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LUCAS COUNTY

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COMMON PLEAS COURT  
BERNIE QUILTER  
CLERK OF COURT

IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

**McKinney Homes, Inc.,**

\*

Case No. CI 0201703041

Appellant,

\*

Honorable Dean Mandros

vs.

\*

**OPINION AND JUDGMENT ENTRY**

**Ohio Department of Developmental  
Disabilities,**

\*

Appellee.

\*

\*\*\*\*\*

Appellant McKinney Homes, Inc. was a certified agency provider in Lucas County that provided homemaker personal care, other home care and habilitation services, and non-medical transportation services to individuals with developmental disabilities. This is an appeal pursuant to R.C. 119.12 of an Adjudication Order issued by the Ohio Department of Developmental Disabilities revoking Appellant's certifications. For the reasons that follow, the Court finds that the Adjudication Order is supported by reliable, probative, and substantial evidence and is in accordance with law; therefore, the Adjudication Order is affirmed.

**E-JOURNALIZED**

**OCT 25 2017**

## I. FACTS AND PROCEDURAL BACKGROUND

In 2006, Appellant McKinney Homes, Inc. ("MHI") was certified as an agency provider in Lucas County to provide homemaker personal care, non-medical transportation and other services under the Individual Options, Level One, Self-Empowered Life Funding, and Supported Living Waiver certifications. (Trans.pg. 154) As an agency provider, MHI was subject to periodic compliance reviews by the Department of Developmental Disabilities ("DODD").

In July of 2011, a regular compliance review of MHI was conducted by the Lucas County Board of Developmental Disabilities which resulted in 22 violations. (Trans. pg. 77, Ex. 1) These violations included, among other things, failure to provide adequate Program Management Services, failure to provide pre-employment attestations, failure to complete required background checks on employees, failure to complete an Abuser Registry, Nurse Aide Registry, or Annual Abuser Registry check of employees on or before the date of hire, failure to ensure that employees received the required training, failure to provide evidence that two employees had a valid driver's license or valid liability insurance coverage, failure to implement homemaker/personal care services in accordance with the Individual Service Plans, failure to properly complete provider's service delivery documentation, failure to submit complete seizure, mileage, financial ledgers and safety awareness review forms, failure to notify Service and Support Specialist of a Major Unusual Incident ("MUI"), failure to develop and implement a policy regarding reporting Unusual Incidents ("UIs"), failure to submit evidence that quarterly reports regarding MUI trends and patterns were sent to the county board, failure to review MUI and UI trends and patterns, and failure to maintain UI logs. (Ex. 1)

The DODD issued an Order suspending MHI's certifications as a result of the 2011 review based on the number of citations that were issued. (Trans. pgs. 82, 294) In addition, DODD required

MHI to write and implement a plan of correction for each of the citations. (Ex. 1; Trans. pg. 85) MHI submitted a plan of correction assuring the DODD that those problems would not exist in the future. (Trans. pgs. 109-110) The suspension was not lifted until May of 2012. (Trans. pgs. 85)

On July 31, 2015, the DODD sent LaVina McKinney, CEO of MHI, an email notifying her that another compliance review would be conducted of MHI in November of 2015. (Trans. pgs. 16-17, 142; Ex. 4) On August 25, 2015, a follow-up email was sent to Ms. McKinney requesting to schedule the compliance review for November 23, 2015. (Trans. pg. 20; Ex. 7) Ms. McKinney never responded to the email so a second email was sent on September 9, 2015. (*Id.*) Thereafter, Ms. McKinney telephoned and the review was scheduled for November 23, 2015. (Trans. pg.20).

Kristina Thompson, a Review Specialist in the Office of Provider Standards and Review, sent an email to Ms. McKinney on September 10, 2015, confirming the review date. (Ex. 8; Trans. pgs. 13, 21-24, 59) Attached to the email was an individual sample key (the names of individuals that were chosen by Ms. Thompson to be included in the review), a staff sample key (a list of employee files that Ms. Thompson would be reviewing to see that compliance is met as far as background checks, training, etc.), required documents list (list of documents to be made available during the review as they apply to the provider), and the review tool (helps the providers prepare for the review and to ensure that the requested items are available to the reviewer). (*Id.*) At Ms. McKinney's request, the review was rescheduled for December 16, 2015. (Trans. pgs. 25, 270, 306)

