

STATE OF SOUTH CAROLINA
ADMINISTRATIVE LAW COURT

South Carolina Department of)
Health and Environmental Control,)
)
Petitioner,)
)
vs.)
)
)
Karen B. McMillian, d/b/a McMillian's)
Community Care Home,)
)
Respondents.)
_____)

Docket No. 13-ALJ-07-0221-CC

FINAL ORDER AND DECISION

RECEIVED
MAR 03 2014
SC Court of Appeals

APPEARANCES: For the Petitioner: Vito Wicevic, Esq.
Ashley C. Biggers, Esq.

For the Respondent: Mary P. Miles, Esq.

STATEMENT OF THE CASE

This matter comes before the South Carolina Administrative Law Court (ALC or Court) pursuant to S.C. Code Ann. § 44-1-60 (Supp. 2012), S.C. Code Ann. §§ 1-23-310 *et seq.* (2005 and Supp. 2012), and 7 S.C. Code Ann. Regs. 61-84 § 302(G) (2012) for a contested case hearing regarding whether Petitioner South Carolina Department of Health and Environmental Control (DHEC or Department) properly imposed a monetary penalty on Respondent Karen B. McMillian d/b/a McMillian's Community Care Home (MCCH), pursuant to S.C. Code Ann. § 44-7-320 (2002 and Supp. 2012) and 7 S.C. Code Ann. Regs. 61-84 § 301 (2012), based upon MCCH's noncompliance with *Standards for Licensing Community Residential Care Facilities*, 7 S.C. Code Ann. Regs. 61-84 (2012).

Notice of a contested case hearing was given to all the parties, and a hearing on the merits was held on November 6 and 7, 2013, at the ALC in Columbia, South Carolina. Both parties appeared at the hearing and presented testimony and evidence. After carefully weighing all of the evidence, the Court concludes that the Department properly imposed a monetary penalty in the amount of \$14,500 on MCCH for the below violations of Regulation 61-84.

FILED
February 4, 2014
SC ADMIN. LAW COURT

FINDINGS OF FACT

Having observed the witnesses and exhibits presented at the hearing and closely passed upon their credibility, and taking into consideration the burden of proof upon the parties, the Court makes the following findings of fact by a preponderance of the evidence:

General Findings

Karen B. McMillian is the licensee and administrator of MCCH, a community residential care facility (CRCF) with 11 beds, licensed by the Department. The Department conducted a number of inspections at CRCF, including general, resident-care-focused, and food-and-sanitation inspections, to determine compliance with Regulation 61-84.

The inspections generally begin with the inspector requesting documentation required by Regulation 61-84 from the CRCF administrator or responsible staff person. The inspector also conducts a medication review to determine whether the CRCF is complying with the regulatory requirements regarding administration of medications. The inspector walks through the CRCF and observes the physical conditions of the facility. The inspector also interviews residents and staff of the CRCF. At the conclusion of the inspection, the inspector conducts an exit conference with the CRCF administrator or responsible staff person, during which the Department's report of visit (ROV) is explained and clarified. The ROV is a document that describes the conditions, conduct, or practices observed by the inspector that are in violation of the regulation. If there are errors in the ROV, the CRCF administrator or responsible staff person has the opportunity during the exit conference to explain the mitigating circumstances regarding the cited errors. The ROV provides the due date for the CRCF's written plan of correction (POC), which describes the actions taken by the CRCF to correct each cited deficiency, the actions taken to prevent recurrences, and the actual or expected completion dates of those actions.¹

The Department visited MCCH five times over a two-year period in order to conduct general, resident-care-focused inspections, and food-and-sanitation inspections. At these inspections, the Department observed and cited numerous repeated violations of Regulation 61-84 concerning deficiencies in MCCH's management of resident records, medication management, and meal service. The following are the violations that were observed during the inspections, along with MCCH's POCs and responses to the citations.

¹ See 7 S.C. Code Ann. Regs. 61-84 § 202(D) (2012).

October 22, 2010 Resident-Care-Focused Inspection

On October 22, 2010, Edward Jashinsky, an Inspector III for the Department, conducted a resident-care-focused inspection at MCCH. The following violations of Regulation 61-84 were observed:

- Section 703(A): MCCH failed to develop an individual care plan (ICP) within seven (7) days of admission for a resident who was admitted on October 1, 2010.
- Section 702: MCCH failed to have a written assessment within seventy-two (72) hours after admission for this same resident who was admitted on October 1, 2010.²

After the above citations were reviewed by MCCH, the Department issued an ROV, which Karen McMillian signed. MCCH submitted a POC for the cited violations in which MCCH's did not credibly dispute the Department's citations. Rather, MCCH's responses substantiated the Department's citations.

