

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Christopher's Personal Care Home, :
Petitioner :
v. :
: No. 535 C.D. 2007
: SUBMITTED: August 24, 2007
Department of Public Welfare, :
Respondent :
:

BEFORE: **HONORABLE BONNIE BRIGANCE LEDBETTER**, President Judge
HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION BY
PRESIDENT JUDGE LEDBETTER**

FILED: June 2, 2008

Christopher's Personal Care Home (CPCH) petitions for review of an order of the Department of Public Welfare (Department), Bureau of Hearings and Appeals (Bureau), denying CPCH's appeal from the Department's revocation of its license to operate a personal care home pursuant to Sections 1026(b)(1) and (2) of the Public Welfare Code (Code),¹ which provide as follows:

(b) The department shall . . . revoke a license for any of the following reasons:

(1) Violation of or non-compliance with the provisions of this act or of regulations pursuant thereto;

¹ Act of June 13, 1967, P.L. 31, as amended, 62 P.S. §§ 1026(b)(1) and (2).

(2) Fraud or deceit in obtaining or attempting to obtain a license.

For the reasons that follow, we affirm.²

The relevant facts are as follows. Dale Christopher owns and operates CPCH, which is located at 720 North Main Street, Washington, Pennsylvania. After receiving an anonymous July 2005 complaint alleging that CPCH staff members were physically and verbally abusing the residents, the Department conducted an investigation and inspection of the facility. Having noted various deficiencies, a licensing representative prepared a July 2005 “Statement of Deficiencies and Plan of Correction” (plan) wherein CPCH agreed that staff member Patricia Christopher would not work unsupervised in the facility and would follow through with a drug test and an anger management program.

The Department received another anonymous complaint in March 2006, alleging that a hospice resident was crying in pain all night and was not receiving his medication. During a March 10, 2006, complaint investigation and inspection, the licensing representative determined that hospice resident J.E. had received only twenty-four doses of morphine between January 6 and March 10, 2006, and that eighty-six doses dispensed by the pharmacy for that patient were not present at the facility. In addition, a licensing representative observed Patricia Christopher working alone with the residents. The Department conducted three additional investigations, one in April 2006 and the other two in May 2006.

As a result of the deficiencies noted, including the issues with Patricia Christopher, the Department filed a June 5, 2006, violation report which resulted in a June 10, 2006, revocation of CPCH’s license. The revocation was based on Dale

² On April 5, 2007, this court entered an order denying CPCH’s application for supersedeas.

Christopher's: (i) lack of knowledge of chapter 2600 of Title 55 of the Pennsylvania Code;³ (ii) inability to supervise staff; (iii) failure to comply with the regulations; (iv) failure to ensure that medications were safeguarded; (v) failure to account for multiple doses of a controlled substance; (vi) failure to follow through with the plan regarding employee Patricia Christopher; and (vii) act of initialing a medication administration report when he was incarcerated.⁴ CPCH appealed the revocation and a hearing before an Administrative Law Judge (ALJ) followed.

In concluding that the license revocation was warranted, the ALJ focused on two factors: (i) CPCH's failure to account for a large quantity of morphine; and (ii) Patricia Christopher's working unsupervised without documentation that she complied with the plan by obtaining a drug test and attending an anger management program. Concluding that either one of these omissions was sufficient for revocation,⁵ the ALJ denied the appeal. The Bureau adopted the ALJ's adjudication in its entirety and CPCH's petition for review to this court followed.

The only issue CPCH has preserved on appeal is whether the adjudication is supported by substantial evidence.⁶ In that regard, CPCH's

³ Pursuant to 55 Pa. Code § 2600.53, an administrator must have knowledge of the personal care home chapter of the adult services manual.

⁴ Ultimately, there was insufficient evidence to prove that Dale Christopher initialed the medication record while incarcerated. Apparently, there was some confusion as to whether the initials "DC" on a medication administration record made during a time in which the parties had stipulated that Dale Christopher was incarcerated stood for Dale Christopher or staff member Diane Carter.

⁵ See generally *Pine Haven Resid. Care Home v. Dep't of Pub. Welfare*, 512 A.2d 59 (Pa. Cmwlth. 1986) (notwithstanding the existence of multiple violations, any one violation that is supported by substantial evidence can support a license revocation).

⁶ In paragraph five of the petition for review, CPCH states that it objects to the order at issue on the sole ground that the Department "failed to establish by substantial, competent evidence (Footnote continued on next page...)

argument appears to be that because of the “invalid and trivial nature” of the violations cited in the Department’s June 2006 violation report, the conclusion that CPCH violated the Code and its regulations is not supported by substantial evidence.⁷ We note, however, that in making this argument, CPCH failed to challenge any specific fact-findings, instead continuously proffering its own version of the facts. It is well-established that this court is bound by the fact-finder’s version of the facts as long as they are supported by substantial evidence. *Ehrhart v. Dep’t of Pub. Welfare*, 632 A.2d 5 (Pa. Cmwlth. 1993).

