

**DISTRICT OF COLUMBIA
OFFICE OF ADMINISTRATIVE HEARINGS**

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DISTRICT OF COLUMBIA
DEPARTMENT OF HEALTH

Petitioner,

v.

DYNAMIC VISIONS HOME HEALTH
SERVICES

Respondent

Case No.: DH-B-09-800066

FINAL ORDER

I. Introduction

Pursuant to the Health-Care and Community Residence Facility, Hospice and Home Care Licensure Act of 1983, D.C. Official Code §§ 44-501-554 (the “Act”), and Title 22 Section 3107 of the District of Columbia Municipal Regulations (“DCMR”), the District of Columbia Department of Health, Health Regulation and Licensing Administration (the “Government” or “HRLA”) issued a Notice dated July 29, 2009 (the “Notice”), to Dynamic Visions Home Health, proposing to revoke its Home Care Agency License, based on ten (10) charges or alleged violations of regulations in Title 22, Chapters 31 and 39 of the DCMR.¹ On August 18, 2009,

¹ The Notice was to “Isaiah Bongam, Dynamic Visions Home Health,” proposing to revoke the license issued to “Dynamic Visions.” The request for a hearing, however, was filed on behalf of “Dynamic Home Health Services,” which is reflected in the name of Respondent in the caption. It is not disputed that the Home Care Agency License in question, License No. HCA-0018, was issued on April 10, 2009, by HLRA to “Dynamic Visions Home Health Services.”

Respondent, by its attorney, filed with the Office of Administrative Hearings (“OAH”) a request for a hearing.

On August 19, 2009, the Government moved to dismiss Respondent’s request for a hearing on the ground that the request was untimely. By order dated September 16, 2009, the motion was denied without prejudice because it was based on facts outside the record which were not supported by affidavit and, accordingly, the Government did not prove that the Respondent’s hearing request was untimely.

The Government did not renew its motion, and a hearing on the merits was held on January 19, 20, and 21, 2010. Petitioner was represented by Carmen Johnson, Assistant Attorney General. The following were witnesses who testified on behalf of the Government: Sharon Mebane, Health Regulation and Licensing Administration, Program Manager for the Intermediate Care Facilities Division, and Paula Johnson, Nurse Consultant, Department of Health Care Finance. Respondent was represented by Rita Grant Ndirika, Esquire, and was joined by Patrick J. Christmas, Esquire. The following were witnesses who testified on behalf of Respondent: Isaiah Bongam, President of Respondent, and Joahana Tingem, Director of Case Management Services for Respondent.

At the conclusion of the hearing, a post-hearing briefing schedule was agreed to, and the parties were invited to address in their submissions whether this court lacked jurisdiction due to the alleged untimely request by Respondent for a hearing.² The parties filed post-hearing

² See *Bowles v. Russell*, 551 U.S. 205 (2007) (statutory time limits for taking an appeal are jurisdictional.)

memoranda, with proposed findings of fact and conclusions of law on the merits of the case.³ In addition, the Government filed a motion to dismiss (the “Motion”) on the ground that Respondent’s hearing request was untimely. Respondent filed a response in opposition to the Motion (the “Response to Motion”). The Motion and the Response were supported by affidavits.

As explained below, I will deny the Government’s Motion. I will also affirm the Government’s proposed revocation of Respondent’s Home Care Agency License, based on the findings that the Government proved by the preponderance of the evidence that Respondent violated regulations upon which the charges are based, except as to Charge VI.

II. Motion to Dismiss

The Government maintains that the Notice was hand-delivered to Respondent’s office on July 29, 2010, and that a timely request for a hearing was due on or before August 13, 2010: namely within 15 calendar days of the date of service. Respondent filed its request for a hearing on August 18, 2010.

Respondent’s opposition is two-pronged: (1) The Notice was insufficient as a matter of law because it was ambiguous on its face, since it stated that it was served by certified mail and facsimile on July 29, 2009, but allegedly was hand-delivered; and (2) Based on the manner of service stated on the face of the Notice, Respondent assumed service had been by mail on July 29, 2009, and applying the OAH Rule for adding 5 days to the 15 days for to request a hearing when service is by mail, the request filed on August 18, 2009, was timely.

³ The Government’s “Proposed Findings of Fact and Conclusions of Law” was filed on February 19, 2009. It is referred to herein as “the “Government’s Proposed Findings.” Respondent filed its “Summary of the Evidence, Proposed Findings of Fact and Conclusions of Law” on February 25, 2010. It is referred to herein as “Respondent’s Proposed Findings.”