- In response to the § 703(A) citation, MCCH stated that "[a] plan of care was developed for the resident prior to his admission [which was October 1, 2010]." Seven days after the resident's admission was October 8, 2010. The ICP attached to the POC stated that the POC had been "developed for the resident prior to his admission." However, the POC had entries and a nurse's signature dated October 25, 2010, twenty-four (24) days after the resident's admission. Further, the attached ICP did not have the signatures of the resident/responsible party and the administrator/administrator's designee.
- In response to the § 702 citation, MCCH stated that "[a]n assessment of the resident was done during the staff visit at the hospital" However, the written assessment attached to the POC did not contain contents required by § 101(J) and was not signed by a direct-care staff member.

MCCH's POC and responses confirm the cited violations.

March 25, 2011 General and Food-and-Sanitation Inspections

On March 25, 2011, Katonya Jackson conducted a general inspection and a food-and-sanitation inspection at MCCH. As a result of this visit, the following violations of Regulation 61-84 were observed:

- Section 701(B)(6). MCCH failed to have monthly notes of observation for one resident for September, November, and December 2010, and January 2011.
- Section 702. MCCH failed to have a written assessment within seventy-two (72) hours of admission for a resident who was admitted on February 23, 2011.

² The evidence also reflects a violation of Section 703(B)(5): MCCH's ICP for a different resident failed to address the resident's special (diabetic) dietary needs. However, the Department decided not to include this violation in its administrative order.

- Section 703(A). MCCH failed to review and/or revise a resident's ICP at least semi-annually. The last date MCCH reviewed the resident's ICP was June 11, 2010, approximately nine and one-half months before this March 25, 2011 inspection.
- Section 1101(A). MCCH failed to have a current annual physical examination for a resident. The last date that MCCH had a physical examination for the resident was January 20, 2010, approximately a year and two and one-half months before the March 25, 2011 inspection.
- Section 1303. Various food contact surfaces, including the stove, tops of several pans, a can opener, and a crock pot, had an accumulation of grease. A cutting board also had cracks which did not allow for proper cleaning. Various non-food-contact surfaces, including cabinet shelves and countertops, had an accumulation of food debris. Finally, MCCH was improperly storing grease in a coffee can.³

After the above citations were reviewed by MCCH, the Department issued an ROV, which Carrie McMillian, a staff member at MCCH, signed.

MCCH submitted POCs for violations cited in the ROVs. Again, MCCH's POCs and responses did not credibly dispute the Department's citations. Rather, MCCH's responses essentially admitted to, and supported, the Department's citations.

- In response to the § 701(B)(6) citation, MCCH stated that "[a]s of 3/28/2011, notes of observation will be documented in instances of significant changes or occurrence of incidents on a monthly basis. . . ." Further, during cross-examination, Karen McMillian admitted that she did not document notes of observation on a monthly basis prior to 3/28/2011.
- In response to the § 702 citation, MCCH stated that "[a]ttachment 3A, which is dated 2/23/2011, indicated assessment of resident on admission date." However, Attachment 3A was an ICP, not a written assessment.⁴
- In response to the § 703(A) citation, MCCH stated that "as of 3/28/2011, an updated review was completed for resident A. Future occurrences shall be prevented by appointing office staff to this specific task."
- In response to the § 1101(A) citation, MCCH stated that "[a]s of 3/26/2011, resident C has an appointment to his primary care physician on Friday April 15th 2011 at 10:00am. An updated physical shall be completed at that time." During cross-

³ The evidence reflects that Ms. Jackson observed and noted several other violations, but these were not included in the Department's administrative order.

⁴ Written assessments are conducted by a direct care staff member within 72 hours of admission to the CRCF. The assessment is used to obtain various information about the resident (e.g., problems and needs of resident, resident's strengths and weaknesses, etc.) and to verify that the resident is appropriate for the CRCF. Development of the ICP, which must be completed within 7 days of admission, uses information obtained from the assessment to provide a framework in how the CRCF will care for the resident, describe any health provider requirements, and explain what activities are suitable and important for the resident.

examination, Karen McMillian admitted that she did not have a current annual physical for this resident at the time of the inspection.

- In response to the § 1303 citation, MCCH admitted to all of the food and sanitation deficiencies, and indicated that MCCH corrected them. Additionally, MCCH, in its written request for final review, did not dispute the terms of the § 1303 citations.

MCCH's POCs and responses confirm the cited violations and also exhibit MCCH's lack of understanding of Regulation 61-84.

July 15, 2011 Resident-Care-Focused Inspection

On July 15, 2011, the Department conducted a resident-care-focused inspection at MCCH. As a result of this visit, the following violations of Regulation 61-84 were observed:

- Section 702. MCCH failed to have a direct-care staff member sign a resident's seventy-two (72) hour assessment.
- Section 703(A). MCCH failed to review and/or revise a resident's ICP at least semi-annually. The last date that MCCH reviewed the resident's ICP was October 27, 2010, approximately eight and one-half months before the July 15, 2011 inspection. Additionally, Ms. Jackson observed that MCCH failed to obtain the signature of a resident (or resident's responsible party) for another resident's ICP.
- Section 1101(A). MCCH failed to have a current annual physical examination for a resident. The resident's last available physical examination was dated July 30, 2009, approximately two years before the July 15, 2011 inspection.

