, 2012, letter to OAH, Mr. Billodeau described his Regional Center Director’s Decision on the appeal as consisting of a review of “the material submitted by the H&R Facility and facts gathered by the VMRC Community

Services Liaison.” Based on this review, Mr. Billodeau reached the decision outlined in Finding 6, and expressed concern at appellant’s efforts to blame both the ER nursing staff and D.F. for its failure to transport D.F. home from the hospital. He concluded that the “factual evidence demonstrates that [appellant] H and R Facility breached the terms of the consumer’s Admission Agreement section 2 (h) and 37 (b) and created a condition that posed a threat to the health and safety of the consumer.” This evidence established VMRC’s finding of substantial inadequacy.

9. In reaching its decision, VMRC did not provide appellant with a hearing as required by section 56062, subdivision (b) (2). Acknowledging this “good faith” procedural oversight in its March 6, 2012 Motion to Dismiss, VMRC indicated that it “chooses to vacate the appeal and retract the corrective action plan.”

LEGAL CONCLUSIONS

1. Pursuant to section 56054, subdivision (a), “substantial inadequacies” include: “(1) Conditions posing a threat to the health and safety of any consumer, that are not considered an immediate danger as specified in Section 56053; [and] . . . (5) Failure to comply with the terms of the consumer’s Admission Agreement.”

2. Once a “substantial inadequacy” has been identified and verified within a facility,³ the regional center and the facility’s administrator must meet within 10 working days to develop a written corrective action plan (CAP). (§ 56056, subd. (a).) The CAP must describe the substantial inadequacy, cite the specific statutes, regulations, or Admissions requirements for which noncompliance is identified, and describe the methods by which the administrator is to correct the substantial inadequacy. (§ 56056, subd. (b).)

3. The facility must comply with the CAP within specific time frames. (§ 56056, subd. (c).) The regional center is authorized to apply various sanctions against a facility that does not timely comply with the CAP. (§ 56057.) In all findings of substantial inadequacy, the regional center may discuss or recommend relocation of a consumer or “[n]ot place consumers into the facility until the facility complies with the CAP.” (§ 56057, subd. (d).) Further, the regional center is required to send the CAP to other regional centers who may have consumers in the facility, and it may

³ Section 56002, subdivision (a)(15), defines “facility” as “a licensed community care facility as defined in Health and Safety Code Section 1502(a)(1), (4), (5) or (6); or a licensed residential care facility for the elderly as defined in Health and Safety Code Section 1569.2(k), which has been vendorized as a residential facility by a regional center pursuant to the requirements of Title 17, California Code of Regulations, Division 2, Chapter 3, Subchapter 2.”

forward copies of the CAP to the appropriate Department of Social Services' Community Care Licensing Division district office. (§ 56056, subds. (e), (f).)

4. The administrator must be advised of the right to appeal any findings against the facility. (§ 56056, subd. (b).) The regulations identify a two-step appeals process: first, to the regional center director as outlined in sections 56062 and 56063, and second, if the administrator remains unsatisfied with the director's decision, to the Director of the Department of Developmental Services, as outlined in sections 56064 and 56065.

5. *Appeal to the Regional Center Director:* The administrator may appeal the finding of substantial inadequacy to the director of the regional center (§ 56061.) Once the appeal is filed, pursuant to section 56062, the regional center director shall review the written appeal documents to ensure that all required information has been submitted. (§ 56062).

Once all necessary documents have been gathered, section 56062, subdivision (b) (2), requires the regional center to schedule a hearing on the contested matter:

If all the required information has been received, *notice of a hearing date shall be sent to the administrator* by certified mail, return receipt requested, within 15 days of receipt of the information, specifying the date, time, and place of the hearing and the matter(s) to be heard. [Italics supplied.]

6. As delineated in section 56062, subdivision (d), the mandated hearing before the regional center director provides the administrator with important rights:

(d) With regard to the hearing, the administrator shall have the right to:

(1) Examine, prior to the hearing, all documents on file pertaining to the subject of the appeal, which are not confidential or otherwise not discoverable under existing statutes and regulations;

(2) Be represented by counsel;

(3) Attend the hearing and present written and/or oral evidence;

(4) Cross-examine witnesses; and

(5) Access documents at the hearing not previously accessed under subsection (1) above.

7. As set forth in the Factual Findings and the Legal Conclusions as a whole, appellant was not offered an evidentiary hearing by the regional center at the first level of appeal as required by section 56062, subdivision (b)(2). The hearing process outlined in this section is mandatory.⁴ The regional center has acknowledged its failure to comply with the mandated hearing procedure and it has retracted the corrective action plan. As the non-appealing party, the regional center cannot “vacate the appeal.” However, it is apparent that VMRC’s intention is to set aside its finding of substantial inadequacy and corrective action plan. As a consequence, a determination on the substantive issues presented by the appeal is unwarranted.

ORDER

(1) The finding of substantial inadequacy and corrective action plan are **VACATED**.

(2) Within ten (10) working days from the effective date of this Decision, VMRC shall forward a copy of the Decision to any entity to which it has provided a copy of its finding of substantial inadequacy and/or corrective action plan concerning this matter.

DATED: March 20, 2012

MARILYN A. WOOLLARD
Administrative Law Judge
Office of Administrative Hearings

⁴ There is nothing in the regulation that would prohibit an administrator properly offered an evidentiary hearing from waiving the right to such a hearing.