I will deny the Motion because the Government has not shown that proper service of the Notice was made on Respondent on July 29, 2009, and, in any event, the Notice is ambiguous and, as a matter of law, it was inadequate to trigger the applicable time limitation for filing a request for a hearing.

On April 10, 2009, HLRA issued a Home Care Agency License to Dynamic Visions Home Health Services, 7603 Georgia Avenue NW, Suite 200, Washington, DC 20012.⁴ The application for the license was in the name of “Dynamic Visions” at the Georgia Avenue address, and Isaiah Bongam was listed as its president.⁵

The Notice proposing to revoke Respondent’s license was addressed to “Isaiah Bongam, Dynamic Visions Home Health, at 7603 Georgia Avenue, N.W.,” and stated that it was “SENT VIA FACSIMILE and US Mail.” It gave notice that HLRA proposed to revoke the “Home Care Agency License issued to Dynamic Visions, located at 7603 Georgia Avenue, N.W.” Regarding Respondent’s right to request a hearing, the Notice stated:

In accordance with 22 DCMR 3107.2, you have a right to a hearing before the proposed action is taken. You may exercise that right by requesting a hearing or submitting documentary evidence within fifteen (15) calendar days of your receipt of this notice.”

The Notice was not served by facsimile or by certified mail, however. Rather, it was hand delivered on July 29, 2009, to Thomas Tanue, an employee of BIC International in BIC’s office at 7603 Georgia Avenue, N.W.

⁴ Attachment #2 to the Motion.

⁵ Attachment #1 to the Motion.

Theodore Lomax, an employee of HRLA who delivered the Notice, states in his affidavit that he went to the second floor of 7603 Georgia Ave., N.W., and “entered an office.” Mr. Lomax does not furnish any information about this office, such as its number or any identifying names or logos on the door to this office, or anywhere else. He further states that he asked an unidentified gentleman in the office where Mr. Bongam was, and the gentleman said he was “in the next office.” Mr. Lomax then “entered the second office” and asked a gentleman sitting behind a desk for Mr. Bongam. This gentleman responded by saying that Mr. Bongam was not in, and he asked if Mr. Lomax had something to deliver. Mr. Lomax replied that he had a Notice of Proposed License Revocation, and the gentleman said “I can sign for that.”⁶

Mr. Tanue states in his affidavit that he is employed by BIC International, whose office is at 7603 Georgia Ave., NW, Suite 203. According to Mr. Tanue, BIC’s office is two offices away from Respondent’s, and that on July 29, 2009, Mr. Lomax came into BIC’s office and asked him if he would take a package for Respondent. Mr. Tanue agreed, and signed for the hand delivery. (See Tanue Affidavit, attached to Respondent’s Response to the Motion).

In his Affidavit in opposition to the motion, Mr. Bongam states that he received the Notice in a sealed envelope on August 3, 2009, and he assumed it was sent by mail.⁷

Based on these facts, the Government has not shown that proper service of the Notice was made on Respondent on July 29, 2009.⁸ The uncontroverted evidence is that on July 29th Mr. Lomax delivered the Notice to Mr. Tanue, an employee of another corporation. Nothing in

⁶ See Lomax Affidavit, Attachment #3 to the Motion.

⁷ See Bongam Affidavit, attached to Response to the Motion.

⁸ See Sup. Ct. Civ. R. 4(e)(2) and 4(h)(1).

the record reflects that Mr. Tanue was authorized to accept service on behalf of Respondent. The Notice was eventually delivered to Respondent, however, since Mr. Bongam acknowledged that he received it on August 3, 2009.⁹ Respondent's request for a hearing on August 18, 2009, was within 15 days of service or receipt of the Notice on by Mr. Bongam, Respondent's president.

Even if it were assumed that receipt of the Notice by Mr. Tanue on July 29th was proper service on Respondent, nevertheless the Motion must be denied because the Notice was ambiguous on its face and, as a matter of law, it was inadequate to trigger the applicable time limitation for filing a request for a hearing.

Respondent argues that the Notice was ambiguous because it was lead to believe that service had been made by mail on July 29, 2009, and, applying OAH Rule 2811.5, an additional 5 days is added to the allotted time for requesting a hearing when service is by mail. Thus, Respondent's attorney calculated the 20 day response time as beginning July 30th, 2009, and ending on August 19, 2009. Respondent's reliance on the five additional days provided by OAH Rule 2811.5 is misplaced for two reasons, however. First, OAH Rule 2811.6 provides that the time period in question is not enlarged when the time period is prescribed by law. In other words, OAH Rule 2811.6 does not enlarge the 15 day response time provided by 22 DCMR 3107.4(b).¹⁰ And second, and more importantly, the Government does not allege that service was by mail, but alleges that the Notice was personally served on July 29, 2009.

