



pennsylvania
DEPARTMENT OF PUBLIC WELFARE

Mr. Craig T. Luffey, Administrator
Rivercliff Terrace, Inc.
120 Allegheny Avenue
Kittanning, Pennsylvania 16201

NOV 06 2013

RE: Rivercliff Terrace Annex
322 North McKean Street
Kittanning, Pennsylvania 16201

Dear Mr. Luffey:

Thank you for your request for a waiver of 55 Pa.Code Ch. 2600 (relating to personal care homes). You have requested a waiver of 55 Pa.Code § 2600.42(s) (relating to specific rights) for the personal care home listed above.

A waiver of § 2600.42(s) is not required. On November 28, 2012, the Bureau of Hearings and Appeals (BHA) sustained your appeal in relation to 55 Pa.Code § 2600.42(s) (relating to specific rights). As a result of the decision, a waiver is not needed in accordance with the enclosed BHA decision.

If you have any questions regarding the waiver process, you may contact the Operator Support Hotline at telephone number (866) 503-3926.

Sincerely,

Matthew Jones
Acting Director

Enclosure

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE

APPEAL OF: Rivercliff Terrace Annex v. Adult Residential Licensing
Personal Care Home Waiver Appeal
BHA ID No.: 9999
Docket No.: 065-12-0002

ORDER

AND NOW, this 28th day of November, 2012, after careful review and consideration of the Recommendation of the Administrative Law Judge, it is hereby ORDERED that the Recommendation be adopted in its entirety.

Either party to this proceeding has fifteen (15) calendar days from the date of this decision to request reconsideration by the Secretary of the Department. To seek reconsideration, you must fully complete the enclosed application/petition for reconsideration. The application/petition shall be addressed to the Secretary, but delivered to the Director, Bureau of Hearings and Appeals, P.O. Box 2675, Harrisburg, Pennsylvania, 17105-2675, and must be received in the Bureau of Hearings and Appeals within fifteen (15) calendar days from the date of this Order. This action does not stop the time within which an appeal must be filed to Commonwealth Court.

The appropriate party(ies), where permitted, may take issue with this Adjudication, and Order, and may appeal to the Commonwealth Court of Pennsylvania, within thirty (30) days from the date of this order. This appeal must be filed with the Clerk of Commonwealth Court of Pennsylvania, 601 Commonwealth Avenue, Suite 2100, PO Box 89185, Harrisburg, PA 17106-9185.

If you file an appeal with the Commonwealth Court, a copy of the appeal must be served on the government unit which made the determination in accordance with Pa. R.A.P. 1514. In this case, service must be made to: Department of Public Welfare, Bureau of Hearings and Appeals, 2330 Vartan Way, 2nd Floor, Harrisburg, Pennsylvania 17110-9721, AND Department of Public Welfare, Office of General Counsel, Third Floor West, Health & Welfare Building, Harrisburg, PA 17120.

If you file an appeal with the Commonwealth Court, a copy of the appeal must be served on the government unit which made the determination in accordance with Pa. R.A.A. 1514. In this case, service must be made to: Department of Public Welfare, Bureau of Hearings and Appeals, 2330 Vartan Way, 2nd Floor, Harrisburg, Pennsylvania 17110-9721, AND Department of Public Welfare, Office of General Counsel, 3rd Floor West, Health & Welfare Building, Harrisburg, PA 17120.

Bureau of Hearings and Appeals

November 28, 2012
Final Order and
Mailing Date

Tracy L. Henry
Tracy L. Henry, Esquire
Chief Administrative Law Judge
Bureau of Hearings and Appeals

cc: Appellant
Eugene Cuccarese, Esq.
R.E. Valasek., Esq.
Ron Melusky, Director, Adult Residential Licensing

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Human Services Licensing

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE

APPEAL OF: Rivercliff Terrace Annex v. Adult Residential Licensing
Personal Care Home Waiver Appeal
BHA ID No.: 9999
Docket No.: 065-12-0002

RECOMMENDATION

It is hereby Recommended that the appeal be sustained.


