

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF HEALTH

In the Matter of the Denial of the Application to Renew Class A Professional Home Care Agency License Issued to Loving Care Nursing and Home Care Services, Inc. to Operate Loving Care Home Services

**INTERIM ORDER ON
DISCOVERY SANCTIONS**

On March 23, 2007, the Minnesota Department of Health (the Department) submitted by facsimile its Motion to Compel responses to the Department's earlier discovery requests of December 7, 2006. Under the terms of a scheduling order dated January 30, 2007, the period for discovery in this matter closed on April 2, 2007.

The Licensee made no reply to the Department's December 7, 2006 discovery requests within the time provided by rule.¹

At the Pre-Hearing Conferences in this matter on January 10, 2007, February 15, 2007, and February 22, 2007, counsel for the Licensee (and on one occasion the Licensee's administrator, Mr. Adewola) pledged to submit responses to the Department's discovery requests.

The Licensee made no reply to the Motion to Compel during the time provided by rule,² notwithstanding efforts by the undersigned to contact counsel for the Licensee directly.

On April 10, 2007, the Licensee was directed to complete the past-due responses for discovery by 4:30 p.m. on Wednesday, April 18, 2007.

By way of a letter from its counsel dated April 19, 2007, the Department asserts that no response to its discovery requests was made "within the deadline, or thereafter." Similarly, no filing of any kind was made to this Office by the Licensee during the month of April, 2007.

¹ Minn. R. 1400.6700 (2005).

² Minn. R. 1400.6600 (2005).

Based upon all of the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum,

IT IS HEREBY ORDERED THAT:

1. At the upcoming evidentiary hearing in this matter, the Licensee shall be precluded from making factual averments, calling witnesses to testify, or offering exhibits into the hearing record, in support of its claim that the proposed denial of the Renewal Application is in error.
2. If the Licensee appears at the evidentiary hearing in this matter, now scheduled to begin on June 4, 2007, the Licensee may:
 - a. Consistent with the restrictions in paragraph 1, assert that the proposed denial of the Renewal Application is in error; and,
 - b. Cross-examine any witnesses called by the Department in defense to any claim of error.
3. The Department shall make the filings referenced in Paragraph 5 of the January 30, 2007 Scheduling Order, as provided in that Order.
4. The parties shall submit any foundation objections as provided in Paragraph 6 of the January 30, 2007 Scheduling Order.

Dated this 7th day of May, 2007.

s/Eric L. Lipman

ERIC L. LIPMAN
Administrative Law Judge

MEMORANDUM

In cases referred to the Office of Administrative Hearings under Chapter 14, the Administrative Law Judge has the authority to enter orders in aid of the discovery of relevant evidence and to ensure that contested case proceedings are “conducted in a fair and impartial manner.”³

Early in the process of this contested case – indeed, within two weeks of the initial Notice and Order for Hearing – the Department served a proper set of

³ See, Minn. Stat. §§ 14.50, 14.51 (2006); Minn. R. 1400.5500 (B) (D), (J) and (Q) (2005).

interrogatories and requests for the production of documents. Notwithstanding the early service of these requests, and the serial pledges by counsel for the Licensee that responses to the requests would be forthcoming, the discovery period in this matter opened and closed without the Licensee fulfilling either its pledges or the obligations imposed upon it by rule.

The prejudice, and the risk of unfair surprise to the Department, as it prepares its case, is substantial. While certainly one, and more likely, two rounds of requests would have fit comfortably within the period set for discovery, the Licensee has made no disclosures regarding the most basic elements of its claims.⁴ The Department scrupulously sought details as to the Licensee's challenge – leaving such time as might be necessary to complete more detailed, follow-on discovery in advance of the hearing date – and yet the Licensee, without justification, refused to make the required disclosures. The contested case rules do not require the Department to guess as to the specific elements of, or the legal basis for, the Licensee's challenge to the proposed denial of the Renewal Application.⁵

In balancing the equities between the Licensee's right to challenge an erroneous licensing decision, and the Department's right to learn the basis of any such challenge in advance of the hearing, fairness requires a broadly inclusive Order. Following its complete failure to provide responses to proper discovery requests, it is appropriate to confine the Licensee to its earlier, unadorned claim – namely, that the proposed denial of the Renewal Application is in error. If the Licensee can establish such error through its cross-examination of witnesses that the Department may choose to call during its defense to this unadorned claim, the Licensee will be permitted an opportunity to do so.

E. L. L.

⁴ Compare, e.g., Interrogatory 15, Exhibit A to the Department's Motion to Compel.

⁵ Compare, Minn. R. 1400.6700 (2005); *Caucus Distributors v. Commissioner of Commerce*, 422 N.W.2d 264, 268 (Minn. App.), review denied (Minn.), cert. denied, 488 U.S. 1006 (1988) ("The ALJ correctly found that the relators' failure to provide the required information deprived respondent of the opportunity to prove its case ..."); *Chang, by State v. Alliant Techsystems, Inc.*, OAH Docket No. 9-1700-10594-2 (2000) ("The ALJ has the authority, for example, to prohibit a party who has failed to reasonably comply with a discovery order from introducing designated matters in evidence") (http://www.oah.state.mn.us/aljBase/170010594.lim.htm#_ftn25).