

staff member was present at the home.

5. On October 9, 1987, the SRS licensor made an unannounced visit to the home and found that no adult staff member was present. Upon her return, the petitioner explained that she had staffing problems. On October 15, 1987, the petitioner was sent a letter by SRS confirming an earlier conversation of October 9, advising her that an adult, other than a nonresident, had to be physically present and in charge at the home at all times. She was given until October 30, 1987 to resolve the problem of residents being left alone by submitting a written staffing pattern to SRS.

6. SRS shortly thereafter was also notified that the petitioner did not have a certificate of compliance from the Department of Labor and Industry because she had failed to install a fire suppressor system as instructed by that Department.

7. The petitioner's license was renewed on December 14, 1987 conditioned upon her obtaining approval of her home from Labor and Industry and having an adult staff person on the premises at all time.

8. On January 5, 1988 an unannounced visit by the SRS licensor revealed that there was no adult staff member present at the home.

9. On January 18, 1988, having received no staffing pattern, the SRS licensor sent the petitioner a letter giving her until March 4, 1988 to submit a staffing pattern

or suffer certain enumerated consequences including administrative monetary penalties, or revocation or suspension of her license. In response to the letter (and a subsequent phone call), the petitioner provided a written staffing pattern and no further action was taken by SRS.

10. In a reapplication for a license made out and signed September 28, 1988 by the petitioner, she admitted that the Labor and Industry regulations had not been complied with.

11. In response to her reapplication, the SRS licensor and licensing chief decided to visit the home on October 18, 1988. At the time of their visit, there was no adult staff member in charge on the premises. When the petitioner returned fifteen minutes later, she admitted she had staffing problems for over one month but had made no attempt to replace a staff member who had left.

12. Thereafter, on December 9, 1988, SRS sent the petitioner a letter saying that her application would be denied based on the fact that the home had been out of compliance with Labor and Industry directives since July 1987 and because residents continued to be left at the home without an adult staff member in attendance. The action was taken because SRS believed the actions violated their regulations; the problems had been going on for some time; that ample opportunity to correct had been given; and that the petitioner herself had agreed to comply previously. The Department concluded that the health and safety of the

residents were endangered by the continuing violation of its regulations.

13. On December 29, 1989, SRS was notified that the Department of Labor and Industry had issued a formal order of noncompliance to the petitioner based on her failure to put a fire sprinkler system in her home.

14. The petitioner appealed the decision of SRS and the case was reviewed by the Commissioner who agreed with the action.

15. The petitioner did not appear at the hearing but sent, instead, a note dated January 30, 1989 which explained that no fire sprinkler system had been installed because the petitioner believed it would depreciate the value of her home and was too expensive. She also stated she planned to turn her home into a "retirement home" to avoid the jurisdiction of SRS. She said nothing about the staffing problem.

ORDER

The decision of the Department not to renew the petitioner's license is affirmed.

REASONS

18 VSA § 2003(c) provides that "a person shall not operate a community care home without first obtaining a license." "Community Care Home" is defined in the statute as:

. . . a place, however named, excluding a licensed foster home, which provides, for profit or otherwise, room, board and personal care to three or more

residents unrelated to the home operator. Community care homes shall be divided into two groups, depending upon the level of care they provide, as follows:

(A) Level III, which provides personal care, defined as assistance with meals, dressing movement, bathing, grooming, or other personal needs, or general supervision of physical or mental well-being, including nursing overview, supervision, and administration of medication, but not full-time nursing care; and

(B) Level IV, which provides personal care, as described in subdivision (A), but not including nursing care.

The licensing agency, in this case SRS, is empowered by the statute to "adopt reasonable rules to carry out the provisions of this chapter, and may prescribe minimum standards of care, program, administration and sanitation for facilities licensed under this chapter." 18 VSA §

2014(a) The statute further provides that:

(a) Upon receipt of an application for a license and the license fee, the licensing agency shall issue a full license when it has determined that the applicant and facilities meet the standards established by the licensing agency. Licenses issued hereunder shall expire one year after date of issuance, or upon such uniform dates annually as the licensing agency may prescribe by regulation.

. . .

(d) In its discretion the licensing agency may issue a temporary license permitting operation of a community care home for such period or periods and subject to such conditions as the licensing agency deems proper, but in no case shall a community care home operate under a temporary license or renewal thereof for a period exceeding thirty-six months.

Pursuant to its statutory authority, SRS and the Department of Health have adopted regulations entitled "Level III and Level IV Residential Care Home Licensing

Regulations". The latest set of regulations were adopted December 1, 1987. Among the regulations are the following:

Section V - Licensing Procedures

2. Denial of Application

An applicant may be denied a license for:

- a. conviction of a crime for conduct which demonstrates unfitness to operate a home;
- b. conduct inimical to the public health, morals, welfare and safety in the maintenance and operation of the premises for which a license may be issued;
- c. financial incapacity to provide adequate care and service;
- d. a substantiated complaint of abuse, neglect or exploitation;
- e. an act or omission which would constitute a violation of any of these regulations.

Section VI - Licensing Regulations

8. Staffing Services

- (a) There shall be competent personnel available at all times to provide necessary care and to maintain a safe and healthy environment, and to assure prompt, appropriate action in cases of injury, illness, fire or other emergencies.

Section IX - Physical Plant

9. Life Safety/Building Construction

All homes shall meet all of the applicable fire safety and building requirements of the Department of Fire Prevention, 7 Court Street, Montpelier, VT 05602.

When an applicant is denied for any of the aforementioned reasons, the applicant may overcome the prohibitions by presenting the Licensing Agency with

evidence of expungement or suitability sufficient to ensure the safety of residents. Section V (2)

The Department claims that the actions set forth in the findings of fact, constitute a violation of its regulations regarding the presence of staff members and fire safety. The petitioner, who did not attend the hearing, made no argument to the contrary. A plain reading of the language of those regulations must lead to the conclusion that the acts or omissions of the petitioner were proscribed by those regulations. It must be concluded, therefore, that the Regulations at Section VI (8) and Section IX (9) as set forth above were violated by the petitioner.

Under the statutes and regulations, the agency must grant licenses to persons who meet its standards. See 18 VSA § 2005 above. However, the agency may deny licenses to persons who have violated regulations. See Section V (2) above. The agency appears to have some discretion, therefore, in determining when it is appropriate to deny a license for violation of its regulations. The evidence shows that the Department did not automatically deny the license for violating its rules but rather reflected on such factors as the length of time the violations had been ongoing, the likelihood that the violations would cease, and the danger thereby posed to the residents. The Department's exercise of its discretion to revoke will not be overturned by the Board absent a showing of arbitrariness. As no such showing was made here, it must be concluded that the

Department acted properly in determining that the violations constituted cause for the non-renewal of the petitioner's license.

Under prior decisions of the Board, it has been held that a licensee has a right to present his position to the agency decision maker in order to inform his or her discretion before a final decision is reached to suspend or revoke a license. See Fair Hearing No. 7400. Presumably, failure to renew falls under the same requirements. The evidence does not make it clear whether the petitioner was afforded this right but as the petitioner did not raise that issue or appear at the hearing, it is presumed that it does not form part of the basis for her appeal.

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