After the above citations were reviewed by MCCH, the Department issued an ROV, which Karen McMillian signed.⁵

MCCH submitted a POC to the violations cited in the July 15, 2011 ROV. Again, MCCH's POC and responses to the Department's citations did not credibly dispute the violations. In fact, MCCH's responses support the cited violations.

- In response to the § 702 citation regarding MCCH's failure to have a signature on a written assessment, MCCH stated that the "[c]are plan was signed as of 7-16-2011 by administrator. . . ." (emphasis added). Karen McMillian noted during cross-examination that she was confused between the written assessment and ICP requirements.
- In response to the § 703(A) citation regarding failure to review ICPs on a semi-annual basis, MCCH stated that "[a]s of 7-22-2011, individual care plans for residents were updated per six month period. . . ." In response to the § 703(A) citation regarding failure to have the resident's (or responsible party's) signature, MCCH indicated that "[o]n 7-22-2011, resident B was asked to place mark on [the ICP]. . . ."

⁵ The evidence reflects that Ms. Jackson observed and noted other violations, but these were not included in the Department's administrative order.

- In response to the § 1101(A) citation, MCCH indicated that they scheduled an appointment at a doctor's office for August 23, 2011, where the physical examination would be completed for the resident. During cross-examination, Karen McMillian again admitted to not having the resident's current annual physical examination at the time of the July 15, 2011 inspection.

MCCH's POC and responses confirm the cited violations and exhibit MCCH's lack of understanding and disregard⁶ of Regulation 61-84.

March 2, 2012 General Inspection

On March 2, 2012, the Department conducted a general inspection at MCCH. As a result of this visit, the following violations of Regulation 61-84 were observed:

- Section 701(B)(6). MCCH failed to document monthly notes of observation for four residents.
- Section 703(A). The ICPs of two residents were not reviewed and/or revised on at least a semi-annual basis (i.e., within the required six-month period). The last date that MCCH reviewed the first resident's ICP was June 27, 2010, approximately a year and eight months before the March 2, 2012 inspection. The last date that MCCH reviewed the other resident's ICP was June 14, 2010, approximately a year and eight and one-half months before the March 2, 2012 inspection.
- Section 1101(A). MCCH failed to have current annual physical examinations for two residents. One resident's last physical examination was dated November 29, 2010, approximately one year and three months before the March 2, 2012 inspection. The other resident's last physical examination was dated June 14, 2010, approximately a year and eight and one-half months before the March 2, 2012 inspection.
- Section 1203(A). MCCH failed to have a medication administration record (MAR) for several medications of a resident that were available in the facility and being administered to the resident.

After the above citations were reviewed by MCCH, the Department issued an ROV, which Karen McMillian signed.⁷

MCCH submitted a POC responding to the violations cited in the March 2, 2012 ROV. MCCH's POC and responses to the Department's citations did not credibly challenge the violations. In fact, MCCH's responses admit to and support the citations.

- In response to the § 701(B)(6) citation, MCCH again stated that "[n]otes of observation, as of 3/2/12, will be done on a monthly basis rather than on an as needed

⁶ The Court includes "disregard" here and onward, because by this point, after its prior violations, MCCH should have availed itself of the regulations, studying them and asking DHEC for guidance or clarification as to any requirements that were unclear.

⁷ The evidence reflects that Ms. Jackson observed and noted other violations, but these were not included in the Department's administrative order.

basis due to occurrence. . . .” This was the second time that MCCH indicated that it would document notes of observation on a monthly basis.⁸

- In response to the § 703(A) citation, MCCH stated that “[r]esident individual care plans were updated as of 3/2/12. . . .” The POC included revised ICPs; however, neither the resident nor the responsible party signed the ICPs.
- In response to the § 1101(A) citation, MCCH indicated that its staff took the residents to the physician’s office to have physical examinations on March 12, 2012. The physical examinations for these residents, dated March 12, 2012, were attached to MCCH’s POC.
- In response to the § 1203(A) citation, MCCH stated that it requested the MAR from the pharmacy on March 1, 2012 and received it on March 2, 2012. Ms. McMillian, during cross-examination, admitted to not knowing the regulatory requirement of initialing on resident MARs as medications or treatments are rendered. She acknowledged that during the time the MARs were away from the facility, “[she] didn’t have the ability to record [the administration of medications or treatments on the MARs]”

MCCH’s POC and responses confirm the cited violations and exhibit MCCH’s lack of understanding and disregard of Regulation 61-84.

