

BEFORE THE OHIO DEPARTMENT OF DEVELOPMENTAL DISABILITIES

In The Matter of:
Caring Hands of Stark County
DODD Provider Certification Number 7603918

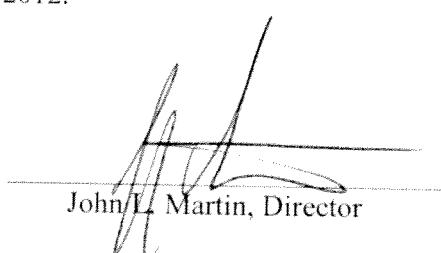
ADJUDICATION ORDER

This matter is before me for consideration of the Revised Report and Recommendation issued by the hearing officer in the above captioned matter. The hearing officer conducted the hearing on November 9, 2011. On December 8, 2011, the hearing officer filed a written report setting forth findings of fact, conclusions of law and a recommendation that the certifications of Caring Hands of Stark County as an Individual Options Waiver and Level One Waiver provider be revoked. A copy of the hearing officer's Report and Recommendation was served upon James J. Collum, Esq., Attorney for Caring Hands of Stark County by certified mail pursuant to section 119.09 of the Ohio Revised Code. Pursuant to an agreement for an extension of time, on December 28, 2011, Attorney Collum filed objections to the Report and Recommendation.

Upon consideration of the objections filed by Attorney Collum, the matter was remanded to the hearing officer to provide more specific findings of fact and conclusions of law. On February 9, 2012, the hearing officer filed a revised Report and Recommendation setting forth more specific findings of fact and conclusions of law. The Revised Report and Recommendation affirmed the recommendation that the certifications of Caring Hands of Stark County as an Individual Options Waiver and Level One Waiver provider be revoked. A copy of the hearing officer's Report and Recommendation was served upon James J. Collum, Esq., Attorney for Caring Hands of Stark County by certified mail pursuant to section 119.09 of the Ohio Revised Code. No objections were filed.

I hereby approve the hearing officer's Recommendation and adopt the findings of fact and conclusions of law contained in the Revised Report and Recommendation. Accordingly, it is ORDERED that the certifications of Caring Hands of Stark County as an Individual Options Waiver and Level One Waiver provider are hereby REVOKED.

Rendered this 1 day of March, 2012.


John L. Martin, Director

BEFORE THE OHIO DEPARTMENT OF
DEVELOPMENTAL DISABILITIES

IN THE MATTER OF PROPOSED)
REVOCATION OF CERTIFICATIONS) Hearing Officer Mark H. Ludwig
OF CARING HANDS OF STARK)
CANTON OHIO)
(TODD BROWN))

**REVISED REPORT AND RECOMMENDATION
OF THE HEARING OFFICER
(On Remand)**

Background

1. This cause comes on for consideration upon the Adjudication Order Remanding To The Hearing Officer For Clarification Of The Report And Recommendation. The order directed that the previous Report was " remanded to the hearing officer to provide more specific findings of fact and conclusions of law."
2. On remand the parties were notified by email that they could provide proposed findings of fact and conclusions of law. Each party declined.
3. After remand and to date neither party moved this Officer to convene further hearing; neither has proffered any additional evidence.

4. The Remand Order provided this Hearing Officer with a copy of the objections of Caring Hands. Those objections addressed "Item #5 on pp 4 and 5" of the original report; "Item #6" of that report; and "Item #9 on page five" of the report. These were references to numbered items in the conclusions of law section of the report. No objections were made to the remaining conclusions.

