

BEFORE THE WEST VIRGINIA INTERMEDIATE COURT OF APPEALS

NO. 22-ICA-277

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WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES/
OFFICE OF HEALTH FACILITY
LICENSURE AND CERTIFICATION,

Petitioner,

v.

DOCKET NO. 22-ICA-277

HEART 2 HEART VOLUNTEERS, INC. dba
SERENITY HILLS LIFE CENTER,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF

CONFIDENTIAL CASE
THIS DOCUMENT CONTAINS CONFIDENTIAL INFORMATION

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Comes now the Petitioner, the West Virginia Department of Health and Human Resources (“Department”)/Office of Health Facility Licensure and Certification (“OHFLAC”) by counsel, James “Jake” Wegman, Assistant Attorney General, and fully incorporating its *Petitioner’s Brief*, further submits this Reply to the brief submitted by the Respondent, Serenity Hills.

The clinical staff at Serenity Hills, not OHFLAC, chose to discharge its consumers.

In their brief, the Respondent maintains that OHFLAC’s decision to not renew Serenity Hills’ behavioral health license forced the facility to discharge its consumers. However, Serenity Hills discharged its consumers prior to any decision by OHFLAC. Indeed, Serenity Hills’ medical director, Staff L, testified that the Serenity Hills’ clinical team discharged consumers as a safety concern because the CEO would not leave the premises. App. 1833. This was prior to OHFLAC submitting its letter denying licensure renewal to Serenity Hills. It should be noted that upon discharge, some residents left through their bedroom windows instead of leaving through the

locked front door. App. 2230. This is further indicative that Serenity Hills was being run as a “lockdown” facility.

Furthermore, OHFLAC issued its non-renewal letter on March 17, 2022, after Serenity Hills discharged its consumers. App. 3-4. Indeed, the statement of deficiencies that accompanied the non-renewal letter noted that Serenity Hills Medical Director, Staff L, had already transferred consumers out of Serenity Hills due to safety concerns. App. 755-56. Therefore, Serenity Hills’ clinical staff chose to discharge consumers prior to any OHFLAC action.

Serenity Hills failed to timely report alleged incidents of consumer abuse.

Serenity Hills minimizes the fact that two allegations of abuse at the facility were not timely reported to OHFLAC. Under W. Va. Code St. R. § 64-11-12.14.1, behavioral health centers such as Serenity Hills must “report, investigate, monitor, and remediate consumer-related incidents.” Furthermore, under W. Va. Code St. R. § 64-11-12.15.1., a behavioral health center “shall immediately report to OHFLAC the neglect, abuse, or suspected neglect or abuse of any consumer who receives services.” This rule further provides that “this requirement mandates self-reporting of neglect, abuse, or suspected neglect or abuse by the service provider.” *Id.*

These code sections clearly require Serenity Hills to report the kitchen incident wherein a kitchen supervisor slapped a consumer on the back of the neck. Even though the consumer was working in the kitchen, the incident should have still been reported because she was still receiving counseling services. Indeed, therapist Staff X testified that the consumer was receiving services from Serenity Hills when the incident occurred. When Staff X inquired of the consumer advocate if any action was being taken, she was told she was “instigating” the situation. App. 1702.

Furthermore, the incident at the Valentine’s Day party between the CEO and that consumer should have been reported as an allegation of abuse. Indeed, W. Va. Code § 12.15.1. requires that

suspected abuse “shall” be reported and specifically notes the rule “mandates self-reporting.” *Id.* Therefore, Serenity Hills’ failure to report these allegations of abuse were significant, and the ALJ was clearly wrong when it required OHFLAC to issue Serenity Hills a renewal license despite these serious deficiencies.

Serenity Hills’ strict rules regarding interaction violated consumers’ rights.