July 3, 2012 Resident-Care-Focused and Food-and-Sanitation Inspections

On July 3, 2012, the Department conducted a resident-care-focused inspection at MCCH. On the same date, the Department conducted a food-and-sanitation inspection at MCCH. As a result of this visit, the following violations of Regulation 61-84 were observed:

- Section 701(B)(6). MCCH failed to have available the requisite monthly notes of observations for one resident.
- Section 702. MCCH failed to have written assessments no later than seventy-two (72) hours after admission for a resident admitted on June 22, 2012, and another resident admitted on June 15, 2012.
- Section 703(A). MCCH failed to have documentation of an ICP developed within seven (7) days of admission for a resident who was admitted on June 22, 2012. Additionally, for the resident admitted on June 15, 2012, MCCH failed to have the resident and/or the sponsor or responsible party sign the resident’s ICP.
- Section 1101(A). MCCH failed to have a physical examination for a resident admitted on June 22, 2012 available for review on the date of inspection. Additionally, MCCH failed to have a current annual physical for another resident. The last available physical examination for this resident was dated May 6, 2011, approximately a year and two months before this July 3, 2012 inspection.

⁸ See Petitioner’s Exhibit 8 (MCCH’s POC filed April 20, 2011).

- Section 1203(A). At 9:45 a.m., a small, round tray with several small plastic cups containing loose pills was observed. MCCH staff indicated that the medications were set for the 11:00 a.m. medication administration pass. However, Regulation 61-84 provides that preparation is not to occur earlier than one hour prior to administering.
- Section 1303. Wet towels were placed on top of dishes instead of in an approved sanitizing solution. Additionally, a MCCH staff member was using a cloth towel to dry pots, plates, and pans, instead of allowing them to air dry as required by Regulation 61-84.

After the above citations from the resident-care-focused inspection were reviewed by MCCH, the Department issued an ROV, which Karen McMillian signed. Likewise, after the above citations from the food-and-sanitation inspection were reviewed by MCCH, the Department issued an ROV, which Carrie McMillian signed.⁹

MCCH submitted POCs for the violations cited in the July 3, 2012 ROVs. MCCH's POCs and responses to the Department's citations did not credibly contest the violations. Again, MCCH's responses bolstered the veracity of the cited violations.

- In response to the § 701(B)(6) citation, MCCH, after being cited for this same violation for the third time in just over a year, stated that "[a]s of July 3, 2012, there will be preparations made to monthly document each of the resident's statuses [sic] in our log book." The POC, in contravention of the plain language of § 701(B)(6), even acknowledges that "[MCCH] does not usually document anything unless it is an abnormal occurrence."
- In response to § 702, MCCH stated: As of July 5, 2012, 72-hour assessments are available for Resident A and Resident B, which were in the possession of the facility nurse. Once the main care plan was completed, the 72-hour assessments were discarded. To prevent further occurrences, a 72-hour assessment will be kept in the resident's chart.

The POC attached two satisfactory written assessments; however, the written assessments were not available at the time of the July 3, 2012 inspection.

- In response to the § 703(A) citation regarding not having an ICP, MCCH attached an ICP and indicated that the ICP was in the possession of the facility nurse at the time of inspection. However, the resident's signature on the ICP attached to the POC is dated July 3, 2012, eleven days after the resident was admitted to MCCH on June 22, 2012. In response to the § 703(A) citation regarding not having a resident or responsible party sign the ICP, MCCH stated that "[a]s of July 4, 2012, the resident signed the Individual Care Plan."

⁹ The evidence reflects that Ms. Smith and Jackson observed and noted other violations, but these were not included in the Department's administrative order.

- In response to the § 1101(A) citation regarding not having a physical examination for a newly admitted resident, MCCH stated that the resident's chart was in possession of the facility nurse during the inspection. In response to the § 1101(A) citation regarding not having a current annual physical examination for another resident, MCCH stated that "[a]s of July 3, 2012, [t]his resident has an appointment on Friday[,] August 3, 2012 and another physical examination will be completed then."
- In response to the § 1203(A) citation regarding preparing medications more than one hour before administering, MCCH stated that "[a]s of July 3, 2012, Administration has informed staff members not to prepare medication until distribution times. Medications will no longer be prepared prior to an hour before they are to be given." Ms. McMillian acknowledged, during cross-examination, that the MCCH staff member should not have prepared the medications more than an hour prior to administering.
- In response to the § 1303 citation regarding dishes not being in approved sanitized solutions, MCCH stated that "[a]s of July 3, 2012, staff was informed to not place the towels over the dishes, and to properly sanitize and dry according to DHEC regulations." In response to the § 1303 citation regarding failure to air dry equipment and utensils, MCCH stated that "[a]s of July 3, 2012, staff member was informed to allow pot, plates, and pans to air dry instead of drying then [sic] with a cloth towel." Additionally, MCCH, in its written request for final review, admits to not disputing the terms of the § 1303 citations.

MCCH's POCs and responses confirm the Department's cited violations and exhibit MCCH's lack of understanding and disregard of Regulation 61-84.

