THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Administrative Law Court

Shirley C. Robinson, Administrative Law Judge

Case No. 15-ALJ-07-0148-CC

South Carolina Department of Health and Environmental Control,

Respondent,

v.

Blessed Births, Inc. d/b/a Blessed Births Family Wellness and Birth Center,

Appellant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This matter was commenced by the filing of an administrative order by the South Carolina Department of Health and Environmental Control on February 12, 2015 which was mailed by certified mail the following day. Appellant timely filed a request for final review on February 23, 2015 with the Board of Health and Environmental Control. By letter dated March 18, 2015 the South Carolina Board of Health and Environmental Control notified Appellant that it would not conduct a final review conference on this subject action. Thereafter the Appellant timely filed, on March 25, 2015, a request for contested case hearing with the Administrative Law Court.

A hearing was held before the Honorable Shirley C. Robinson, Administrative Law Judge, on October 21, 2015 and a final decision and order was rendered and filed on January 7, 2016 which was received by the Appellant on January 10, 2016. This appeal timely followed.

EXCEPTIONS

I. That the Administrative Law Judge erred in finding a violation of Regulation 61-102D(3)(b) the error being that the finding is arbitrary, capricious and in violation of law.

II. That the Administrative Law Judge erred in finding a violation of Regulation 61-102D(3)(f) the error being that the finding is arbitrary, capricious and in violation of law.

III. That the Administrative Law Judge erred in finding a violation of Regulation 61-102D(6)(d) the error being that the finding is arbitrary, capricious and in violation of law.

IV. That the Administrative Law Judge erred in finding a violation of Regulation 61-102C(3) the error being that the finding is arbitrary, capricious and in violation of law.

ARGUMENTS

I. That the Administrative Law Judge erred in finding a violation of Regulation 61-102D(3)(b) the error being that the finding is arbitrary, capricious and in violation of law.

Appellant was licensed as a birthing center in the year 2000 and is subjected to, at minimum, an annual inspection. In October 2013 the Respondent reinterpreted the Licensing Act and wrote to Appellant seeking to revoke her license. (R. Pg. 135)

Thus began a two year period of constant harassing "inspections" seeking a violation and even extending to the point of soliciting violations from physicians (R. Pg. 145) ultimately culminating in this final agency decision which was contested before the Administrative Law Court.

The first inspection leading to this action was attempted on July 11 at 3:15pm. When the inspector arrived the office was closed. Upon calling the Appellant the inspector was advised that the Appellant was in Spartanburg County seeing a patient and could not return to the office by closing time of 5:00pm. (R. Pgs. 147-148) Despite Appellant attempting to set a specific date for the inspection, (R. Pg. 148) the inspector sought and obtained a search warrant and arrived at the facility in the morning hours of July 16 with a police officer and another Department employee. Upon arrival the inspector was immediately advised that Appellant was attending a mother in labor, (R. Pg. 55) despite the Appellant mid-wife's responsibility to the wellbeing of her patient and her unborn child the inspector proceeded to conduct an inspection of the facility inclusive of requiring the Appellant to retrieve and copy numerous files. (R. Pgs. 55, 56 and 215)

As a result of the investigation the Petitioner was cited with six violations of which four were affirmed by the Administrative Law Court.

Appellant testified that in order to obtain the initial license in 2000 she was required to submit, along with numerous other items, a policies and procedures manual that conformed with Regulation 61-102 for approval by the Department. She further testified that the subject policies and procedures had remained unchanged for the entire fourteen years since licensing of the facility and had been inspected at least fifteen times by the Respondent's inspector. (R. Pgs. 199-200)

Although the appealed Order states that, "Respondent's policy and procedure manual did not address the receiving, transcribing and implementing of orders for the administration of drugs..."

neither party testified to that effect. To the contrary, the policy and procedure manual did address those issues but not in a way that Respondent had apparently secretly determined was now required to be addressed in order not to be in violation of the Regulation.

There is no issue, now or at the time of the hearing, with the Department's interpretation of the necessary material required to be contained within the policies and procedures manual. The issue is that the interpretation was changed without any notice, notification or opportunity of the Appellant to be aware of and to conform to the change of interpretation.

Due process requires some opportunity to be apprised of and then have an opportunity to conform your behavior when there is a change in that demanded of you. It is uncontradicted that the policies and procedures related to 61-102D(3)(b) were approved by the Respondent in 2000, there has been no amendment or modification to the aforesaid Regulation and that no notice of an intention to modify the interpretation of that portion of the Regulation, or opportunity to comply, was provided to the Appellant prior to the citation. It is arbitrary, capricious and fundamentally unfair to notify a license holder of a change in policy or interpretation by issuing a citation and fine.