Serenity Hills argues that its rules promoted consumer welfare. However, the evidence shows that Serenity Hills violated consumers’ civil rights with overly strict rules that prohibited consumer interactions. Therapist Staff X reported to OHFLAC that consumers were told they would go back to prison if they did not follow the rules. App. 1021. Staff X testified and explained that if a consumer receives three write-ups, they could be kicked out of the program and returned to prison. App. 1697. She explained that Serenity Hills issued write-ups for minor issues, such as sugar packets being found in a consumer’s room. App. 1698-99. Further, Staff A testified that write-ups result in consumers losing privileges and that the consumers could be written up for being in another consumer’s room. App. 1757-58.

During the survey, OHFLAC surveyors observed consumers in assigned rooms speaking to each other through open doors. The surveyors asked the consumers why they were not intermingling with each other and were informed that the consumers were not “allowed to come out of their rooms.” App. 1532-33. Surveyor Pingley testified that a consumer told her “we’re not allowed to speak to each other. If we poke our head out the door, we will be wrote up.” App. 1613. Consumer #10 reported that interaction was prohibited and was “worse than being in prison.” App. 724, 1148, 1534, 1614.

Therapist Staff X reported to surveyors that consumers are written up for standing in doorways or sticking their heads out from their assigned room. App. 725. Staff X testified that

consumers complained about the strict rules. She also testified that she personally observed a staff member yell at a consumer for sticking her head past her bedroom doorway. App. 1699. Staff X testified that “this has gone way beyond COVID and this is just flat out a patient right violation.” *Id.* Therefore, these unnecessarily strict rules violated consumers' civil rights. Indeed, the evidence shows that consumers were threatened with jail for minor violations. The ALJ was clearly wrong to require OHFLAC to issue a renewal license to a facility that violated consumers' rights.

Serenity Hills' overly strict rules regarding consumer telephone and mail communications violated consumers' rights.

Under W. Va. Code St. R. § 64-11-5.1.1.w.4., consumers are afforded basic rights, including the right to communication by mail and telephone. OHFLAC correctly determined that Serenity Hills failed this mandate by unreasonably restricting private telephone communications and mail correspondence. App. 723. Case Manager Staff A reported that consumers are granted two 10-minute phone calls per week that are monitored by staff. App. 725, 1144-47. She also reported that the facility restricts consumers' mail. App. 726. Staff A and Staff X testified that the strict rules delayed mail from being delivered to consumers. App. 1709, 1756. Staff A testified that consumers complained and “didn't like” the strict mail rules. App. 1755.

Staff A further testified that consumers were only authorized to communicate with “good” people. *Id.* She explained that staff searched the internet and social media to determine if a person was “healthy” and therefore authorized to communicate with a consumer. *Id.* Staff A testified that consumers “definitely wanted to be able to talk to whoever they wanted to, and they felt like the time limit was really constricting. They just didn't have a lot of time for phone calls.” App. 1752. Similarly, therapist Staff X also testified that consumers often complained about the strict telephone rules. App. 1707.

Program coordinator Staff R testified that she received complaints that mail was lost at Serenity Hills. App. 1803. She also explained that Serenity Hills prohibited consumers from receiving any mail from the jail system, even from a spouse. *Id.* See also Staff A testimony, App. 1754.

Of additional concern, Staff A testified that Consumer #8 was written up at Serenity Hills for asking about her mail, which consisted of a winter coat and photographs of her children. App. 1791-93. Staff A testified that Consumer #8 lacked a winter coat, and to her knowledge, was not able to obtain the coat that was needed due to the cold weather or the photographs of her children. App. 1795. Photographic prints received in the mail were not permitted, even if depicting the residents' children. The pictures were photocopied in black and white ink and provided to the residents. The original prints were provided to the residents upon discharge. App. 1708-09, 1803. Serenity Hills alleged that the original photographs may contain drugs which required this restrictive practice; however, less restrictive measures were available, such as making colored copies of the photographs or testing the photographs for drugs. Staff testified that residents were upset when they only received black and white photocopies of their children's photographs.

Therefore, OHFLAC correctly determined that Serenity Hills violated the consumers' rights to have mail and telephone communications. The ALJ was clearly wrong to require OHFLAC to issue a renewal license to Serenity Hills despite significant violations of consumer rights involving mail and telephone communications.