Administrative Order

As a result of general inspections on March 25, 2011 and March 2, 2012; resident-care-focused inspections on October 22, 2010, July 15, 2011, and July 3, 2012; and food-and-sanitation inspections on March 25, 2011 and July 3, 2012, the Department determined that enforcement action was appropriate. As a result, the Department ultimately issued an administrative order imposing a \$14,500 monetary penalty against MCCH on January 31, 2013. In calculating the monetary penalty, the Department utilized the schedule in Regulation 61-84 § 302(F), which provides a recommended monetary penalty (or range) based upon the classification level of each violation and the number of times the violation has occurred at a facility within a thirty-six month time period.

The Department calculated the monetary penalty as follows: _____

- MCCH violated § 701(B)(6), a Class II violation, on March 25, 2011, March 2, 2012, and July 3, 2012. Three occurrences of a Class II violation carried a penalty range of \$1,000-3,000.

- MCCH violated § 702, a Class II violation, on October 22, 2010, March 25, 2011, July 15, 2011, and July 3, 2012. Four occurrences of a Class II violation carried a penalty range of \$2,000-5,000.
- MCCH violated § 703(A), a Class II violation, on October 22, 2010, March 25, 2011, July 15, 2011, March 2, 2012, and July 3, 2012. Five occurrences of a Class II violation carried a penalty of \$5,000.
- MCCH violated § 1101(A), a Class I violation, on March 25, 2011, July 15, 2011, March 2, 2012, and July 3, 2012. Four occurrences of a Class I violation carried a penalty of \$5,000.
- MCCH violated § 1203(A), a Class I violation, on March 2, 2012 and July 3, 2012. Two occurrences of a Class I violation carried a penalty range of \$1,000-3,000.
- MCCH violated § 1303, a Class II violation, on March 25, 2011 and July 3, 2012. Two occurrences of a Class II violation carried a penalty range of \$500-1,500.

Where there was a penalty range, the Department chose to use the lower amount and arrived at a sum of \$14,500 for the monetary penalty against MCCH.

Additionally, in determining this enforcement action, the Department considered the factors provided in Regulation 61-84 § 302(E), including the health, safety, or well-being of the residents, and MCCH's history of compliance and efforts to correct the cited violations. In addition to the Class I and Class II violations mentioned above, the Department found that despite receiving from MCCH plans of correction that said that various safeguards were in place to prevent reoccurrence of violations, those violations kept reoccurring – maybe with a different chart or resident, but still reoccurring.

CONCLUSIONS OF LAW

Based upon the foregoing findings of fact, the Court concludes the following as a matter of law:

General Conclusions

In reviewing this matter, the Court serves as the finder of fact and makes a *de novo* determination regarding the matters in controversy. See S.C. Code Ann. § 1-23-600(A) (Supp. 2012); *Brown v. S.C. Dep't of Health and Envtl. Control*, 348 S.C. 507, 560 S.E.2d 410 (2002). The standard of proof to be used by the Court in weighing the evidence and making a decision on the merits during a contested case proceeding is a preponderance of the evidence. S.C. Code Ann. §§ 1-23-330(1) (2005) and 1-23-600(A)(5) (Supp. 2012); *Anonymous (M-156-90) v. State Bd. of Med. Exam'rs*, 329 S.C. 371, 496 S.E.2d 17 (1998). Because this is an action for the

enforcement of an administrative order, the Department has the burden of proof. Rule 29(B) of the South Carolina Administrative Law Court Rules (SCALC).

The Department is the state agency charged with the licensure of health facilities and the administration of the *State Certificate of Need and Health Facility Licensure Act* (the Act), S.C. Code Ann. § 44-7-110 *et seq.* (2002 & Supp. 2009). S.C. Code Ann. § 44-7-140 (2002). Pursuant to S.C. Code Ann. §§ 44-7-150(3) and -260(A)(6) (2002), the Department promulgated *Standards for Licensing Community Residential Care Facilities*, 7 S.C. Code Ann. Regs. 61-84 (2012). A CRCF is defined by law as “a facility which offers room and board and provides a degree of personal assistance for two or more persons eighteen years old or older.” S.C. Code Ann. § 44-7-130(6) (2002). A CRCF “provides/coordinates a degree of personal care for a period of time in excess of 24 consecutive hours” 7 S.C. Code Ann. Regs. 61-84 § 101(N) (2012). “Personal care” is defined in the CRCF regulation as:

The provision by the staff members/direct care volunteers of the facility of one or more of the following services, as required by the individual care plan or orders by the physician or other authorized healthcare provider or as reasonably required by the resident, including: 1. Assisting and/or directing the resident with activities of daily living; 2. Being aware of the resident’s general whereabouts, although the resident may travel independently in the community; 3. Monitoring of the activities of the resident while on the premises of the residence to ensure his/her health, safety, and well-being.

Id. § 101(QQ) (2012). “Activities of Daily Living” (ADLs) are defined as:

Those personal functions performed by an individual in the course of a day that include, but are not limited to, walking; bathing; shaving; brushing teeth; combing hair; dressing; eating; getting in or getting out of bed; toileting; ambulating; doing laundry; cleaning room; managing money; shopping; using public transportation; writing letters; making telephone calls; obtaining appointments; administration of medication; and other similar activities.