⁹ See Bongam Affidavit attached to Response to Motion.

¹⁰ When the Director contemplates revoking a license pursuant to 22 DCMR 3107.2 (c), 22 DCMR 3107.4 requires that the written notice include the following statement:

(b) That the Director shall take the proposed action unless within fifteen (15) days of the receipt of the notice the facility files with the Director a written request for a

But the Notice is defective and was inadequate to trigger the applicable time limitation for filing a request for a hearing for another reason. The Notice incorrectly states that Respondent may exercise its right to a hearing by requesting it “within fifteen (15) **calendar** days” of receipt of the Notice. (Emphasis added). The regulations state that the hearing request must be filed within fifteen days of receipt, and the regulations do not define “day or days” to be a calendar day or business days.¹¹ Assuming proper service had been made on Respondent on July 29th, and if “day” were defined to be “business day,” or to exclude Saturdays and Sundays, then the request for a hearing filed on August 18th would be timely.¹²

The Government’s Notice was facially ambiguous when it incorrectly stated that it was served by facsimile and certified mail, and then, without basis in the regulations, it provided that a request for a hearing had to be filed within 15 *calendar* days of receipt of the notice. Such ambiguity tolled the running of the time for filing a request for a hearing.¹³ Accordingly, I will deny the Motion.

hearing or in the alternative submits documentary evidence for the Director’s consideration before the Director takes final action.

¹¹ The Government’s reliance on the definition of “day” under OAH Rule 2899 (“day” means calendar day, unless otherwise specified) is misplaced, just as Respondent’s argument that OAH Rule 2811.5 providing for 5 additional days when service is by mail should be employed in calculating the time limitation for filing a hearing request.

¹² See *Zollicoffer v. District of Columbia Public Schools*, 735 A.2d 944, 947 (D.C. 1999).

¹³ See *Wright-Taylor v. Howard University Hospital*, 974 A.2d 210 (D.C. 2009).

III. Findings of Fact

Respondent is licensed by HRLA as a home care agency. A “home care agency” is “an agency, organization, facility, or a distinct part thereof, other than a hospice, that provides, either directly or through a contractual arrangement, a program of health care, habilitative or rehabilitative therapy, personal care services, homemaker services, chore services, or other supportive services to sick individuals or individuals with disabilities living at home or in a community residence facility.”¹⁴

Respondent’s license authorizes it to operate in the following categories: Skilled Nursing Services; Physical Therapy; Intravenous Therapy; Medical Social Services; Home Health Aid Services; and Personal Care Aid Services.¹⁵ Respondent has approximately five hundred forty (540) employees, five hundred (500) who work in the homes of patients and forty (40) who work in Respondent’s office.¹⁶

The Government’s July 29, 2009, Notice proposing to revoke Respondent’s license is based on Respondent allegedly violating ten (10) regulations adopted pursuant to the Act. The charges are based on: (1) An investigation by HRLA which was precipitated by a complaint made on April 21, 2009, on behalf of a patient and which eventually resulted in a Statement of Deficiencies and Plan of Correction from HRLA dated May 20, 2009 (the “HRLA Statement of Deficiencies”);¹⁷ (2) An investigation/survey by the Department of Health Care Finance, Office

¹⁴ D.C. Official Code § 44-501(a)(7)

¹⁵ *Ibid.*

¹⁶ Bongam, Tr. (1/20/10) p. 24. “Tr. () p. ____” refers to the transcript of the proceedings by date and page number.

¹⁷ Petitioner’s Exhibit (“PX”) 101

of Chronic and Long-Term Care, in connection with its oversight of Respondent's Medicaid participation, which resulted in a Statement of Deficiencies and Plan of Correction from that office dated June 1, 2009 (the "DHCF Inspection" and the "DHCF Statement of Deficiencies", respectively);¹⁸ and (3) Complaints by or on behalf of patients that Respondent did not honor or respond to requests for transfers to another facility.¹⁹ The Government's Charges and Specifications are as follows:

Charge I: Alleged Violation of 22 DCMR 3105.4

Respondent is alleged to have violated 22 DCMR 3105.4 for failing to respond to a Statement of Deficiencies. The Specification for this charge is that on or about May 20, 2009, Respondent was forwarded a Statement of Deficiencies and Plan of Correction as a result of an investigation conducted, and Respondent failed to return a Plan of Correction.