J. A. Paine, Esquire
Administrative Law Judge

October 31, 2012
Date

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE

APPEAL OF: Rivercliff Terrace Annex v. Adult Residential Licensing
Personal Care Home Waiver Appeal
BHA ID No.: 9999
Docket No.: 065-12-0002

ADJUDICATION

Opening Statement

This is an administrative adjudication of the appeal of Rivercliff Terrace Annex (PCH) of a decision of the Department of Public Welfare (Department) Adult Residential Licensing (ARL). The Department denied Rivercliff's request for a waiver from the Department's regulation regarding the use of an audio monitoring system. The Department notified Appellant of its decision denying the request for a waiver by notice dated January 6, 2012. An administrative hearing was held on April 12, 2012, at the Bureau of Hearings and Appeals, in Pittsburgh, Pa. The witnesses were sworn in by the undersigned and testified under oath. The transcript was received May 9, 2012. The Department submitted its brief to the Bureau of Hearings and Appeals on June 14, 2012; the Appellant submitted their brief on June 18, 2012. Upon review of the testimony, briefs and exhibits, the undersigned prepared this Recommendation and Order.

Administrative Law Judge (ALJ) John A. Parse, Esq. presided.

Appearances

For the Department:

Eugene A. Cuccarese, Esquire

For the Appellant:

R.E. Valasek, Esq.

Witnesses

For the Department:

Tara Pride - Policy Director

For the Appellant:

Craig Thomas Luffey - Rivercliff Terrace Administrator
Thomas Harry Luffey - Proprietor

Exhibits

For the Department:

- C-1 Request for Waiver - 2 pages
- C-2 Personal Care Home Regulations - 3 pages
- C-3 Denial Letter - 2 pages
- C-4 Technical Assistance Letter - 2 pages
- C-5 Proposed Stipulation - 2 pages

For the Appellant:

- A-1 Photograph of Call Buttons - 1 page
- A-2 Wall mounted Audio Monitoring System - 1 page
- A-3 Wall mounted Audio Monitoring System - 1 page

Issue

Whether the Department correctly denied Appellant's request for a waiver of 55 Pa. Code Section 2600.42(s) --"Right to Privacy".

Findings of Fact

1. The parties agreed on the record to a stipulation (Exhibit C-5, N.T. 6-7) as follows:
 - A. The audio system of Rivercliff Terrace, Inc., located at 120 Allegheny Avenue, Kittanning, PA 16201, is a hard-wired Two-Way Emergency Call System installed in resident bedrooms that permits residents to notify staff of emergencies or otherwise request staff assistance and also allows staff to monitor audio emanating within resident bedrooms.
 - B. Rivercliff Terrace installed the Two-way Emergency Call System at issue more than two decades ago.
 - C. The Two-Way Emergency Call System at issue is intended as a device to aid resident health and safety.
 - D. Upon a resident's request, the Two-Way Emergency Call System at issue can be disabled on a room-by-room basis by the staff of Rivercliff Terrace.
 - E. In order to disable the Emergency Two-Way Call System at issue, a resident must make a request to a staff person to disable the system. Residents cannot independently disable the Emergency Two-Way Call System without staff involvement
 - F. Twenty-four hour Rivercliff Terrace residents or their representatives

signed an undated statement indicating that they would like the Emergency Two-Way Call System to remain in their respective bedrooms.

