

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGS ON REFERRAL
FROM THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of)	
)	
LAMAR'S HOUSE ALH)	OAH No. 16-1132-ALH
_____)	Agency No. 101130

DECISION

I. Introduction

Lamar McGrew is the owner and operator of an assisted living home (ALH). The Department of Health and Social Services, Division of Health Care Services – Residential Licensing section (“Division”) sought a ruling that Mr. McGrew’s ALH was in violation of the terms of his provisional license, and therefore the license should be revoked and a substantial fine imposed. Mr. McGrew requested a hearing to challenge the notice of violation.

Mr. McGrew apparently was a good care provider for the single resident of his ALH. However, he allowed his girlfriend to live in the ALH and to interact with, and sometimes care for, the resident, despite the fact that she did not meet the Division’s background check requirements, due to a prior conviction for a barrier crime. By doing so, Mr. McGrew violated standards of his provisional license, and this violation provided sufficient grounds for the Division to revoke the license. The Division’s revocation, therefore, is affirmed, but the Division’s proposed fine is reversed.

II. Facts

A hearing was held on November 30, 2016. Mr. McGrew represented himself, with the assistance of Sterling Gallagher, a former special assistant to Governor Walker. Assistant Attorney General Kimberly Allen represented the Division.

The Division called the following witnesses at the hearing: community care licensing specialist I (CCLS I) Bobby Nave; program manager Craig Baxter; CCLS I Julie Drayton; Kristine Ferris, a licensing and compliance specialist with the ARC of Anchorage; and the ALH resident K.J.¹ Mr. McGrew testified on his own behalf, and also called the following witnesses: Marla Severson; Sterling Gallagher; and Mr. McGrew’s friend and co-worker, Kent Rayford. The following facts were established at the hearing by a preponderance of the evidence.

¹ K.J. was referred to by his initials throughout the hearing, as his identity is confidential.

Mr. McGrew owns and operates Lamar's House ALH. He operates the ALH under a one-year provisional license, which was issued in January 2016.² Mr. McGrew testified that he invested at least \$25,000 to upgrade his house to make it suitable for use as an ALH.³

Marla Severson was Mr. McGrew's girlfriend,⁴ and with Mr. McGrew she had signed the lease for the residence where the ALH would be located.⁵ Ms. Severson, however, had a prior conviction for theft in the first degree from approximately 1994. The judgment of conviction apparently included a condition that Ms. Severson pay restitution to the victim, and Ms. Severson had never fully satisfied this condition.⁶

While Mr. McGrew's application was pending, the Division alerted him to the fact that Ms. Severson had not passed the Division's background check review because her theft conviction constituted a barrier crime that made her ineligible to work or live at the ALH.⁷ Mr. McGrew and Ms. Severson then filed an application for a variance under 7 AAC 10.930 in September 2015.⁸ The variance, if granted, would allow Ms. Severson to work and/or live at the ALH and have contact with ALH residents, despite her inability to pass the Division's background check requirements. But before the variance application could be fully processed, Mr. McGrew and Ms. Severson withdrew it.⁹ On January 21, 2016, Ms. Severson wrote a note to the Division stating "I, Nicki Severson, will not be working at Lamar's House in any capacity."¹⁰

In May 2016, Mr. McGrew and Ms. Severson filed a second variance application.¹¹ However, when Ms. Severson learned that she would have to get another set of fingerprints and submit a new background check application, she opted to not pursue the variance. She informed Mr. Baxter of that decision in early June 2016 and told him she would be moving out of the house.¹²

² Administrative Record ("AR") p. 22. Conversion of the license to a biennial license was put on hold pending the outcome of the hearing.

³ McGrew testimony.

⁴ For unknown reasons, Ms. Severson is also known by the name Nicki Tomberlin or Nicki Severson.

⁵ McGrew testimony. The lease document was not made a part of the record of this matter.

⁶ Baxter testimony; AR p. 7. A copy of the actual judgment was not included in the record of this matter, but the fact that the restitution had not been fully paid was not in dispute.

⁷ AR p. 5.

⁸ See AR pp. 7-8.

⁹ McGrew testimony; Severson testimony. Ms. Severson explained that they withdrew the variance application so that it would not cause delays in the processing of the ALH license itself.

¹⁰ AR p. 1.

¹¹ AR pp. 12-18.

¹² AR p. 19. The processing of the variance requests submitted by Ms. Severson and Mr. McGrew was not at issue in this hearing.