5. The objections of Caring Hands did not question the original eight Findings of Fact.

Findings of Fact

1. This cause came for hearing on November 9, 2011. Petitioner was represented by Assistant Attorney General Lindsay Nash. Respondent Todd Brown, dba Caring Hands of Stark (Caring Hands), was represented by attorney James J. Collum. The hearing concerned the proposals by The Ohio Department of Developmental Disabilities, Office of Provider Standards & Review (DODD) to suspend¹ (Ex. 1) and to revoke the certifications (Ex.2) previously issued to Caring Hands (Certification # 7603918)

2. Caring Hands was notified by mail of the proposed revocation of certifications. Caring Hands requested a hearing. The same was scheduled and it was not disputed that Caring Hands received actual notice thereof. (Ex. 5)

3. The notice of the proposed action addresses these areas:

DODD Provider Certification #: 7603918

¹ At the same time that DODD proposed to revoke the various certifications held by Caring Hands, DODD issued a suspension of those same certifications based upon the same reasons. The suspension is not an issue that was presented at the hearing other than as background and is not further addressed herein.

ODJFS Medicaid # 2720130
Individual Options Waiver
Homemaker Personal Care - Effective: 4/13/07
Vocational Habilitation - Effective: 1/22/08
Adult Day Support - Effective: 1/22/08
Non-Medical Transportation Per Mile - Effective: 1/8/08
Non-Medical Transportation Trip Vehicle - Effective: 1/8/08
IO Transportation Mileage-Effective: 4/13/07
Level One Waiver
Homemaker Personal Care -Effective: 4/13/07
Transportation - Effective: 4/13/07
Vocational Habitation - Effective: 1/22/08
Adult Day Support - Effective: 1/22/08
Non-Medical Transportation Per Mile - Effective: 1/8/08
Non-Medical Transportation Trip Vehicle - Effective: 1/8/08

4. Caring Hands did not question the sufficiency or actual receipt of notice of the proposed action and notice of the hearing. Caring Hands stipulated to admission of DODD Exhibits 1 through 5 and made no claim that it did not understand the basis of the proposed action.

5. The DODD is proposing to issue an adjudication order revoking Caring Hands' certifications as set forth above. The basis for this action is as follows: Serious pattern of non-compliance as identified in a compliance review conducted by the Department on March 17, 2011. (Ex. 2) (Ex. 6)

6. The DODD's Exhibit 6, the March 17, 2011 Compliance Review and its Exhibit 9, the June 4, 2009 Compliance Review and Plan of Compliance (previously agreed to by Caring Hands) were identified and admitted in evidence.

7. On receipt of the suspension notice Caring Hands addressed the March, 2011 Compliance Review (DODD Ex. 6; Caring Hands Ex. A). In its Exhibit B (6-12-11 letter to DODD) Caring Hands *acknowledged* “that there have been past violations by Caring Hands” (p.2). It is against an *admitted* background of past violations that the current findings are made.

8. Caring Hands offered Exhibits marked A through L at the hearing, all of which were admitted without objection and considered. (Its Ex B also attached Ex. A-K)

9. The Provider Compliance Review of March 2011 (DODD Ex. 6 CaringHands Ex. A) and the Provider Compliance Review/**Plan of Compliance** of June/July 2009 (Ex. 9) (Bold type added) are substantially accurate and complete and evidence the errors chargeable to Caring Hands.

10. The Provider Compliance Review of March 2011 alone compels acceptance of the recommendation; each page evidences multiple violations by Caring Hands as detailed therein. When the two reviews of 2009 and 2011 are compared it is clear that the many of Caring Hands’ basic promises made in the 2009 plan of compliance were simply not kept.

Conclusions of Law

1. The Department has the burden of proof to a preponderance of the evidence; it has more than met that burden as to its allegations.

2. Ohio Rev Code § 5123.166 entitled “Adjudication order against certificate applicant or holder” provides:

(A) If good cause exists as specified in division (B) of this section and determined in accordance with procedures established in rules adopted under section 5123.169 of the Revised Code, the director of developmental disabilities may issue an adjudication order requiring that one of the following actions be taken against a person or government entity seeking or holding a supported living certificate:

(2) Revocation of a supported living certificate;

3. The Support Living Provider, Individual Options Waiver and Level One Waiver certifications are “supported living certificates” as “supported living” services are defined by Rev. Code § 5123.01(Z) and R.C. § 5126.01(U)

4. Revised Code 5123.166 (B) provides *any* of the following constitute good cause for taking action :

- (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.