On December 16, 2015, Ms. Thompson conducted the compliance review of MHI. (Trans. pgs. 15, 25) MHI had three employees: Ms. McKinney, her husband Gilbert McKinney, and Lavenia Edwards. (Trans. pgs. 146-147) MHI was providing non-medical transportation and in-home supported living services to R.M., Gilbert McKinney's brother, and non-medical transportation

only to another six or seven individuals. (Trans. pgs. 93, 142-143, 275-276) R.M. lives right down the block from the McKinneys and requires 24-hour supervision, seven days a week. (Trans. pgs. 143-144) Services provided to R.M. by MHI included dispensing medication, checking blood pressure and blood sugar, providing meals, taking care of his personal hygiene, taking him to workshop, etc. (Trans. pg. 144)

The 2015 review resulted in the issuance of twelve citations for violation of administrative rules governing agency providers. Six were repeat citations from the July 2011 review and three were immediate citations, requiring immediate corrective actions while the reviewer was on site.

(Ex. 10) The twelve citations included:

1. Provider did not evidence a system to record any financial transactions, receipts, etc. (Repeat citation)
2. Provider did not evidence completion of the MARS (medical administration record system) for Individual #1 from 11/23 - 11/30/15. (Repeat citation)
3. a) The provider did not evidence any service delivery documentation for the entire month of October 2015 for Individual #1. b) The provider did not evidence having a copy of the current ISP for Individual #2. (Repeat citation)
4. Provider did not evidence completion of semi-annual or annual analysis report of trends and patterns. (Repeat citation)
5. Provider did not evidence completion of monthly reviews of unusual incidents for trends and patterns. (Repeat citation)
6. Provider did not evidence completion of the Inspector General, Sex Offender, System Award Management, or Incarcerated/Supervised Offenders database checks for staff Lavinia Edwards or Gilbert McKinney. (Immediate citation)
7. Provider did not evidence results of BCII for staff person Lavinia Edwards.
8. Provider did not evidence that staff person Lavinia Edwards signed an attestation statement. (Repeat citation)
9. Provider did not evidence that staff Gilbert McKinney or Lavinia Edwards have statements from physicians regarding physical capability to perform nonmedical transportation duties. (Immediate citation)
10. Provider did not evidence completion of a drug test for staff person Lavinia Edwards. (Immediate citation.)

11. Provider did not evidence having a first aid kit in the nonmedical transportation vehicle.

12. Provider did not evidence completion of daily vehicle inspections.

By letter dated December 24, 2015, the Director of DODD notified MHI of the suspension of its authority to begin providing services to individuals who were not receiving services at the time of the Director's action and of the proposed revocation of its certifications. (Ex. 19) MHI timely requested a hearing. (Ex. 21)

The hearing was held on May 31 and June 1, 2016. (Ex. R-4) The Hearing Examiner, Robert Angell, issued his Report and Recommendation on July 29, 2016, finding that the testimony and documentary evidence at the hearing established that all citations were valid and recommending that MHI's provider certifications be revoked in their entirety. (Ex. R-5) Mr. Angell concluded:

D. The evidence and testimony in this proceeding \* \* \* support, by the requisite standard of proof, a conclusion that summary suspension of Respondent's authority to begin to provide services to individuals who were not receiving services at the time of suspension was appropriate. Respondent failed to continue to meet (or meet in the first instance) applicable certification standards, that failure was systemic in nature, and that failure created substantial risks to the health and safety of individuals who received or would receive services from Respondent. In particular, Respondent failed to show that it met the applicable certification standards with respect to required database and criminal background checks, physician's examinations and drug screening of employees, and incident reporting. All of these deficiencies have the potential to cause harm to the individuals in Respondent's care.

E. The evidence and testimony in this proceeding \* \* \* support, by the requisite standard of proof, a conclusion that revocation of Respondent's certifications is appropriate. Respondent's actions and omissions \* \* \* constitute a failure to meet or continue to meet the applicable certification standards, misfeasance, nonfeasance, and 'other conduct the director determines is or would be injurious to individuals who receive or would receive supported living services from the provider,' within the meaning of the governing statutes.