Id. § 101(A) (2012). A CRCF “is designed to accommodate residents’ changing needs and preferences, maximize residents’ dignity, autonomy, privacy, independence, and safety, and encourage family and community involvement.” *Id.* § 101(N) (2012).

The Department is authorized to make inspections and investigations of CRCFs as it deems necessary. S.C. Code Ann. § 44-7-150(1) (2002); 7 S.C. Code Ann. Regs. 61-84 § 201 (2012). The Department may take enforcement action against a CRCF, including imposing monetary penalties, for a violation of the Act or departmental regulations. S.C. Code Ann. § 44-7-320(A)(1)(a) (Supp. 2012); 7 S.C. Code Ann. Regs. 61-84 § 301 (2012).

On January 31, 2013, the Department, pursuant to S.C. Code Ann. § 44-7-320 (2002 and Supp. 2012) and 7 S.C. Code Ann. Regs. 61-84 §§ 301 and 302 (2012), issued an administrative order against MCCH imposing a monetary penalty in the amount of \$14,500 for violations of Regulation 61-84. MCCH opposes the issuance of the administrative order. The Court has jurisdiction over this contested-case matter pursuant to S.C. Code Ann. § 1-23-310 *et seq.* (Supp. 2012) and S.C. Code Ann. § 44-1-60 (Supp. 2012).

Section 701(B)(6) and Notes of Observation

CRCFs are required to “initiate and maintain an organized record for each of its residents.” 7 S.C. Code Ann. Regs. 61-84 § 701(A) (2012). Regulation 61-84 § 701(B) explains the minimum requirements of entries/documentation of such records, including *inter alia*, notes of observation. Specifically, Regulation 61-84 § 701(B)(6) states:

“Specific entries/documentation shall include at a minimum:

6. Notes of observation. In instances that involve significant changes in a resident's medical condition and/or the occurrence of a serious incident, notes of observation shall be documented at least daily until the condition is stabilized and/or the incident is resolved. In all other instances, notes of observation for residents shall be documented at least monthly

Based upon the foregoing findings of fact, the Court concludes that MCCH violated 7 S.C. Code Ann. Regs. 61-84 § 701(B)(6):

- on March 25, 2011, by failing to have at least monthly notes of observation for a resident;
- on March 2, 2012, by failing to have at least monthly notes of observation for four different residents; and
- on July 3, 2012, by failing to have notes of observation for a resident.

Section 702 and Written Assessments

7 S.C. Code Ann. Regs. 61-84 § 702 states that “[a] written assessment of the resident in accordance with Section 101[(J)] shall be conducted by a direct care staff member as evidenced by his or her signature within a time-period determined by the facility, but no later than 72 hours after admission.” Regulation 61-84 101(J) defines “Assessment” as:

A procedure for determining the nature and extent of the problem(s) and needs of a resident/potential resident to ascertain if the facility can adequately address those problems, meet those needs, and to secure information for use in the development of the individual care plan. Included in the process are an evaluation of the physical, emotional, behavioral, social, spiritual, nutritional, recreational,

and, when appropriate, vocational, educational, legal status/needs of a resident/potential resident. Consideration of each resident's needs, strengths, and weaknesses shall be included in the assessment.

Based upon the foregoing findings of fact, the Court concludes that MCCH violated 7 S.C. Code Ann. Regs. 61-84 § 702:

- on October 22, 2010, by failing to have a written assessment for a resident, who was admitted on October 1, 2010, within seventy-two (72) hours after admission;
- on March 25, 2011, by failing to have a written assessment within seventy-two (72) hours after admission for a resident who was admitted on February 23, 2011;
- on July 15, 2011, by failing to have a resident's written assessment signed by the direct care staff member who conducted the assessment; and
- on July 3, 2012, by failing to have written assessments for two residents, one admitted on June 22, 2012 and the other on June 15, 2012, within seventy-two (72) hours after their admissions.

Section 703(A) and Individual-Care Plans

7 S.C. Code Ann. Regs. 61-84 § 703(A) states:

The facility shall develop an ICP with participation by, as evidenced by their signatures, the resident, administrator (or designee), and/or the sponsor or responsible party when appropriate, within seven days of admission. The ICP shall be reviewed and/or revised as changes in resident needs occur, but not less than semi-annually by the above-appropriate individuals.

Section 703(B) describes the contents of ICPs, which include: the needs of the resident; the resident's requirements and arrangements for visits by, or to, authorized health providers; advanced care directives/healthcare power-of-attorney, as applicable; recreational and social activities that are "suitable, desirable, and important to the well-being of the resident"; and resident dietary needs.