The Serenity Hills consumer advocate actively dissuaded consumers from pursuing complaints.

Under W. Va. Code St. R. § 64-11-5.1.1.m., behavioral health centers are required to have a consumer advocate. OHFLAC correctly found that Serenity Hills did not protect the rights of the consumers by failing to provide an unbiased advocate. App. 714, 1518.

Case Manager Staff A reported to surveyors and testified that she witnessed Staff I, the consumer advocate, dissuade Consumer #8 from filing a grievance against the CEO regarding the Valentine's Day party incident. App. 1131-34, 1136, 1739. Staff A testified that Staff I told Consumer #8 that if she filed a grievance, it could delay the OHFLAC survey and "did she really want to do that." App. 1739. Staff A testified that "it felt like" the consumer advocate was dissuading Consumer #8 from filing a consumer grievance. *Id.* Staff A further testified that Consumer #8 stated "I feel like the [consumer advocate's] trying to talk me out of doing anything, and we've been taught in this program that we have to set healthy boundaries, and I feel that this is a healthy boundary for me." *Id.*

Staff I "confirmed her own prejudice" by telling surveyors that Consumer #8 only filed a complaint against the CEO due to being set back a level in her treatment. App. 716-17. Consumer #8 told surveyors that the advocate stated, "You did not see the nurse for anything [meaning injury]," and "You know if we do this the CEO won't be allowed here" when she attempted to file a grievance. App. 717, 1125-28.

Additionally, therapist Staff X testified that she spoke with Consumer #11 about the kitchen slapping incident. Staff X inquired about the incident to HR/consumer advocate, and she was told she was "instigating" and essentially causing trouble. App. 1702. Therefore, contrary to Serenity Hills' claims, the consumer advocate was not providing advocacy services to consumers. Indeed, the evidence shows that advocate dissuaded Consumer #8 from filing a grievance about the Valentine's Day incident, and accused Staff X of "instigating" when she inquired about the kitchen slap incident. Therefore, the ALJ was clearly wrong to require OHFLAC to issue a renewal license despite serious violations regarding consumer advocacy.

OHFLAC held an exit interview with Serenity Hills' medical director.

Serenity Hills argues that OHFLAC did not hold a proper exit interview prior to the survey concluding. Jim Patterson, OHFLAC program manager of the Behavioral Health Program, testified that he did hold an exit interview with Serenity Hills' medical director, Staff L. App. 1884, 1922-23. This exit interview was held on March 14, before OHFLAC issued its non-renewal letter. App. 1885, 1923. During this exit interview, OHFLAC went over "several issues that we had" with the medical director. App. 1924. Program Manager Patterson testified he performed the exit interview with the Staff L because she was "the chief medical director, and per the immediate Plan of Correction, [the CEO] should not have been available at that time pending an outcome of an investigation." App. 1924.

The Department has standing to appeal the Board of Review's final order.

As discussed in further detail in its appeal brief, the Department reiterates that it has standing as a party in this matter under West Virginia Code. Indeed, hearings conducted before the Board of Review are subject to the requirements of the Administrative Procedures Act ("APA") Under the APA, "[a]ny party adversely affected by a final order or decision in a contested case is entitled to judicial review thereof under this chapter..." W. Va. Code § 29A-5-4(a).

Furthermore, the final page of ALJ David A. Bishop's decision acknowledges that proceedings for judicial review "must be instituted by filing an appeal to the Intermediate Court of Appeals as provided in W. Va. Code § 29A-5-4, within 30 days after the date upon which such party received notice of the final order or decision of the agency." Therefore, ALJ Bishop's decision acknowledges that the APA applies, and that parties can initiate an appeal to the Intermediate Court of Appeals within 30 days. Serenity Hills argues that ALJ Bishop's cover letter

was directed toward the facility and merely “cc’d” the Department; however, how the ALJ drafts his correspondence does not override the APA, which allows either party to file an appeal.