G. The controlling personal home care regulations at 55 Pa. Code Chapter 2600 became effective October 24, 2005.

2. Craig Luffey was the qualified administrator of Rivercliff Terrace during the relevant period from December of 2011 through February of 2012. (Exhibit C-1)
3. The Appellant was cited for violation of 55 Pa. Code, Section 2600.42(s) as a result of an inspection of Rivercliff Terrace on November 23, 2011. (N.T. 48, 65)
4. By application dated December 15, 2011, Rivercliff requested that ARL grant a waiver of Pa Code 2600.42(s) which pertains to the resident privacy. (Exhibit C-1)
5. Rivercliff Terrace residents indicated their consent to the Emergency Two-Way Call System installed in their respective bedrooms by signing an application submitted into evidence in Exhibit C-1. (Exhibit C-1)
6. The call system provides a measure of safety by enabling two-way communication between staff and residents. (N.T. 61-62, 79-80).
7. All licensed Personal Care Homes (PCHs) on August 26, 2008, received a Licensing Measuring Instrument (LMI) providing interpretive guidelines concerning the governing regulations. (Exhibit C-2)
8. On January 1, 2012, ARL issued the Regulatory Compliance Guide (RCD) to all PCHs. This guide replaced the LMI and provided updated interpretive guidelines concerning the regulations. (Exhibit C-2)
9. The August 26, 2008, Interpretive Guidelines (LMI) were used by ARL to reach their final determination on Rivercliff Terrace's waiver request. (N.T. 50-51, 79)
10. ARL determined that the use of the audio monitoring system constitutes an impermissible invasion of privacy under 55 Pa. Code Section 2600.42(s) because the residents lack the ability to disable the system without making overt requests to the staff that does so. (Exhibit C-2)
11. Changing and dressing, bathing, and medical procedures sometimes occur within the resident's bedroom. (N.T. 76)

12. The emergency call system consists of a monitoring box maintained in the front office of the facility and is always turned off unless an individual rings the buzzer from inside his or her room. (N.T. 5-7)
13. Each resident has a light within his or her room which becomes illuminated and lets the resident know that they are now involved in a two-way conversation. (N.T. 85, Exhibits A-1, A-2 and A-3)
14. The system allows personnel to talk to one person at a time; it does not allow personnel to monitor the entire building at the same time. When a new resident moves into Rivercliff Terrace, they are given the option of disabling the Emergency Two-way Call System. (N.T. 94)
15. ARL issued a notice of its final determination to deny the waiver request on January 6, 2012. (Exhibit C-3)
16. On February 9, 2012, ARL offered technical assistance indicating that an on-off switch on the emergency call system would cause it to be in compliance. (Exhibit C-4)
17. The Appellant obtained an estimate indicating that the system could be refitted for approximately \$2,400.00; the Appellant determined not to make that commitment. (N.T. 104-106)

The Department's Position

The Department argues that the Bureau of Adult Residential Licensing has properly exercised its discretion in denying the waiver request of the Appellant. Resident's safety concerns do not trump the resident's privacy rights guaranteed in 55 Pa. Code Section 2600.42(s). In the instant matter, the record evidence shows that the two way emergency system installed in Rivercliff Terrace violates the privacy rights granted to residents under 55 Pa. Code Section 2600.42(s). Specifically, this system enables staff to monitor audio emissions from within any resident's bedroom and does not provide residents any means of disabling the two-way emergency system without staff involvement. The decision to grant or deny a regulatory waiver request is a matter of administrative discretion. Keith v. Dept. of Public Welfare, 552 A.2d 333 (Pa. Cmwlth. 1988). The standard of review over discretionary decision by an administrative agency is limited to a determination as to whether there has been an abuse of discretion. Second Breath v. Dept. of Public Welfare, 731 A.2d 674, 676 (Pa. Cmwlth. 1999). A judicatory body must abide by the Department's decision absent "bad faith, fraud, capricious action or abuse of power." Slawek v. State Board of Medical Education and Licensure, 536 Pa. 361, 321, 586 A.2d 362, 365 (1991).