Based upon the foregoing findings of fact, the Court concludes that MCCH violated 7 S.C. Code Ann. Regs. 61-84 § 703(A):

- on October 22, 2010, by failing to have an ICP for a resident who was admitted on October 1, 2010;
- on March 25, 2011, by failing to review and/or revise an ICP for a resident at least semi-annually;
- on July 15, 2011, based-upon the following two grounds: (1) MCCH failed to review and/or revise an ICP for a resident at least semi-annually; (2) MCCH failed to have an ICP for another resident signed by the resident, or the resident's sponsor or responsible party;

- on March 2, 2012, based upon the following two grounds: (1) MCCH failed to review and/or revise ICPs for two residents at least semi-annually; (2) MCCH failed to have the ICP for another resident signed by the resident or the resident's sponsor or responsible party; and
- on July 3, 2012, based upon the following two grounds: (1) MCCH failed to review and/or revise an ICP at least semi-annually; (2) MCCH failed to have the ICP for another resident signed by the resident or the resident's sponsor or responsible party.

Section 1101(A) and Physical Examinations

7 S.C. Code Ann. Regs. 61-84 § 1101(A) states in part:

A physical examination shall be completed for residents within thirty (30) days prior to admission and at least annually thereafter. Physical examinations conducted within thirty (30) days prior to admission by physicians licensed in states other than South Carolina are permitted for new admissions under the condition that residents obtain an attending physician licensed in South Carolina within thirty (30) days of admission to the facility and undergo a second (2nd) physical examination by that physician within thirty (30) days of admission to the facility. The physical examination shall be updated to include new medical information if the resident's condition has changed since the last physical examination was completed. . . .

Physical examinations must address, *inter alia*, the appropriateness of the resident's placement in a CRCF; the resident's ordered medications; and the need of continuous daily attention, or lack thereof, of a licensed nurse. *Id.*

Based upon the foregoing findings of fact, the Court concludes that MCCH violated 7 S.C. Code Ann. Regs. 61-84 § 1101(A):

- on March 25, 2011, by failing to have a current annual physical examination for a resident;
- on July 15, 2011, by failing to have a current annual physical examination for another resident;
- on March 2, 2012, by failing to have current annual physical examinations for two residents; and
- on July 3, 2012, based upon the following two grounds: (1) MCCH failed to have a physical examination for a resident, who was admitted on November 29, 2010; and (2) MCCH failed to have a current annual physical examination for another resident.

Section 1203(A) and Medication Administration Records and Preparation of Medications

7 S.C. Code Ann. Regs. 61-84 § 1203(A) states:

Doses of medication shall be administered by the same staff member who prepared them for administration. *Preparation shall occur no earlier than one hour prior to administering.* Preparation of doses for more than one scheduled

administration shall not be permitted. *Each physician ordered treatment or medication dose administered/supervised shall be properly recorded by initialing on the resident's medication administration record (MAR) as the medication is administered or treatment record as treatment is rendered.* Recording medication administration shall include medication name, dosage, mode of administration, date, time, and the signature of the individual administering or supervising the taking of the medication. The treatment record shall document the type of treatment, date and time of treatment and signature of the individual administering treatment. If the ordered dosage is to be given on a varying schedule, e.g., "take two tablets the first day and one tablet every other day by mouth with noon meal," the number of tablets shall also be recorded.

(emphasis added).

Based upon the foregoing findings of fact, the Court concludes that MCCH violated 7 S.C. Code Ann. Regs. 61-84 § 1203(A):

- on March 2, 2012, by failing to have a resident's MAR for medications available at the facility and being administered to the resident; and
- on July 3, 2012, by preparing medications more than one hour prior to administering.

Section 1303 and Food Equipment and Utensils

7 S.C. Code Ann. Regs. 61-84 § 1303 states that "[t]he equipment and utensils utilized, and the cleaning, sanitizing, and storage of such shall be in accordance with [4 S.C. Code Ann. Regs. 61-25 (2011)]." Relevant sections of Regulation 61-25 to this matter include:

- Chapter IV § A(7). Single-service and single-use articles. Single-service and single-use articles shall not be reused.
- Chapter IV § B(1)(a). Food-contact surfaces shall be easily cleanable, smooth, and free of breaks, open seams, cracks, chips, pits, and similar imperfections, and free of difficult-to-clean internal corners and crevices. Threads subject to food contact shall be designed to facilitate cleaning.
- Chapter V § A(1)(b)(3). Kitchenware and food-contact surfaces of equipment shall be washed, rinsed, and sanitized: . . . (3) At any time during the operation when contamination may have occurred.
- Chapter V § A(1)(e). Non-food-contact surfaces of equipment shall be cleaned as often as necessary to keep the equipment free from accumulation of dust, dirt, food particles, and other debris.
- Chapter V § A(2)(b). Cloths or sponges used for cleaning surfaces of equipment, counters, dining table tops, and shelves shall be clean and shall be rinsed in an approved sanitizing solution used for no other purpose. In-use cloths and sponges shall be stored in an approved sanitizing solution.
- Chapter V § A(3)(e)(1). Except for fixed equipment and utensils too large to be washed, rinsed, and sanitized in sink compartments, manual washing, rinsing, and

sanitizing shall be conducted in the following sequence: (1) Equipment and utensils shall be thoroughly washed in the first compartment with a hot detergent solution that is kept clean;

- Chapter V § A(6). Drying. After sanitization, all equipment and utensils shall be air-dried.
- Chapter V § B(4)(d). Reuse of single-service and single-use articles is prohibited.