\* \* \*

Based on the testimony and documentary evidence in this hearing, and the Findings of Fact and Conclusions of Law set forth above, this Hearing Examiner recommends that the Director's order of suspension be UPHELD, and that Respondent's provider certifications, in their entirety, be REVOKED. \* \* \*

On October 12, 2016, the Director of the DODD issued an Adjudication Order adopting the findings of fact and conclusions of law contained in the Hearing Examiner's Report and Recommendation and revoking MHI's certifications. (Ex. R-7)

MHI timely filed its Notice of Appeal in this Court on November 1, 2016, Case No. CI 0201604946. (Ex. R-9) On April 17, 2017, the Court reversed DODD's Adjudication Order and remanded the case to DODD to consider a letter received by DODD on August 12, 2016, sent by MHI as objections to the Hearing Examiner's Report and Recommendation. (Ex. R-6)

The Director reconsidered the case, including MHI's objections, and issued a new Adjudication Order on May 30, 2017, again revoking MHI's certifications. On June 15, 2017, MHI filed the instant appeal of DODD's May 30, 2017, Adjudication Order pursuant to R.C. 119.12.

## II. STANDARD OF REVIEW

R.C. 119.12 sets forth the standard of review a common pleas court must follow when reviewing an administrative appeal. O.A.C. 5123:2-2-04(F)(2). Under R.C. 119.12(M), "[t]he court may affirm the order of the agency complained of in the appeal if it finds, upon consideration of the entire record and any additional evidence the court has admitted, that the order is supported by reliable, probative and substantial evidence and is in accordance with law." In *Our Place, Inc. v. Ohio Liquor Control Commission*, 63 Ohio St.3d 570, 571, 589 N.E.2d 1303 (1992), the Ohio Supreme Court provided the following definition of reliable, probative and substantial evidence as:

- (1) 'Reliable' evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true.
- (2) 'Probative' evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue.
- (3) 'Substantial' evidence is evidence with some weight; it must have importance and value.

A common pleas court must "not substitute its judgment for that of an administrative board \* \* \* unless the court finds that there is not a preponderance of reliable, probative and substantial evidence to support the board's decision." *Kisil v. Sandusky*, 12 Ohio St.3d 30, 34, 12 Ohio B. 26, 465 N.E.2d 848 (1984).

"A reviewing court must give deference to an administrative agency's interpretation of its own rules and regulations if such interpretation is consistent with statutory law and the plain language of the rule itself." *Clark v. Ohio Department of Mental Retardation and Developmental Disabilities*, 55 Ohio App.3d 40, 562 N.E.2d 497 (6th Dist. 1988), paragraph one of the syllabus. *See also, Zingale v. Ohio Casino Control Commission*, 8th Dist. Cuyahoga No. 101381, 2014-Ohio-4937, ¶ 81, citing *Bernard v. Unemployment Compensation Review Commission*, 136 Ohio St.3d 264, 267, 2013-Ohio-321, 994 N.E.2d 437 ("courts \* \* \* must give due deference to an administrative interpretation formulated by an agency that has accumulated substantial expertise, and to which the General Assembly has delegated the responsibility of implementing the legislative command"); *Twenty Two Fifty, Inc. v. Ohio Liquor Control Commission*, 10th Dist. Franklin No. 06AP-844, 2007-Ohio-946, ¶ 110, citing *Ohio Historical Society v. State Employee Relations Board*, 66 Ohio St.3d 466, 471, 1993-Ohio-182, 613 N.E.2d 591 ("an agency's findings of fact are presumed to be correct and must be deferred to by a reviewing court unless that court determines that the agency's findings are internally inconsistent").

### III. DISCUSSION

R.C. 5123.166 governs the DODD's authority to revoke operating certificates issued to agency providers such as MHI. *County Med, Inc. v. Ohio Department of Developmental Disabilities*, 8th Dist. Cuyahoga No. 104921, 2017-Ohio-5745, ¶ 27. R.C. 5123.166(A) authorizes the DODD

to revoke a provider certificate "if good cause exists as specified in 5123.166(B)." R.C. 5123.166(B)

provides:

The following constitute good cause for taking action under division (A) of this section against a person or government entity seeking or holding a supported living certificate:

(1) The person or government entity's failure to meet or continue to meet the applicable certification standards established in rules adopted under section 5123.1611 of the Revised Code;

(2) The person or government entity violates section 5123.165 of the Revised Code;

(3) The person or government entity's failure to satisfy the requirements of section 5123.081 or 5123.52 of the Revised Code;

(4) Misfeasance;

(5) Malfeasance;

(6) Nonfeasance;

(7) Confirmed abuse or neglect;

(8) Financial irresponsibility;

(9) Other conduct the director determines is or would be injurious to individuals who receive or would receive supported living from the person or government entity.