22 DCMR 3105.4 provides:

The Director may require the facility to respond to the written report of findings with a written plan of correction no later than ten (10) days after the receipt of the report.

On April 14, 2009, HRLA received a complaint from a family member of a patient of Respondent that a home health aide employed by Respondent improperly solicited money from the patient for going to the store, and refused to do some housekeeping chores requested by the patient. In addition, the patient wanted to be transferred to another home care agency, but allegedly Respondent would not cooperate in the transfer. HRLA initiated an onsite

¹⁸ PX 116 and Respondent's Exhibit ("RX") 206.

¹⁹ PX 103, 105, 106, 108, and 115.

investigation on April 21, 2009, consisting of a review of clinical records, personnel files and staff, patient and caregiver interviews.²⁰

On April 29, 2009, HRLA received a second complaint about the same home health aide alleging that the aide had stolen money from the patient in question. It was alleged that the home health aide had been asked not to return to the patient's home, but that she did return, was belligerent, and had to be escorted from the premises by the police.²¹ On April 29, 2009, Theresa Waters, a HRLA nurse consultant who was involved in the initial investigation, and Sharon Mebane, Program Manager, telephoned Isaiah Bongam, Respondent's president, about the second complaint. Ms. Mebane asked Mr. Bongam for Respondent's policy or procedure on the managing of an aide against whom a complaint of abuse, neglect or misconduct had been made.²² Mr. Bongam said he was aware of the complaint but he would not provide any information unless HRLA's request for information was put in writing.²³

That same day, April 29, 2009, Ms. Mebane sent a letter by facsimile, e-mail and first class mail to Respondent to Sylvie Fomundam, its Director,²⁴ requesting the information she

²⁰ PX 101.

²¹ Mebane, Tr. (1/19/10) pp. 88, 89.

²² Mebane, Tr. (1/19/10) p. 90.

²³ *Ibid.*

²⁴ *See* PX 117, p. 4 (Respondent's application for its license)..

requested in the telephone call to Mr. Bongam.²⁵ Respondent never responded to Ms. Mebane's letter.²⁶

The HRLA Statement of Deficiencies based on the investigation of the complaints made against Respondent beginning in April 21, 2009, was served on Respondent on May 20, 2009.²⁷ In a cover letter from Ms. Mebane, Respondent was advised that a response to each deficiency was required and that a signed and completed Plan of Correction, with specific detailed information, had to be returned to the Government by June 5, 2009.²⁸ Respondent did not respond to the Statement of Deficiencies in the manner specified and within the time allotted.²⁹

Respondent does not deny the charge.³⁰ In its defense, it asserts that it made available to the Government its policies and procedures and the files on the patient and employee in question during the Government's on-site investigation on April 21, 2009.³¹ Even assuming this to be true, it is not responsive to the charge that Respondent failed to respond in writing to the HRLA Statement of Deficiencies with a Plan of Correction, as required. And it certainly is not responsive to deficiencies noted in the Statement of Deficiencies occurring subsequent to the on-site visit on April 21, 2009. For example, the Statement of Deficiencies includes Respondent's

²⁵ Mebane, Tr. (1/19/10) p 90.

²⁶ Mebane, Tr. (1/19/10) p. 92.

²⁷ Mebane, Tr. (1/19/10) p. 99; PX 101.

²⁸ *Ibid.*

²⁹ Mebane, Tr. (1/19/10) p. 100; *See also* Tingem, Tr. (1/21/10) p. 93. Ms. Mebane stated, however, that Respondent did furnish a folder the preceding month in the course of a discussion about pending civil infractions which mentioned the complaint. Mebane, tr. (1/19/10) pp. 92-93.

³⁰ *See* Respondent's Proposed Findings, p. 4.

³¹ Tingem, Tr. (1/21/10) pp. 79-81.

failure to furnish its Incident and Complaint Management Systems requested verbally and in writing on April 29, 2009 by Ms. Mebane.³² Mr. Bongam denies that he received Ms. Mebane's April 29, 2009, letter, which was addressed to Respondent's Director, Sylvie Fomundam.³³ Ms. Fomundam apparently was on leave from Respondent for a long period of time, but this had not been communicated to the Government.³⁴ Mr. Bongam testified, however, that he is the Director/Administrator for Respondent, that he has run the facility for the past seven years, that he was involved in all aspects of Respondent's business, and that all mail received by Respondent is routed to him.³⁵ Nothing in the record suggests that the letter was not received by Mr. Bongam, and in fact, the e-mail confirmation of the receipt of the letter was shown to him in October 2009, when he first indicated that he had not seen it.³⁶ Whether Mr. Bongam actually received the April 29th letter is not crucial, however. The substance of the deficiency noted in the April 29th letter is also included in the HRLA Statement of Deficiencies sent to Respondent, to Sylvie Fomundam, as Director, on May 20, 2009, which Respondent does not deny receiving.³⁷ The violation charged is Respondent's failure to respond to the Statement of Deficiencies sent on May 20th.