Based upon the foregoing findings of fact, the Court concludes that MCCH violated 7 S.C. Code Ann. Regs. 61-84 § 1303:

- on March 25, 2011, based upon the following four grounds: (1) MCCH, in violation of 4 S.C. Code Ann. Regs. 61-25 Ch. V §§ A(1)(b)(3) and A(3)(e)(1), had several food-contact surfaces, including the stove, tops of several pans, a can opener, and a crock pot, with accumulations of grease; (2) MCCH, in violation of 4 S.C. Code Ann. Regs. 61-25 Ch. IV § B(1)(a), had a cracked cutting board, which did not allow for proper cleaning; (3) MCCH, in violation of 4 S.C. Code Ann. Regs. 61-25 Ch. V. § A(1)(e), had several non-food-contact surfaces, including cabinet shelves and counter tops, with an accumulation of food debris; and (4) MCCH, in violation of 4 S.C. Code Ann. Regs. 61-25 Ch. IV § A(7) and Ch. V § B(4)(d), reused a single-use article – a coffee can – by storing grease in the can; and
- on July 3, 2012, based upon the following two grounds: (1) MCCH, in violation of 4 S.C. Code Ann. Regs 61-25 Ch. V § A(2)(b), placed an in-use and wet towel on top of dishes instead of storing it in an approved sanitizing solution; and (2) MCCH, in violation of 4 S.C. Code Ann. Regs. 61-25 Ch. V § A(6), used a cloth towel to dry pots, plates, and pans, instead of allowing them to air-dry.

Section 302(E) and Enforcement Action

7 S.C. Code Ann. Regs. 61-84 § 302(E) (2012) states “[i]n determining an enforcement action the Department shall consider[,]” *inter alia*, the conditions and their impact on the health, safety, or well-being of residents; the efforts of the facility to correct cited violations; the overall conditions of the facility; and the facility’s history of compliance. “Class I violations are those that the Department determines to present an imminent danger to the health, safety, or well-being of the persons in the facility or a substantial probability that death or serious physical harm could result therefrom. . . .” *Id.* § 302(A). “Class II violations are those, other than Class I violations, that the Department determines to have a negative impact on the health, safety or well-being of persons in the facility. . . .” *Id.* § 302(B). Based upon the foregoing findings of fact, the Court concludes that there was a sufficient basis for the Department to bring this enforcement action.

Section 302(F) and Monetary Penalty

Pursuant to the Act, the penalty imposed by the Department for violation of the Act or regulation must be not less than one hundred nor more than five thousand dollars for each

violation. S.C. Code Ann. § 44-7-320(C) (2002). Each day's violation is considered a subsequent offense. *Id.* Additionally, 7 S.C. Code Ann. Reg. 61-84 § 302(F) (2012) provides a monetary penalty schedule that the Department may utilize that is based upon the classification level of each violation and the number of times the violation has occurred at the facility within a thirty-six (36) month time period. "Class I violations are those that the Department determines to present an imminent danger to the health, safety, or well-being of the persons in the facility or a substantial probability that death or serious physical harm could result therefrom. . . ." *Id.* § 302(A). "Class II violations are those, other than Class I violations, that the Department determines to have a negative impact on the health, safety[,] or well-being of persons in the facility. . . ." *Id.* § 302(B). "Class III violations are those that are not classified as Class I or II in these regulations or those that are against the best practices as interpreted by the Department. . . ." *Id.* § 302(C). "The notations, '(I)' or '(II)' placed within sections of [Regulation 61-84], indicate those standards are considered Class I or II violations if they are not met, respectively. . . ." *Id.* § 302(D).

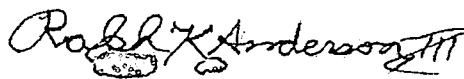
Based upon the foregoing findings of fact, the Court concludes that a monetary penalty against MCCH of \$14,500 is appropriate.

ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby:

ORDERED that MCCH must submit payment of the \$14,500 monetary penalty to the Department no later than thirty (30) days from the date of this Order.

AND IT IS SO ORDERED.



Ralph King Anderson, III
Chief Administrative Law Judge

February 4, 2014
Columbia, South Carolina

CERTIFICATE OF SERVICE

I, E. Harvin Belser Fair, hereby certify that I have this date served this Order upon all parties to this cause by depositing a copy hereof in the United States mail, postage paid, in the Interagency Mail Service, or by electronic mail, to the address provided by the party(ies) and/or their attorney(s).

E. Harvin Belser Fair

E. Harvin Belser Fair
Judicial Law Clerk

February 4, 2014
Columbia, South Carolina