R.C. 5123.166(B) is implemented by O.A.C. 5123:2-2-04(F):

(1) The department may initiate certification suspension or certification revocation proceedings if the department finds one or more of the following:

(a) Substantial violation of applicable requirements which present a risk to an individual's health and welfare; or

(b) A pattern of non-compliance with plans of correction approved in accordance with this rule; or

(c) A pattern of continuing non-compliance with applicable requirements; or

(d) A licensed provider has had its license revoked by the licensing authority; or

(e) Failure to cooperate with the compliance review process set forth in this rule; or

(f) Other good cause, including misfeasance, malfeasance, nonfeasance, substantiated abuse or neglect, financial irresponsibility, or other conduct the department determines is injurious to individuals being served. \* \* \*



In the instant case, the Hearing Examiner fully explained the facts relied on and his reasoning in affirming the twelve violations. The Court agrees that such violations establish good cause under R.C. 5123.166 and O.A.C. 5123:2-2-04 to revoke MHI's certifications. In fact, Ms. McKinney admitted that each citation was accurate. (Trans.pgs. 159, 196, 200-201, 224, 234, 235, 239, 247, 249, 253, 256, 259) Further, Ms. McKinney conceded at the hearing:

Q: [I]f I understood you correctly, you really do not disagree or contest any of the statements or evidence that were made by the reviewer with regard to this particular review?

A: No, I don't because you get -- in this field, you get so involved. I stepped out of the employer mode and ended up as an employee mode. And it just get in a whirlwind like that, you know.

\* \* \*

Q: Do you recognize that you have shown a persona of non-compliance?

A: Yes, I have.

\* \* \*

Q: You really don't even dispute that DODD does have good cause to revoke your certifications?

A: No, I don't.

(Trans. pg. 280, 297)

Nevertheless, MHI maintains that it should be excused from complying with the multiple rules and certifications standards designed to protect developmentally disabled individuals, as well as with its promise following the 2011 review to comply with all such rules in the future, because (1) Ms. McKinney's health issues and the fact that MHI was in the process of converting to a computer-based recordkeeping system and moving all files to an office hampered MHI's ability to comply, (2) Ms. McKinney was not sure what documents were required, (3) MHI corrected many of the violations by submitting required documents at the hearing, and (4) none of the individuals served by MHI were placed at risk of being harmed.

At the time of the review, MHI was in the process of transitioning from a paper-based system of recordkeeping to a computer-based system, as well as in the process of moving its records from the McKinney home to an office. (Trans. pgs. 159-160, 175-76, 178, 213, 224, 283-284) As a result, some of the records were boxed up, down at the office, destroyed, or misplaced. (*Id.*) In addition, Ms. McKinney broke her ankle on September 27, 2015, and stated she was unable to get up to get the records. (Trans. pgs. 149, 177, 213, 216, 256, 259)

However, more than three months before the review, Ms. Thompson sent MHI a list of documents that would be required at the review and a review/self-review tool. (Ex. 8; Trans. pgs. 21-24) Therefore, MHI had ample time to retrieve the documents before the review. Even if Ms. McKinney was unable to get the documents herself, there were two other MHI employees who could have gotten them for her during that three-month period.

Furthermore, there is conflicting evidence as to whether Ms. McKinney was immobilized from the ankle injury. According to Ms. Thompson, Ms. McKinney told her at the review that she "has not left her house except for doctor's appointments." (Ex. 17; Trans. pgs. 55-56) Yet, Ms. Thompson saw Ms. McKinney at Kroger the day before the review walking without an assistive device. (Trans. pgs. 26, 57) Ms. McKinney denied being at Kroger. (Trans. pgs. 270-271) In addition, Ms. McKinney stated that she is the only one who provided services to R.M. and that the home and personal care documentation for R.M. was all completed by her. (Trans. pgs. 55-56; Ex.17) These services included transportation to medical appointments, housekeeping, cooking, etc., all of which would have required Ms. Kinney to leave her house as R.M. lives down the block from the McKinneys. (Trans. pg. 55-56) Ex. AA shows that Ms. McKinney initialed the form indicating that she administered medication to R.M. in November 2015. (Trans. pgs. 284-85) The

documentation is to be signed at the time the services are delivered and only by the person providing the services. (Trans. pgs. 105-106) When Ms. Thompson asked Ms. McKinney how all the individual services were being performed by her when she has not left the house, Ms. McKinney did not answer her. (Trans. pgs. 56-57, 73-74; Ex. 17) Also, Ms. Edwards testified:

She still -- in all the pain and agony, she still tried to get up and do whatever she needed to do. \* \* \* [S]he still put forth the effort to try to get up and do whatever she needed to do, whether it was taking care of R.M., the dog, the squirrels, I mean anything and anybody."