³² *Ibid*; PX 114; Mebane, Tr. (1/19/09) pp. 90 and 92.

³³ Bongam, Tr. (1/21/10) p. 30.

³⁴ Bongam, Tr. (1/20/10) pp. 105, 106, 108

³⁵ Bongam, Tr. (1/20/10) pp. 24, 105; Bongam Tr. (1/21/10) pp. 14-15.

³⁶ Mebane, Tr. (1/21/10) p. 112.

³⁷ Bongam, Tr. (1/20/10) p. 30.

Accordingly, I find that the Government has proved by the preponderance of the evidence that Respondent violated 22 DCMR 3105.4 for failing to respond to the Statement of Deficiencies in the manner required and within the time allowed, as charged.

Charge II: Alleged Violation of 22 DCMR 3907.6

Respondent is alleged to have violated 22 DCMR 3907.6 by failing to verify at the time of initial employment that within six (6) months of the hire date each employee has been screened for and is free of communicable disease. The Specification for this charge is that on or about June 1, 2009, twelve (12) identified employees³⁸ of Respondent had not been screened.

22 DCMR 3907.6 provides:

At the time of initial employment of each employee, the home care agency shall verify that the employee, within six months immediately preceding the date of hire, has been screened for and is free of communicable disease.

Charge II relates to the failure of Respondent to verify that 12 employees had been screened for communicable disease within 6 months of their hire dates. The DHCF Inspection disclosed that employees' records did not reflect that Respondent had made the required verification.³⁹ Respondent does not dispute these facts.⁴⁰ It asserts, however, that "all twelve employees . . . had been screened as of 01/02/09."⁴¹ But apparently only eight (8) of the twelve

³⁸ To protect the confidentiality of patients and employees of Respondent, they are referred to herein by number only (Employees Nos.: 1 through 12), which is how they are identified in the Notice. The names of the employees and patients referred to were furnished by the Government in a separate addendum to the Notice, which is part of the record.

³⁹ Johnson, Tr. (1/19/09) pp. 292 295, and.297.

⁴⁰ See Respondent's Proposed Findings, p. 4, citing Respondent's Exhibit ("RX") 206, p.4, Item 5 "Department of Health Care Finance, Statement of Deficiencies and Plan of Correction Plan of Correction, dated June 1, 2009."

⁴¹ *Ibid.*

(12) employees in question had proof of screening as of 1/02/09.⁴² Moreover, Respondent does not dispute that it failed to verify that each of these employees had the required screening within 6 months prior to their respective hire dates.

Accordingly, I find that the Government proved by the preponderance of the evidence violated 22 DCMR 3907.6 by failing to verify at the time of initial employment that within six (6) months of the hire date each employee has been screened for and is free of communicable disease, as charged.

Charge III: Alleged Violation of 22 DCMR 3907.2(e)

Respondent is alleged to have violated 22 DCMR 3907.2(e) by failing to maintain accurate personnel records, which shall include health certification as required by 22 DCMR 3907.6. The Specification for this charge is that on or about June 1, 2009, for twelve (12) employees⁴³ no documentation of screening for communicable disease had been maintained.

22 DCMR 3907.2(e) provides:

Each home care agency shall maintain accurate personnel records, which shall include the following information: . . .

(e) Health certification as required by section 3907.6

Charge III is related to, but is not duplicative of, Charge II, as asserted by Respondent.⁴⁴

Charge III relates to Respondent's failure on June 1, 2009, to maintain accurate personnel records, which include the required health certificate for each employee. It is not disputed by

⁴² Respondent's Exhibit ("RX") 206, p.4, Item 5."

⁴³ Employee Nos.: 1 through 12.

⁴⁴ See Respondent's Proposed Findings, p 5.

Respondent that the records of the 12 specified employees did not have the required health certificate.⁴⁵

Accordingly, I find that the Government has proved by the preponderance of the evidence that Respondent violated 22 DCMR 3907.2(e) by failing to maintain accurate personnel records, which shall include health certification as required by 22 DCMR 3907.6, as charged.