The Appellant's Position

The Appellant argues that the denial of Rivercliff Terrace's application for waiver constitutes a purely arbitrary execution of duty. And further, the denial of Rivercliff Terrace's application also constitutes an abuse of discretion. Nowhere in the LMI or any other interpretive document drafted by DPW does it require a resident to have an in-room switch to enable them to disable the system. This is an erroneous interpretation by ARL personnel. The residents of Rivercliff Terrace have elected to provide written approval of the system. The residents are asked at the time that they enter the facility if they wish to have it disabled in their room. It is the resident's choice. If the resident elects to have the system disabled, they still have the option to have the system reinstalled at their discretion. The ability of the residents to disable the system itself is not a requirement under the LMI. Based on these facts, the denial of the application for waiver was an abuse of discretion because ARL denied the application of erroneous interpretation of the LMI. Rivercliff Terrace is in compliance with 55 Pa. Code Section 2600.42(s) and the LMI as drafted at the time the violation was issued.

Applicable Law

55 Pa. Code Section 2600.19(a)

A home may submit a written request for waiver of a specific requirement in this chapter. The waiver request must be on a form prescribed by the Department. The secretary or the secretary's appointee may grant a waiver of a specific requirements of this specific chapter if the following conditions are met:

1. There is jeopardy to the residents;
2. There is an alternative providing an equivalent of health, safety and well-being protection of the residents
3. The residents will benefit from the waiver of the requirement.

(b) The scope, definitions, applicability or residents' rights under this chapter may not be waived.

(c) At least 30 days prior to the submission of the completed written waiver request to the Department, the home shall provide a copy of the completed written waiver request to the affected resident and designated person to provide the opportunity to submit comments to the Department. The home shall provide the affected resident and designated person with the name, address and telephone number of the Department staff person to submit comments.

(d) The home shall discuss the waiver request with the affected resident and designated person upon the request of the resident or designated person.

(e) The home shall notify the affected resident and designated person of the approval or denial of the waiver. A copy of the waiver request and the

Department's written decision shall be posted in a conspicuous and public place within the home.

(f) The Department will review waivers annually to determine compliance with the conditions required by the waiver. The Department may revoke the waiver if the conditions required by the waiver are not met.

(g) A waiver granted prior to October 24, 2005, is no longer in effect as of October 24, 2006.

55 Pa. Code Section 2600.42(s)

a. A resident has the right to privacy of self and possessions. Privacy shall be provided to the residents during bathing, dressing, changing, and medical procedures.

The decision to grant or deny a regulatory waiver request is a matter of administrative discretion. Keith v. Com., Dept. of Public Welfare, 551 A.2d 333 (Pa. Cmwlth. 1988). The standard of review of a discretionary decision by an administrative agency is limited to a determination of whether there has been an abuse of discretion. Second Breath v. Com., Dept. of Public Welfare, 731 A.2d 674 (Pa. Cmwlth. 1999). The scope of review of that decision is limited to determining whether the agency abused its discretion. Slawek v. Com., State Board of Medical Education and Licensure, 586 A.2d 362 (Pa. Cmwlth. 1991). An abuse of discretion occurs if the agency decision demonstrates evidence of bad faith, fraud, capricious action or abuse of power. J.A.M. Cab Co., Inc. v. Pennsylvania Public Utility Commission, 572 A.2d 1317 (Pa. Cmwlth. 1990).

A party seeking to change the present state of affairs bears the burden of proof. McCormick on Evidence, § 337 (Edward W. Cleary, ed., 3d ed. 1984). The party with access to relevant information bears the burden of proof. Gateway Coal Co. v. Pennsylvania Worker's Compensation Appeal Board, 388 A.2d 1122 (Pa. Cmwlth. 1978)

The Department of Public Welfare's interpretation of its own regulations is entitled to judicial deference unless it is plainly erroneous, inconsistent with regulations, or contrary to the enabling statute. Suburban Manor Highland Hall Care Center, 680 A.2d 867 Pa. (1996)

Before a state agency may make an adjudicatory determination depriving an individual of a state protected interest, the agency must provide a hearing before an impartial adjudicator to conduct a de novo examination of all the factual and legal issues. Millcreek Manor v. Department of Public Welfare, 796 A.2d 1020 (Pa. Cmwlth. 2002) (citing Lawson v. Pennsylvania Dept. of Public Welfare, 744 A.2d 804, Pa. Cmwlth. 2000).