(Trans. pg. 312) Lastly, Ex. X is a letter dated May 23, 2016, from the parents of an MHI client which states:

Our autistic daughter \* \* \* has been transported by LaVina for the last nine months. Not only has LaVina driven her, she has become \* \* \* [her] friend and mentor in the worst of emotional times for \* \* \* [her]. A true and loving bond has been established.

Our trust is put in LaVina as she carries our precious child one hour each way to \* \* \* [her] daily programs. \* \* \*."

Ms. McKinney also asserts that the reviewer did not make clear what documents she was looking for. Again, MHI was given a list of the required documents on September 10, 2015. If Ms. McKinney was confused or had any questions regarding the documentation, she had over three months prior to the review to contact the DODD and ask for clarification.

Regarding MHI's argument that many of the citations were corrected by MHI presenting required documents at the hearing, the Hearing Examiner found that MHI's exhibits were dated after the review, were not provided to the reviewer at the December 16, 2016 review, were incomplete and/or insufficient, or were not probative of any of DODD's allegations or MHI's defenses thereto. Additionally, R.C. 5123.166 and the associated regulations provide that revocation may still be imposed even when a provider later comes into compliance. *Inrex Home Care, LLC v. Ohio*

N.E.3d 681, ¶ 9. Specifically, O.A.C. 5123:2-2-04(F)(5) states:

The department may suspend or revoke a certified provider's certification regardless of whether some or all of the deficiencies enumerated in accordance with this rule that prompted the department's intent to suspend or revoke the certification have been corrected at the time of the hearing.

Finally, MHI asserts that no client of MHI was placed at risk of being harmed. However, it is not relevant that there was no harm, as long as the actions of MHI are of the type that may cause harm. Gilbert McKinney was transporting clients and dispensing/recording medication while suffering from vertigo since August of 2015 and without a statement from a physician stating he was fit to perform his duties. (Trans. pgs. 199, 221, 286-288; Ex. 17) Clients were being transported even though there was no evidence that the vehicles used were inspected daily or contained a first aid kit. MHI allowed employees to deliver services to clients without first completing criminal background checks, drug tests, or mandatory database searches. There was no evidence that unusual incidents and major unusual incidents were reported by MHI. MHI failed to document correctly the medication being administered to R.M. There was no evidence that MHI had a current Individual Service Plan for one of its clients. (Ex.10) Clearly, MHI's actions placed the very vulnerable developmentally disabled individuals at risk of harm.

Therefore, the Court finds the record is replete with reliable, probative and substantial evidence that MHI did not comply with multiple certification standards and such noncompliance will not be excused.

Nonetheless, MHI contends that the issue is not whether MHI was issued citations or whether those citations were accurate, but whether those citations were of sufficient number and import,

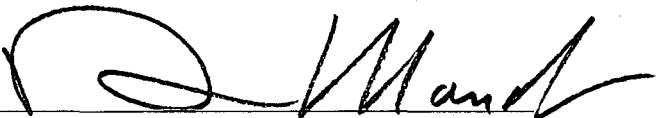
especially with regard to safety, to warrant the extreme sanction of revocation. But where the penalty imposed by the Department is authorized by the applicable statute, this Court has no authority to modify that penalty. *Leake v. Ohio State Board of Psychology*, 6th Dist. Sandusky No. S-92-32, 1993 Ohio App. LEXIS 3290, \*9 (June 30, 1993), citing *Henry's Cafe, Inc. v. Board of Liquor Control*, 170 Ohio St. 233, 237, 163 N.E.2d 678 (1959), paragraph three of the syllabus.

In conclusion, after a thorough review of the entire record and the briefs of counsel, the Court finds that there is reliable, probative, and substantial evidence supporting the May 30, 2017 Adjudication Order and it is in accordance with law.

**JUDGMENT ENTRY**

It is ORDERED that the Ohio Department of Developmental Disabilities' Adjudication Order issued on May 30, 2017, is **AFFIRMED** and Appellant's appeal is **DISMISSED**. This is a final appealable order.

Date: 10.23.17

  
Dean Mandros, Judge