Charge IV: Alleged Violation 22 DCMR 3907.2(c)

Respondent is alleged to have violated 22 DCMR 3907.2(c) by failing to maintain accurate personnel records, which shall include evidence of attendance at orientation and in-service training, workshops, or seminars. The Specification for this charge is that on or about June 1, 2009, for fourteen (14) specified employees⁴⁶ there was no documentation or incomplete documentation of employees' attendance at orientation training.

22 DCMR 3907.2(c) provides:

Each home care agency shall maintain accurate personnel records, which shall include the following information: . . .

Resume of education, training certificates, skills checklist, and prior employment, and evidence of attendance at orientation and in-service training, workshops or seminars.

The DHCF Inspection disclosed that the records of the 14 employees in question did not reflect that they had participated in orientation training.⁴⁷ Respondent admitted the violation.⁴⁸

Accordingly, I find that the Government has proved by the preponderance of the evidence that Respondent violated 22 DCMR 3907.2(c) by failing to maintain accurate personnel records,

⁴⁵ See footnote 20 above.

⁴⁶ Employees Nos: 1, 2, 4, 6, 7, 8, 10, 11, 13, 14, 15, 16, 17, and 18.

⁴⁷ Johnson, Tr. (1/19/10) p. 302, 1-19.

⁴⁸ Respondent's Findings, p. 5; RX 206, p. 4, no.8.

which shall include evidence of attendance at orientation and in-service training, workshops, or seminars, as charged.

Charge V: Alleged Violation of 22 DCMR 3907.2(i)

Respondent is alleged to have violated 22 DCMR 3907.2(i) by failing to maintain accurate personnel records, which shall include documentation of a criminal background check having been conducted. The Specification for this charge is that on or about June 1, 2009, there was no documentation of a criminal background check having been conducted for three specified (3) employees.⁴⁹

22 DCMR 3907.2(i) provides:

Each home care agency shall maintain accurate personnel records, which shall include the following information: . . .

Documentation of any required criminal background check.

The DHCF Inspection disclosed that there was no documentation of a criminal background check having been conducted on 3 specified employees.⁵⁰ Respondent admitted the violation.⁵¹

Accordingly, I find that the Government has proved by the preponderance of the evidence that Respondent violated 22 DCMR 3907.2(i) by failing to maintain accurate personnel records which included criminal background checks on the employees in question, as charged.

Charge VI: Alleged violation of 22 DCMR 3909.2(e)

Respondent is alleged to have violated 22 DCMR 3907.9(e) by refusing to transfer or discharge a patient without written notice based on the refusal of further services by the patient or the patient's representative. There are three (3) Specifications for this charge:

⁴⁹ Employees Nos.: 10, 11, and 13.

⁵⁰ Johnson, Tr. (1/19/10) p. 303.

⁵¹ See Respondent's Proposed Findings, p. 5; RX 206, p. 5, no.12.

Specification A: On or about January 2009 Respondent failed to provide the necessary information needed to facilitate the transfer of a specified patient⁵² after the patient's representative requested a transfer to another home health agency.

Specification B: On or about April 23, 2009, Respondent failed to provide the necessary information needed to facilitate the transfer of a specified patient⁵³ after the patient's representative requested a transfer to another home health agency.

Specification C: On or about May 7, 2009, Respondent failed to provide the necessary information needed to facilitate the transfer of a specified patient⁵⁴ after the patient's representative requested a transfer to another home health agency.

Specification D: On or about April 2, 2009, a HRLA investigator confirmed during a complaint investigation that a patient of Respondent informed respondent that she no longer wanted the services of respondent. HRLA confirmed that respondent continued to send its employee to the patient's home and did not provide information needed to facilitate the transfer of the patient.

22 DCMR 3909 pertains to discharges, transfers, and referrals of patients: It provides:

3909.1 Each home care agency shall have written policies that describe transfer, discharge, and referral criteria and procedures.

3909.2 Each patient shall receive written notice of discharge or referral no less than seven (7) calendar days prior to the action. The seven (7) day written notice shall not be required, and oral notice may be given at any time, if the transfer, referral or discharge is the result of:

- (a) A medical or social emergency;
- (b) A physician's order to admit the patient to an in-patient facility;
- (c) A determination by the home care agency that the referral or discharge is necessary to protect the health, safety or welfare of agency staff;
- (d) A determination, made or concurred in by a physician, that the condition that necessitated the provision of services no longer exists; or
- (e) The refusal of further services by the patient or the patient's representative.

3909.3 Each home care agency shall document activities related to discharge planning for each patient in the patient's record.