Moreover, notwithstanding CPCH’s characterization of its issue as one of substantial evidence, we conclude that the issue before us is really one of law: whether CPCH’s conduct as set forth in the ALJ’s fact-findings constitutes a violation of the Code sufficient to warrant license revocation.⁸ To the extent,

(continued...)

that [CPCH] committed even *de minimis* violations of the code sections cited.” In reviewing quasi-judicial orders, this court must consider only issues which were raised before the government unit and in the petition for review. Pa. R.A.P. 1551 and 1513. While it is true that the petition for review in an appellate jurisdiction case is a notice pleading document and that the petitioner’s objections will be deemed to include “every subsidiary question fairly comprised therein,” that does not mean that petitioners may raise new issues in their briefs. 20A West’s Pa. Prac., Pa. Appellate Prac. §1513:4 (2008) (footnote omitted). Given the fact that CPCH raised only a substantial evidence issue, we decline to consider the remaining two issues set forth in CPCH’s statement of questions involved. In addition, we decline to consider what appears to be an equitable estoppel argument set forth in the body of CPCH’s brief. These issues have been waived as a result of CPCH’s failure to properly preserve them for appellate review. *McDonough v. Unemployment Comp. Bd. of Review*, 670 A.2d 749 (Pa. Cmwlth. 1996).

⁷ Substantial evidence is that which a reasonable mind can accept as adequate to support the conclusion reached. *Ehrhart v. Dep’t of Pub. Welfare*, 632 A.2d 5 (Pa. Cmwlth. 1993). This court may not reweigh evidence or find facts in evaluating whether findings of fact are supported by substantial evidence. *Id.* In addition, we must respect the Bureau’s role as the ultimate fact-finder and accept its credibility determinations with regard to witnesses. *D.T. v. Dep’t of Pub. Welfare*, 873 A.2d 850 (Pa. Cmwlth. 2005).

⁸ This court has plenary review over questions of law. *Frazier v. Unemployment Comp. Bd. of Review*, 833 A.2d 1181 (Pa. Cmwlth. 2003).

however, that our role is to determine whether the facts as found by the ALJ warranted license revocation as a matter of law, we will set forth the evidentiary support for the two violations serving as the basis for the license revocation.

The primary basis for the license revocation was CPCH's inability to account for eighty-six doses of morphine. The background of how the ALJ came to accept that number as the missing amount is as follows. During the course of its March 10, 2006 investigation, a licensing representative encountered visiting hospice nurse Kathleen Fox and requested her assistance in determining whether any of J.E.'s medications were missing. To that end, CPCH staff presented Fox with two 30 cc-sized bottles of morphine, which was all that was on the premises that day. The staff did not present Fox with a 7.5 cc bottle which had been dispensed as part of a hospice comfort kit. In any event, below are the pertinent fact-findings and corresponding record support reflecting how the missing amount of morphine was calculated.

19. As of March 10, 2006, J.E. was prescribed five milligrams or 0.25 cc per dose of morphine to be provided as needed up to once every hour.⁹ (10/17/16 NT 105-107, 124).

23. Each 30 cc-sized bottle of morphine sulfate had a concentration of 20 milligrams of morphine for every cc or milliliter of liquid. (10/17/06 NT 124, 125).

24. Each 30 cc-sized bottle of morphine sulfate would have 120 (25 milligram-sized) doses of morphine if full. (10/17/06 NT 98, 99).

⁹ "There were four doses (at 0.25 cc) for every one cubic centimeter." F.F. 19, footnote 2 of adjudication.

25. On March 10, 2006, one bottle (previously delivered to the PCH on February 21, 2006) was one-third full and Fox measured 10 cc of morphine remaining in that bottle.^[10] (10/17/06 NT 98, 107, 138; Exhibit C-2).

26. On March 10, 2006, upon visual examination, the second bottle (previously delivered to the PCH on March 9, 2006) did not appear to be full and had been opened prior to inspection. (10/17/06 NT 107; Exhibit C-2).

27. On March 10, 2006, Fox accidentally spilled the contents of the second bottle prior to measuring its contents. Fox disposed of the bottle and its contents as "wasted." (10/17/06 NT 110, 136, 150, 186; Exhibit A-1).^[11]

28. Between January 6, 2006 and March 10, 2006, J.E. received 24 doses of morphine sulfate. (10/17/06 NT 108, 114-116; Exhibit C-3).