Additionally, the testimony and evidence reflect that the Appellant met the burden of claiming estoppel against the Respondent for such violation by clear uncontradicted evidence of a lack of knowledge and the means of knowledge of the truth as to the facts in question, clearly justifiable reliance upon conduct of the Respondent and by not doing that which was easily done after the citation (amend the policies) thereby prejudicing her position. Midlands Utility, Inc. v. SCDHEC, 298 S.C. 66, 378 S.C. 2nd 256 (1989)

II. That the Administrative Law Judge erred in finding a violation of Regulation 61-102D(3)(f) the error being that the finding is arbitrary, capricious and in violation of law.

Regulation 61-102D(3)(f) requires that drugs and medication be stored and secured.

During the fifteen to twenty previous inspections by this inspector of this facility there had never been a citation or complaint about the storage and security of drugs and medications. (R. Pg. 206) None of those prior inspections occurred, nor was deemed necessary to occur, during the actual labor and delivery of a mother and child. (R. Pg. 207)

Besides the fact of conducting an inspection which could have in any way increased the risk to mother and child, this violation is particularly indicative of the pettiness of the inspector and her obvious desire to find violations when none exist.

It is beyond the pale to interpret this particular regulation as requiring that the drugs and medications necessary for the delivery of the child and the safety of the mother and child remain secured while the procedure is ongoing. At some point they have to be used. At some point they will be used. Other than the unexpected arrival of the police, the inspector and her associate, the only people in the facility were the patient and her immediate family. Prior to labor they were stored and secured and subsequent to labor they were stored and secured. (R. Pgs. 208-211) There is no purpose in having them if this Regulation is to be read that they must <u>always</u> be stored and secured. When a mother is in labor the drugs that may, or will be administered must be readily at hand for that purpose.

The finding of a violation is arbitrary, capricious and an error of the applicable law.

III. That the Administrative Law Judge erred in finding a violation of Regulation 61-102D(6)(d) the error being that the finding is arbitrary, capricious and not supported by any evidence.

Regulation 61-102D(6)(d) reads as follows:

"d. At least one member of the clinical staff **or** a registered nurse shall be in the facility when a patient is present; and up to at least one hour after each mother's delivery. Two members of the clinical staff **or** one member of the clinical staff **and** a registered nurse shall be present during the mother's delivery." (Emphasis added)

Despite seeking absolute technical compliance with the Regulations, despite the expediencies caused by the insistence to conduct an investigation during the delivery of a child, the Administrative Law Court and the Respondent completely ignore those technicalities in finding a violation of this Regulation.

Both Appellant and the inspector testified that the Appellant attempted to contact another midwife to take over the responsibilities for attending to the mother in labor when the inspector insisted upon conducting the inspection during the delivery. Both testified that the inspector refused to allow another midwife to assist with the delivery. (R. Pgs. 164-165)

When confronted with that circumstance, having to attend to the mother and the inspector and after being thwarted in her attempt to address it, the Appellant relied upon the technical language of the Regulation. (R. Pgs. 212-216)

The inspector testified that she was a registered nurse and was present during the delivery. (R. Pg. 165) Accordingly, the only evidence in the record is that one member of the clinical staff (Appellant) and a registered nurse (inspector) were present during the mother's delivery.

The finding of a violation of this subsection of the Regulation is not supported by any evidence in the record.

IV. That the Administrative Law Judge erred in finding a violation of Regulation 61-102C(3) the error being that the finding is arbitrary, capricious and in violation of law.

Last, but not least, the most egregious example of ignoring reality and encouraging dishonesty in order to find something to cite Appellant.

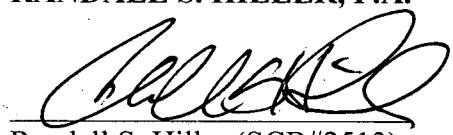
The classic case of a small business regulation that ignores reality and insures that every licensee will at some time be in violation if they maintain their records in an honest and truthful manner.

Appellant was cited for not having a name in her policies and procedures appointing an individual to act in her absence. As before, during all the prior inspections, a name was, in fact, specified. (R. Pg. 201) However, absent the return of indentured servitude, employees are free to come and go as they please, with or without notice. If, as in the instant case, that employee is the person appointed to act as the alternate administrator and the licensee is honest enough to remove his or her name from the policy and procedure manual promptly upon the employee's departure then, inevitably, there is a violation of the regulation. Apparently, the better practice in the eyes of the Respondent would be to not remove that name until you had an opportunity to interview, hire, train and be confident in a new employee. The incredibly technical application of the Regulation to the circumstances which were uncontradicted in this case constitute an abuse of discretion in finding the violation.

CONCLUSION

For the reasons set forth hereinabove each of the conclusions of a violation of Regulation 61-102 should be reversed as being arbitrary, capricious or being an error of law in application of the facts to the law.

RANDALL S. HILLER, P.A.



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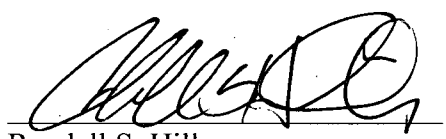
CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

June 7, 2016



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