Administrative Law Judge's Opinion

The Appellant filed a request with the Bureau of Adult Residential Licensing seeking a waiver from the regulation holding that a resident has the right to privacy of self and possessions. The ARL denied Appellant's request, finding Appellant did not meet the privacy requirements, finding specifically, pursuant to 55 PA Code Section 2600.19(b), that the resident's rights may not be waived by the facility. But Section 2600.19(b) does not say that the residents can't waive certain rights, and that is exactly what happened here.

The factual situation here is that the Appellant installed in each resident's room a two-way audio monitoring system. This system was installed 27 years ago and allows the patients to communicate with the front desk and, likewise, allows the front desk to communicate with the patients. The way it works is if the patient wishes to call the front desk, they simply push a button and alert the desk that they are about to send them a message. If the front desk wishes to communicate with a resident, they push a button on the panel in the front office and a red light comes on in the resident's room. It is the Department's contention that this apparatus violates the resident's right to privacy because the facility's personnel can listen to conversations in the resident's room without the resident being aware that they are listening. There are several difficulties with the Department's argument.

First, all new residents are given the option of disconnecting the monitoring system if they so choose. Second, when the facility's personnel activate the system, a red light comes on in the room making the resident aware that the system is operational. Third, twenty-four residents have signed a petition indicating that they are aware of how the audio system works and would like to continue having the system operational in their respective rooms.

The major infirmity, however, with the Department's argument is that the regulation cited simply does not fit the facts of this case. 55 Pa. Code Section 34(s) recites: ".... a resident has the right to privacy of self and possessions. Privacy shall be provided to residents during bathing, dressing, changing and medical procedures." The Department has simply not shown that any of these specifically named activities can in any way be infringed or overheard by the facility's personnel. There simply is little or no auditory component to bathing, dressing, changing or medical procedures. Also, the red light that comes in in the resident's room alerts them to the fact that the system has been activated. Had the Department shown that the residents' privacy could be violated without notice to the resident, the court's decision in this matter may have been altered or at least in some way affected. But the Department has not done so.

Of further moment in this case is the reaction of the facility's owner. Testimony shows that the audio system could have been changed to comport with the Department's requirements for a cost of \$125.00 per resident room.

This came to a total of \$2,700.00 which, the court notes, is probably less than the Appellant is spending to prosecute this matter. Quite clearly, the Appellant has placed greater value into preserving the health and safety of his residents who rely upon this system. And the system should, clearly, not be disturbed.

Slawek v. State Board of Medical Education and Licensure, 526 Pa. 316, 586 A.2d 362 (1991) holds that the court must abide by DPW's decision absent "bad faith, fraud, capricious action or abuse of power." Clearly here, DPW is not acting capriciously, in bad faith or fraudulently. They have, however, abused their authority in this matter. The system the Appellant has in place here works perfectly well, to the satisfaction of all the residents, and certainly to the satisfaction of the Appellant.

In the final analysis, this matter comes down to a balance between resident safety and the right to privacy. The residents themselves have chosen safety. They have consented to the audio monitoring system as evidenced both by their initial decision upon entering the facility and by the petition signed by the residents which has been entered into evidence here. Many residents in Personal Care Homes such as the Appellant's chose this type of facility because they feel the need for additional help, safety and security that were no longer available to them in their own private homes. The option to have the audio monitoring system available provides these residents with the level of safety and security they feel they need. A denial of the Appellant's waiver application here would strip the residents of their right to place their safety ahead of their right to privacy. What the department is attempting to do, instead of regulating the provider (which is perfectly legitimate) is to regulate the residents. A thorough search of 55 Pa. code Section 2600 reveals no such authority given to the Department. Given all the other facts, and especially the residents' option to decline the use of the system, the existence of the monitoring system in the residents' rooms is a de minimus presence, and in no way compares to the major amount of safety and security that the system affords the residents. The appeal should be sustained.