5. It is concluded that these definitions from *State ex rel. Neal v. State Civil Service Commission*, 147 Ohio St. 430, 434, 72 N.E.2d 69 (Ohio 1947) are appropriate for application here :

“Nonfeasance is the omission of an act which a person ought to do; misfeasance is the improper doing of an act which a person might lawfully do; and malfeasance is the doing of an act which a person ought not to do at all.” (Citation omitted)

6. The details set out in the March 17, 2011 Compliance Review evidence both misfeasance and nonfeasance. The demeanor of the DODD representatives is persuasive; their testimonies are credible. The items in the 2011 report at its numbers 1 through 15 are substantially accurate. Caring Hands only attempted to address most of the areas **after** the report issued. Based on the 2009 promises it is clear Caring Hands should have if not avoided at least earlier addressed all failures found in 2011 given its 2009 agreed promised conduct and done so **before** the 2011 report issued.

7. Caring Hands Exhibit B attaches Exhibits A through J. For ease of reference those exhibits are hereinafter cited as e.g., Ex. B –A (citation to Mr. Brown’s one page notice of hiring a Compliance Coordinator)

Ex B-A Hiring a compliance coordinator after the 2011 report shows that Caring Hands recognized it was not complying with rules with then current employees and needed additional supervision to do so. This action comes too late.

Ex B-B The process and forms shown by this Exhibit were not shown to have been in place after the 2009 Report and before the 2011 report issued. This exhibit evidences that Caring Hands knew what should have been done with each employee but it made no showing that this was actually done with anyone prior to the 2011 report.

Ex B-C and D Caring Hands cover letter (Ex B, p2 note2) acknowledges that “new BCI checks or FBI checks” were done; its own exhibits show such checks were first done for employees *after* their hire date and many only first done after the March 2011 review was underway. See Ex.B –C-1 to C-7, D-1. Had Caring Hands kept the promises of diligence it made after the 2009 report, the majority of these errors would have been avoided.

Ex B- E, F and G Caring Hands exhibits are offered to show that every staff member had training but nearly every training certificate is dated **after** the 2011 Review was underway in March 2011. The DODD position that such training and actions were required by rule before the 2011 review began is well taken. It is especially damaging to Caring Hands given its promised diligence set forth in the agreed Plan of Compliance as part of the 2009 review.

Ex B-H Caring Hands offered evidence it apparently first obtained insurance of \$500,000 required aggregate only **after** the reviewers explained during the 2011 Review that the insurance in place then was not adequate.

Ex B-I, B-J The exhibits evidence that required drug screening and physicals were not obtained until **after** the 2011 Review was underway.

8. The 2011 Report (p 4 of 16) correctly found 14 employees had not signed statements that they would notify the agency within 14 days of being charged with a disqualifying offense. Caring Hands offered evidence that one (1) of the 14 (Flowers) had signed. CH Ex. C.

9. The 2011 Report (p 6 of 16) correctly found no evidence of initial MUI training to five (5) employees. Caring hands offered evidence that two (2) of the five (5) had received training. CH Ex. D and E

10. The 2011 Report (p 7 of 16) correctly found no evidence that twenty six (26) identified staff had not received annual MUI training from 2008-2011. Caring Hands offered evidence *one* (1) of the twenty six had received initial training. CH Ex. E

11. The 2011 Report (p 7-8 of 16) correctly found no evidence that twenty five (25) identified staff had no evidence of annual training from 2008-2011. Caring Hands offered no evidence all had so received that training although a small number had in different years. CH Ex. F, G, H.