K.J. was the first and only resident of Mr. McGrew’s ALH; he became a resident in mid-June, 2016.¹³ K.J. is developmentally disabled and under the terms of his residency in the ALH, he was not allowed to be left alone in the home at any time.¹⁴

In early August, 2016, the Division received a complaint in which it was alleged: (a) that Mr. McGrew had “forced” K.J. to go along, against his will, when Mr. McGrew mowed lawns as part of his landscaping business; (b) that he was required to go to dinner with Mr. McGrew and his girlfriend; and (c) that he was forced to go fishing “while not possessing a fishing license.”¹⁵ In response to the complaint, Division Community Care Licensing Specialist Bobby Nave initiated an investigation. He reviewed the ALH’s file and determined that in addition to the allegations in the complaint, case notes filed by Mr. McGrew¹⁶ included references where Mr. McGrew referred to K.J. as “lazy” and also indicated that he had called K.J. lazy to his face.¹⁷ At that point in time, Division records indicated that Ms. Severson had previously been living in the home, but because of her barrier condition and her failure to obtain a variance, she had told the Division in June that she would be moving out.¹⁸

Mr. Nave conducted an unannounced inspection of the ALH on August 10, 2016. Mr. Nave interviewed K.J. during his inspection on that day. K.J. confirmed that there were times when he had been required to go along when Mr. McGrew left the home to do his lawn mowing work, even though K.J. had told him that he did not want to go.¹⁹ K.J. also confirmed that Ms. Severson was living in the home.²⁰ K.J. told Mr. Nave that Mr. McGrew had called him lazy and it made him feel sad.²¹

Mr. Nave also interviewed Mr. McGrew, who confirmed that he had taken K.J. along to some of his lawn mowing jobs even when K.J. had indicated that he did not want to go. Mr. Nave had already learned, prior to conducting the inspection, that Ms. Severson had a barrier condition on her background check and therefore was not supposed to be at the ALH.²² Mr. McGrew acknowledged that day that Ms. Severson “sometimes” lived at the house; that he was aware of

¹³ AR p. 133.

¹⁴ Nave testimony.

¹⁵ AR p. 32.

¹⁶ The case notes are prepared by the ALH operator and submitted to the ARC of Anchorage, as part of the process of facilitating Medicaid payments for the ALH resident.

¹⁷ AR p. 104.

¹⁸ Nave testimony; AR p. 19.

¹⁹ Nave testimony.

²⁰ AR p. 144.

²¹ Nave testimony.

²² Nave testimony.

her barrier condition; and that he and Ms. Severson had attempted to obtain a variance, but they had not followed through on it because of the documentation requirements.²³ Mr. Nave also interviewed Ms. Severson, who acknowledged having the barrier condition and that she had previously indicated she would be moving out.²⁴ At the end of the interview, Mr. Nave informed Ms. Severson that she would have to leave the ALH.²⁵

After Mr. Nave concluded his investigation, the Division issued a report of investigation and notice of violation (“report & notice of violation”) on September 8, 2016, proposing to revoke Mr. McGrew’s ALH license and fine him \$3850 for the following: (a) requiring K.J. to accompany Mr. McGrew on lawn-mowing jobs, against K.J.’s will; (b) allowing Ms. Severson to reside at the ALH and interact with K.J., despite the fact that she had a barring condition (the unresolved theft conviction); (c) not having sufficient staff to allow K.J. to stay at the ALH while Mr. McGrew was working; and (d) calling K.J. lazy to his face and referring to him in that manner in his case notes.²⁶

Mr. McGrew appealed the report & notice of violation on September 27, 2016. The hearing was held on November 30, 2016. After the hearing, the record was kept open to allow the Division to supplement the record with typewritten copies of Mr. Nave’s notes. The typed notes were submitted on December 2, 2016, and the record was closed.²⁷

III. Discussion

A. Grounds for Revocation

Despite being warned on several occasions that Ms. Severson could not stay in the ALH or have contact with the resident K.J., and despite Mr. McGrew’s promises that she would either move out or obtain a variance from the Division, Ms. Severson continued to live in the ALH and to sometimes stay with K.J. and cook meals for him when Mr. McGrew was away at work. Although there is no evidence that Ms. Severson mistreated K.J. in any way, her presence in the ALH violated licensing standards – anyone living in an ALH and having contact with ALH

²³ *Id.*; AR p. 145.

²⁴ AR p. 146.