⁵² Patient No. 1

⁵³ Patient No. 2

⁵⁴ Patient No. 3

The Government maintained that Respondent failed to act, or to act appropriately or timely, regarding transfer requests made on behalf of four of Respondent's patients.⁵⁵ Yet the charge under 22 DCMR 3909.2(e) is inapposite. This regulation merely waives the requirement that a facility give written notice of a transfer when the patient or the patient's representative refuses further services from the facility.

Respondent's defense is that upon receipt of required patient authorizations, Respondent completed the patient transfers.⁵⁶ The Government candidly concedes that if it "had been made aware of Respondent's transfer policies or been apprised of respondent's plan to manage transfers, it is likely that HRLA would have considered the transfer complaints sufficiently addressed without enforcement action."⁵⁷ In other words, the Government's complaint is that it did not have available to it Respondent's written policies describing its transfer, discharge, and referral criteria and procedures, as required by 22 DCMR 3909.1. This, however, is not the basis for the charge.

Accordingly, I find that the Government failed to prove by the preponderance of the evidence that Respondent violated 22 DCMR 3909.2(e), as charged.

Charge VII: Alleged Violation of 22 DCMR 3914.4

Respondent is alleged to have violated 22 DCMR 3914.4 by failing to have a plan of care approved and signed by a physician within thirty (30) days of the start of care. The Specification for this charge is that on or about June 1, 2009, the clinical records of four (4) specified patients⁵⁸ did not have timely physician signatures.

⁵⁵ Government's Proposed Findings, p.p. 19-21; See PX 105,106, and 115.

⁵⁶ Respondent's Proposed Findings, p. 6.

⁵⁷ Government's Proposed Findings, p. 21.

⁵⁸ Patient Nos.: 1, 4, 5, and 6.

22 DCMR 3914.4 provides, in pertinent part:

Each plan of care shall be approved and signed by a physician within thirty (30) days of the start of care . . .

A sampling of patient records made in connection with the DHCF Inspection disclosed that four (4) plans of care for patients did not contain signatures of physicians made within the allotted time.⁵⁹ Respondent does not dispute this charge, but maintains that after it received the DHCD Statement of Deficiencies it “conducted in-service training to ensure that affected personnel were familiar with these requirements.”⁶⁰

Charge VIII: Alleged Violation of 22 DCMR 3917.2

Respondent is alleged to have violated 22 DCMR 3917.2 by failing to have the nurse who delivers or supervises skilled services to record progress notes for each applicable patient at least every thirty (30) days. The Specification for this charge is that on or about June 1, 2009, the clinical records of five (5) specified patients⁶¹ did not contain nurses’ progress notes.

22 DCMR 3917.2 provides, in pertinent part:

Duties of the nurse shall include, at a minimum, the following:

(g) Recording progress notes at least once every thirty (30) calendar days

Pursuant to the DHCF Inspection, a sampling of patient records disclosed that monthly registered supervisory progress notes were missing from the records of seven (7) of the ten (10)

⁵⁹ Johnson, Tr. (1/19/10), p. 268, 269, 1-19; p. 260, 261, 1-19; PX 116, p. 7, Items 4 and 5.

⁶⁰ See Respondent’s Proposed Findings, p. 6; PX. 116

⁶¹ Patient Nos.: 7, 5, 4, 6, 1, and 3

client records reviewed.⁶² Respondent does not dispute this charge. By way of explanation, it maintains that after it received the Statement of Deficiencies DHCF it “Immediately corrected the missing documentation and provided the corrective action in the Plan of Correction submitted to the Government on July 28, 2009.”⁶³

Accordingly, I find that the Government proved by the preponderance of the evidence that Respondent violated 22 DCMR 3917.2 by failing to have the nurse who delivers or supervises skilled services to record progress notes for each applicable patient at least every thirty (30) days, as charged.

Charge IX: Alleged Violation of 22 DCMR 3101.3

Respondent is alleged to have violated 22 DCMR 3101.3 by failing to provide access to records, including patient or resident records to an authorized official. The Specification for this charge is that on or about April 29, 2009, the Government requested information from Respondent to complete an investigation of a complaint, and Respondent failed to respond.

22 DCMR 3101.3 provides:

The authorized official shall have access to the following:

- (a) To records, including patient or resident records;
- (b) To staff;
- (c) To patients or residents;
- (d) To policies and procedures, contracts; and
- (e) Any other information necessary to determine the facility’s compliance with the Act and the rules of this title.

⁶² Johnson, Tr. (1/19.10), p. 284, 1-19; PX 116, p. 10-11, Item 1.