29. On March 10, 2006, the PCH could not account for eighty-six (86) doses of morphine sulfate dispensed by the pharmacy to J.E. but not present in the facility on March 10, 2006. (10/17/06 NT 151-154; Exhibits C-2 & C-3).

30. On March 13, 2006, J.E. died. (10/17/06 NT 122; 11/22/06 NT 47, 48).

F.F. 19, 23-30 (footnote 11 added).

We must agree that CPCH's overall mishandling of the morphine was not a "trivial" violation. Under 55 Pa. Code § 2600.185, CPCH was required to develop and implement procedures for the safe storage, access, security,

¹⁰ "Ten milliliters contain forty (40) doses if dispensed at the rate of 0.25 milliliters per dose." F.F. 25, footnote 3 of adjudication.

¹¹ Licensing representative Dennis Smiddle, whose testimony the ALJ accepted as credible, testified that he observed Fox spill the bottle and that he did not take that bottle into account when ascertaining how much morphine was missing. October 17, 2006, Hearing, N.T. 150; R.R. 78a.

distribution and use of medications and medical equipment by trained staff persons. In addition, CPCH was required to have a process to investigate and account for missing medications and medication errors. *Id.* As the ALJ determined, CPCH failed on all accounts.

To wit, CPCH's own records indicate that hospice patient J.E. received only twenty-four doses of morphine from January to March 10, 2006. In addition, the credited evidence of record reflects that CPCH was unable to account for over eighty doses of morphine, failed to offer any explanation as to why the morphine was missing, failed to have a process to investigate and account for the missing drug and failed to offer evidence that it even conducted any sort of investigation. Therefore, we conclude that the Bureau did not err in determining that CPCH's mishandling of the morphine constituted a violation of the Code and attendant regulations such that a license revocation was warranted under Section 1026(b) of the Code.

The secondary basis for the license revocation was CPCH's failure to comply with the plan with regard to Patricia Christopher. To reiterate, the origin of the plan was an anonymous complaint alleging that CPCH staff members were physically and verbally abusing the residents. As a result of the ensuing investigation, the licensing representatives determined that CPCH's deficiencies constituted a class II violation.¹² Specifically, the licensing representatives noted in the plan that

[d]uring today's complaint investigation visit[,] the Administrator [Dale Christopher] admitted hearing of possible physical abuse and also verbal abuse in terms of scolding language, profanity in front of residents, and

¹² According to the plan, class II violations warrant correction within five days.

disrespectful attitudes, especially directed at residents who have fecal incontinence. These reports should have been reported as unusual incidents and also to Protective Services for investigation. . . . This involves 2 employees-Trish Christopher (who is still working) & David Allen [fired].

October 17, 2006, Hearing, Exhibit C-4; R.R. 15a.

The plan further reflected that the administrator's plan of corrective action included the requirement that Patricia Christopher could not work unsupervised and must submit to drug testing and an anger management program. The credited evidence reflects that a licensing representative observed her working alone with residents *without* the benefit of a negative drug test.¹³ CPCH's argument on this issue is based on the rejected testimony and evidence of Patricia Christopher and Dale Christopher that she did comply with the plan.¹⁴

Based on the essential fact-findings and the credited evidence in support thereof, we conclude that the Department's revocation of CPCH's license

¹³ Notwithstanding the fact that there is no evidence of record that Patricia Christopher had an actual addiction to drugs, we must presume that the Department's investigation of the facility at the time of the July 2005 complaint warranted the imposition of the very specific conditions regarding Ms. Christopher. *See* 55 Pa. Code § 2600.1 ("[t]he purpose of [the personal care home] chapter is to protect the health, safety and well-being of personal care home residents").

¹⁴ The ALJ found the testimony of both Christophers to be not credible. As for documentary evidence, we note that CPCH introduced into evidence what purported to be Patricia Christopher's June 2006 drug test at the November 22, 2006 hearing. The Department objected to it on the grounds that it constituted a subsequent remedial measure that could not serve to demonstrate compliance with the plan. The ALJ admitted it, noting the Department's objection. November 22, 2006, Hearing, Exhibit A-2; R.R. 38a. Clearly, it was within the discretion of the fact-finder to determine whether the alleged June 2006 drug test, which presumably occurred almost one year from the date of the July 2005 plan, satisfied the plan's requirements. We reiterate that it is within the purview of the Bureau as fact-finder to determine what weight to afford the evidence. *Ehrhart*, 632 A.2d 5.

to operate a personal care home was warranted as a matter of law under Section 1026(b) of the Code. Accordingly, we affirm.

BONNIE BRIGANCE LEADBETTER,
President Judge

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ORDER

AND NOW, this 2nd day of June, 2008, the order of the Department of Public Welfare in the above captioned matter is hereby AFFIRMED.

**BONNIE BRIGANCE LEDBETTER,
President Judge**