12. The 2011 Report (p 8-9) correctly found no evidence that driver's abstracts had been completed for thirteen (13) persons. Caring Hands offered evidence that one (1) had been completed. CH Ex. I

13. The 2011 Report (p9 of 16) correctly notes four (4) staff had no evidence of abuser registry check. Caring Hands' evidence showed one (1) (Devan) completed. CH Ex. J

14. The 2011 Report (p11 of 16) correctly notes no evidence of annual abuser registry notification for 2010. Caring Hands offered evidence as to 2009 but *nothing* as to 2010. CH Ex. K

15. The 2011 Report (p13 of 16) correctly noted twelve (12) staff persons had no evidence of current CPR training. Caring Hands offered evidence that one (1) (S. Hall) had training in 2009. CH Ex. L

16. It is further concluded that paragraphs 8 through 15 above prove both nonfeasance in the failure to complete the required records and misfeasance in the partial completions of required records.

17. It is concluded on review of the evidence that the agency correctly stated as to 9 of the 15 numbered Items in the 2011 Report that those areas were ones addressed as “previously cited on 6/4/09 ...Caring Hands submitted a plan of compliance and *failed to implement* the approved plan...” DODD Ex. 6 and CH Ex. B Report at Item # 1, #2 p4 ; #3, p3 ;# 9 p 10; #10 pp10-11; #11, p11; #12 p.12 ;#13, p 131 and #14, p.14

18. A majority of the findings in the 2011 Report occurred **after** Caring Hands promised future compliance in the 2009 Plan and before the 2011 reports issued. It is concluded that Caring Hands’ efforts to cure its mistakes noted in the 2011 Report which occurred *while it was underway or after* the Report issued are of no avail. Caring Hands made no showing of efforts to avoid those kinds of mistakes as it had promised in 2009. Its promises during the hearing that it would do better in the future frankly come too late given that it earlier had made substantially the same promises to implement procedures to avoid the very errors found in the March 17, 2011 Review.

19. It is concluded that nonfeasance and misfeasance have been proven. Given the definitions of the terms, it is determined that Caring Hands' failures to conform to its own 2009 Plan of Compliance constituted both nonfeasance and misfeasance. It is likewise determined that the failures evidenced in the March 2011 Review constitute both nonfeasance and misfeasance.

20. There was substantial credible proof well beyond a preponderance of the evidence of *a serious pattern of non-compliance* identified by the compliance review of March 17, 2011.

21. Comparing the Compliance Review of March 17, 2011 (Ex. 6) and the promises in the Plan of Compliance agreed to by Caring Hands as part of the June 2009 Provider Compliance Review shows Caring Hands has failed to conform to the Rules. In its plan of compliance in 2009 Caring Hands promised to use a Checklist Form for each employee to be signed and reviewed by *three* persons in Caring Hands. (Ex. 9, p.1 of 8). Caring Hands claims that a process and staff checklist form now exist. CH Ex. B-B. It is concluded that creation and intended apparent future use of such a form comes too late.

22. A continuing pattern of admittedly poor and often non-existent record keeping was shown and alone warrants the recommendation. Quite frankly, Caring Hands wants yet another chance to obey the rules after having failed to do so in 2009 and then failed in its promises to improve and correct its non compliance.

23. The DODD is not required to accept yet another promise that Caring Hands will conform to the Rules nor must the DODD revoke certifications only after actual harm occurs which is strictly and directly shown to be a result from poor record keeping, training and/or background checks. The record keeping, training, and background check requirements are in place to hopefully insure that quality providers exist that prevent harmful situations.

24. The DODD recommendation here meets its burden to protect all concerned and its decision that a serious pattern of noncompliance here warrants revocation is supported by the evidence.

RECOMMENDATION:

That an adjudication order issue revoking all certifications issued to Todd Brown/Caring Hands as proposed by DODD.

Respectfully submitted

2/7/2012

Dated



Mark H. Ludwig

Law Office of Mark H. Ludwig, LLC

Hearing Officer