Due to the independent nature of the Office of Inspector General/Board of Review, the Department further has standing to appeal the final orders. Under W. Va. Code § 9-2-6(a)(7), the Department shall establish an Office of Inspector General (“OIG”) for the “purpose of conducting and supervising investigations, performing inspections, evaluations, and review, and providing quality control for the programs of the department.” The Code further mandates that “neither the secretary nor any employee of the department may prevent, inhibit, or prohibit the Inspector General...from initiating, carrying out, or completing any investigation, inspection, evaluation, review or other activity oversight of public integrity.” *Id.* The Department was mandated to organize a Board of Review which was placed within the Office of Inspector General. *See* W. Va. Code § 9-2-6(a)(13).

Therefore, the OIG is a quasi-independent agency within the Department designed to provide quality control for programs under the Department. This is distinguishable from the cases cited by Serenity Hills for the proposition that the Department cannot appeal Board of Review decisions. Indeed, *Mason Cty. Bd. of Educ. v. State Supt. of Schools (“Mason”)* cited by the Petitioner is not applicable because the APA does not apply to Board of Education cases. 160 W.Va. 348, 349; 234 S.E.2d 321, 322 (1977). Also, unlike *Mason*, the OIG is established as a quasi-independent agency. West Virginia Code prohibits the Secretary or Department employees from interfering with OIG operations. Board of Review decisions are therefore made without interference from the Secretary. As such, when the Board of Review issues a decision in a case, it is an appealable order and not merely a “proper reflection” of Department policies as argued by Serenity Hills.

Additionally, contested cases involving a licensed facility and OHFLAC are very different than the case cited by the Petitioner regarding patient complaints against medical doctors. *J.H. v W. Va. Bd. of Med.*, 2022 WL 10076874. In the *J.H.* matter, the Petitioner filed an appeal to circuit court after the Board of Medicine dismissed a complaint he made against a medical doctor. The Supreme Court determined that the patient could not appeal the Board of Medicine's dismissal. A complainant in a Board of Medicine proceeding is very different than the instant matter. A complainant is not a party in a Board of Medicine case. The Board of Medicine, not the complainant, investigates and prosecutes any action against the medical doctor's license. *See W. Va. Code § 30-3-1 et seq.* In the present matter, OHFLAC took official action against Serenity Hills by not renewing its behavioral health license. Serenity Hills requested a hearing which occurred over a four-day period before the Board of Review. During that hearing, OHFLAC, as a party, was represented by counsel and presented witnesses and evidence supporting its decision. Therefore, a contested case involving OHFLAC licensure is very different than a situation where a patient has his complaint dismissed against a medical doctor.

As previously discussed, the Department avers that it does have standing to appeal the Board of Review's decision in this matter. Specifically, under the APA, any party may file an appeal of final administrative order. Indeed, ALJ Bishop's decision cited to the APA for the proposition that parties can appeal his final order to the Intermediate Court. As previously discussed, the OIG is a quasi-independent agency within the Department designed to provide quality control for programs under the Department. When the Board of Review issues a decision, it does so without interference from the Secretary; therefore, its orders are appealable under the APA. As such, the Department has standing to proceed with this administrative appeal, and therefore, this Court has jurisdiction in this matter.

WHEREFORE, the Board of Review's decision requiring OHFLAC to issue a renewal license and reverse assessment of a Civil Monetary Penalty is in violation of law, clearly wrong, arbitrary and capricious, an abuse of discretion, and/or a clearly unwarranted exercise of discretion, and must be reversed.

Respectfully submitted,

WEST VIRGINIA DEPARTMENT OF
HEALTH AND HUMAN RESOURCES/
OFFICE OF HEALTH FACILITY
LICENSURE AND CERTIFICATION,

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CERTIFICATE OF SERVICE

I, James "Jake" Wegman, Assistant Attorney General, do hereby certify that on this 10th day of May, 2023, I electronically filed a true copy of the foregoing *Petitioner's Reply to Respondent's Brief* with the Court, thereby serving all parties via email as follows:

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