⁶³ Respondent’s Proposed Findings, p.6.

The facts set forth under Charge I above are incorporated by reference regarding this charge. The April 29, 2009, letter from Ms. Mebane to Respondent stated, in pertinent part, that Respondent was required to provide written notification of the status of the complaint investigation concerning the home care aide in question and Respondent's policies and procedures on complaint investigations. This was confirmatory of what Ms. Mebane's told Mr. Bongam in their telephone conversation earlier the same day. Respondent never furnished to the Government its policies and procedures for handling complaint investigations involving its employees.⁶⁴ Respondent does not dispute this. But its defense is simply that it did not receive Ms. Mebane's April 29, 2009, letter.⁶⁵ As set forth above, however, the HRLA Statement of Deficiencies sent on May 20, 2009, refers to Respondent's failure to furnish its Incident and Complaint Management Systems which had been requested verbally and in writing on April 29, 2009, by Ms. Mebane.⁶⁶ And the letter and the e-mail confirmation of the receipt of the letter was discussed with Mr. Bongam by Ms. Mebane in October 2009, when Mr. Bongam first suggested that he had not received the letter.⁶⁷ Yet, Respondent never responded, or attempted to respond, to the Government's request for the written policies and procedures.

Accordingly, I find that the Government proved by the preponderance of the evidence that Respondent violated 22 DCMR 3101.3 by failing to provide access to records to the Government, as charged.

⁶⁴ Mebane, Tr. (1/19/10) p. 234.

⁶⁵ Respondent's Proposed Findings, p. 7.

⁶⁶ PX 101

⁶⁷ Mebane, Tr. (1/21/10) p. 112.

Charge X: Alleged violation of 22 DCMR 3915.10(d)

Respondent is alleged to have violated 22 DCMR 3915.10(d) by a personal care aide administering medication. The Specification for this charge is that on or about May 30, 2009, a personal care aide employed by Respondent administered medications to two specified patients.⁶⁸

22 DCMR 3915.10(d) provides:

Personal care aide duties may include the following: . . .

Assisting the patient with self-administration of medication.

Ms. Johnson is a Management Analyst for DHCA who participated in the DHCA Inspection on June 1, 2009.⁶⁹ Ms. Johnson is a registered nurse, with a master's degree in community health. She has over thirty years experience in nursing and nursing related fields.⁷⁰ I credit her testimony, that in the course of home visits, in connection with her investigation of Respondent, two of Respondent's personal care aides admitted to her that they gave patients medications.⁷¹ Ms. Johnson also concluded that the aides actually administered the medications, by giving the medications directly to the patient, as opposed to assisting the patients with self-administration of medications, based on their descriptions of what they actually did.⁷² Of particular relevance is the fact that the two patients in question were incapable of self-

⁶⁸ Patient Nos.: 4, and 8.

⁶⁹ Johnson, Tr. (1/19/10) p. 251; PX 116.

⁷⁰ Johnson, Tr. (1/19/10) pp.251-256.

⁷¹ Johnson, Tr. (1/19/10) pp. 286-287; RX 116, p. 21-22.

⁷² Johnson, Tr. (1/19/10) pp. 340-346.

administering their medications with assistance, since they were mentally-challenged.⁷³ Respondent disputed the charge, but merely asserted that the Government provided no proof in support of the charge.⁷⁴

I find, however, that the Government proved by the preponderance of the evidence that Respondent violated 22 DCMR 3915.10(d) by a personal care aide administering medication, as charged.

IV. Conclusions of Law

Section 5(a)(2)(F) of the Licensure Act authorizes “ revoking the license of a facility . . . that is in violation of any provision of this subchapter, rules adopted pursuant to this subchapter, or other provision of District of Columbia or federal law” D.C. Official Code, § 44-504(2)(F). Under 22 DCMR 3107.1 the Director has discretion to revoke a license issued pursuant to this chapter for one or more of the reasons listed in § 5(a)(2)(f) (sic) of the (Licensure) Act.⁷⁵

Based on Respondent’s violations of any or all of the regulations upon which the charges are based, except as to Charge VI, the Government may revoke Respondent’s Home Care Agency License, as proposed in the Notice.

⁷³ Johnson, Tr. (1/19/10), p. 347; PX 116 pp. 22-23.

⁷⁴ Respondent’s Proposed Findings, p. 8; *See also* RX 206, pp. 21-22.

⁷⁵ The Government, in its discretion, may also seek civil or criminal penalties, or injunctive relief to enforce the Act. *See* D.C. Official Code § 44-509.