²⁵ *Id.*

²⁶ AR pp. 132-139. This was actually the second, amended report & notice of violation issued by the Division to Mr. McGrew, an initial report & notice of violation having been issued in mid-August, 2016. The first report was amended to take into account a later complaint regarding Mr. McGrew’s treatment of K.J., which alleged that he blamed K.J. for not being able to conduct his lawn-mowing business. Nave testimony; AR p. 136.

²⁷ The notes were marked AR 000144-000146.

residents in a licensed facility must either pass background check requirements or obtain a variance from those requirements.

ALHs are subject to state licensing requirements.²⁸ If a person lives in the ALH and has contact with ALH residents, he or she must pass the Division's background check requirements. Any exception to the background check requirements must be addressed through the Division's variance procedures. Ms. Severson's prior conviction for theft in the first degree constituted a barrier condition that could only be addressed by obtaining a variance.²⁹ Although the conviction was far older than the ten-year period within which it would normally constitute a barrier condition, the remaining unpaid judgment for restitution from the conviction meant that the barrier remained in place.³⁰ Under the Division's regulations governing barrier crimes, the ten-year period does not begin to run until all conditions of the judgment of conviction have been satisfied.³¹ Because the restitution had not been fully paid on Ms. Severson's judgment, her conviction still constituted a barrier condition, and Mr. McGrew was required to obtain a variance if Ms. Severson was to stay at the ALH or have contact with K.J.

Mr. McGrew and Ms. Severson were both informed and knew that Ms. Severson did not meet the background check requirements, and they were informed and knew about the Division's variance procedures. Twice they attempted to obtain a variance, but they failed to follow through on both occasions and the variance was never granted.³² Under these circumstances, Ms. Severson's continued presence in the ALH and contacts with K.J. constituted repeated violations of the Division's regulations governing ALHs; these violations provided sufficient grounds for the Division to revoke Mr. McGrew's license.

Mr. McGrew made several arguments in opposition to the Division's effort to revoke the license. He argued that by "accepting" the lease with Ms. Severson's name on it, the Division effectively accepted Ms. Severson as a principal of the ALH, and therefore the

²⁸ AS 47.32.010(b)(2).

²⁹ 7 AAC 10.905(c)(2)(A); 7 AAC 10.905(g).

³⁰ No witness testified as to the amount of the unpaid restitution, nor as to whether it was possible for Ms. Severson to just pay off the restitution to remove the barrier condition and allow her to pass the background check.

³¹ 7 AAC 10.905(i) ("... the barrier times listed in this section begin to run from the date that an individual was charged with or convicted of the crime, whichever period ends at a later date. If the individual is subject to a judgment of a court related to sentencing, probation, or parole, the individual is barred as described in (a)(1) of this section for the barrier time listed in this section or until the individual has fully complied with the conditions of the sentencing, probation, or parole, whichever period is longer").

³² Nor was it ever denied; the two variance applications apparently never reached the committee within the Division that handles such applications. Baxter testimony.

Division should be estopped from revoking the ALH's license.³³ To establish that estoppel can be invoked as a defense to the Division's revocation action, Mr. McGrew would need to prove the following four elements: (1) the Division had asserted a position by conduct or words; (2) Mr. McGrew acted in reasonable reliance thereon; (3) Mr. McGrew suffered resulting prejudice; and (4) the estoppel serves the interest of justice so as to limit public injury.³⁴

In this case, Mr. McGrew's argument fails because he did not establish the first of the required four elements listed above: he did not show that the Division, by accepting the lease as part of his application for an ALH license, "asserted a position by conduct or words" regarding Ms. Severson's eligibility to live or work at the ALH.³⁵ One can reasonably view the lease document as serving the purpose of confirming that the applicant for an ALH license has an appropriate physical location for the proposed ALH, and that the applicant has control over the premises as an owner or lessee. By processing the application from Mr. McGrew that included the lease with Ms. Severson's name on it, the Division asserted nothing "by conduct or words" regarding Ms. Severson's eligibility to work or live at the ALH – the Division simply would have acknowledged that the proposed ALH premises were located at the residence listed in the lease signed by Mr. McGrew and Ms. Severson.

If one were to accept Mr. McGrew's argument, the background check requirement would be rendered useless or cumbersome in many cases. Any application for an ALH license involving a residence or other building owned or leased by someone other than, or in addition to, the ALH operator would necessarily lead to one of two scenarios: everyone listed on the lease or title document either would automatically be deemed eligible to participate in the ALH, or would be required to go through the background check process. In other words, either the background check requirement would be eviscerated, or it would be extremely cumbersome and impose unnecessary burdens on ALH license applicants. This result is inconsistent with what was intended by the Legislature in enacting the background

³³ Mr. Gallagher presented this argument on Mr. McGrew's behalf.

³⁴ *Allen v. State, Div. of Public Assistance*, 203 P.3d 1155, 1164 (Alaska 2009); *Wassink v. Hawkins*, 763 P.2d 971, 975 (Alaska 1988).

³⁵ It would also be difficult for Mr. McGrew to meet the second criterion for estoppel – that he acted in reasonable reliance on the Division's "acceptance" of the lease – because clearly he was aware of the background check requirement, and it would not have been reasonable for him to conclude that the background check was somehow supplanted simply because Ms. Severson's name was listed on the lease document. We need not decide this issue, however, as the failure to meet the first criterion is fatal to the estoppel argument.

check program – to ensure that persons working or residing in ALHs and otherwise being in regular contact with ALH residents be required to undergo the background check process.³⁶

Mr. McGrew also argued that the entire process of first granting his provisional license, then allowing K.J. to be assigned to his ALH, then not allowing Ms. Severson to reside or work at the ALH, then sanctioning him for taking K.J. on lawn-mowing jobs and for having Ms. Severson in the house constituted a “game.” He perceived this “game” as a predetermined process aimed at preventing him from operating an ALH. I find that there is no evidence that Division staff had any animus against Mr. McGrew or any preconceived notion that he should have his ALH license taken away. The evidence showed that the key to this entire dispute was Ms. Severson’s barrier condition based on the unsatisfied restitution from her criminal conviction. If she and Mr. McGrew had provided sufficient documentation demonstrating that the restitution obligation had lapsed, as they argued was the case, it is likely that they could have obtained a variance from the Division.

The Division also met its burden of proof regarding the other allegations concerning Mr. McGrew taking K.J. along on lawn-mowing jobs and not treating K.J. with appropriate consideration and respect by calling him lazy. However, Mr. Baxter testified that he felt that these allegations probably did not rise to a level that called for revocation, and that they could have been addressed through a plan of correction. I agree with that conclusion, especially in light of the fact that there was no dispute that Mr. McGrew truly cared about K.J. and made a good faith effort to help him with working on his interpersonal skills and goals regarding activities of daily living. The violations of allowing Ms. Severson to live in the ALH, despite her barrier condition; the warnings given by Division staff; and twice promising that she would leave the ALH constituted sufficient grounds for revocation.

B. Fines Imposed by the Division

In addition to the proposed revocation of Mr. McGrew’s license, the Division proposed to fine him \$3850, comprised of the following:

- \$50 per each day K.J. was required to go along with Mr. McGrew and sit in his truck while he mowed lawns, for a total of \$850;
- \$500 for calling K.J. lazy in the case notes and in person;
- \$2500 for allowing Ms. Severson to be in the ALH and have contact with K.J.

³⁶ This conclusion is supported by 7 AAC 10.900(d)(4), which exempts from the background check requirement a “partner, member or principal of the business organization that owns an entity” if the person, among other things, does not have regular contact with ALH residents.

Taking into account all of the facts and circumstances of this case, I find that these fines are unnecessary and disproportional to the violations; revocation of Mr. McGrew's ALH license is a sufficient sanction for the violations at issue here. Mr. McGrew invested considerable sums of money and a great deal of effort to establish his ALH and get it approved by the Division. Then, after waiting for nearly six months, he received his first and only resident, K.J., whom he was able to serve for only a limited period of time before being found in violation of the ALH regulations and facing revocation of his license. The Division did not establish that Mr. McGrew or Ms. Severson acted in bad faith regarding either the operation of the ALH in general or the services provided to K.J. specifically. Under these circumstances, imposing this substantial monetary fine on Mr. McGrew would have a punitive effect that is not commensurate with the violations found by the Division.

IV. Conclusion

The Division's revocation of Mr. McGrew's ALH license is upheld. The proposed fine of \$3850, however, is reversed.

Dated this 1st day of March, 2017.

By: Signed
Andrew M. Lebo
Administrative Law Judge

Adoption

The undersigned adopts this Decision, under the authority of AS 44.64.060(e)(1), as the final administrative determination in this matter.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 5th day of April, 2017.

By: Signed
Name: Douglas Jones
Title: Medicaid Program Integrity Manager

[This document has been modified to conform to the technical standards for publication.]