

IN THE COURT OF APPEALS OF IOWA

No. 2-715 / 11-2026
Filed February 13, 2013

**DUBUQUE RETIREMENT COMMUNITY,
Petitioner-Appellant,**

vs.

**IOWA DEPARTMENT OF INSPECTIONS
AND APPEALS, HEALTH FACILITIES
DIVISION,
Respondent-Appellee.**

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble,
Judge.

Dubuque Retirement Community appeals the district court's decision to uphold the agency's findings of regulatory insufficiencies related to its assisted living program. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Rebecca A. Brommel of Brown, Winick, Graves, Gross, Baskerville & Schoenebaum, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Jeanie Kunkle Vaudt, Assistant Attorney General, for appellee.

Heard by Doyle, P.J., and Mullins and Bower, JJ.

MULLINS, J.

Dubuque Retirement Community (DRC), an assisted living program, appeals the district court's decision to uphold the imposition of regulatory insufficiencies. DRC contends (1) the agency failed to present substantial evidence to support regulatory insufficiencies; (2) the agency's conclusions of law and application of law to the facts were irrational, illogical, or wholly unjustifiable; (3) all of the agency's findings of regulatory insufficiencies were unreasonable, arbitrary, capricious, or an abuse of discretion; and (4) the Iowa Administrative Code rule requiring sufficiently trained staff and the Iowa Code section governing procedures involving a significant change in a tenant's health status were unconstitutionally vague. For the reasons set forth below, we affirm in part, reverse in part, and remand.

I. Background Facts & Proceedings

The Department of Inspections and Appeals (DIA) is the state regulatory agency charged with licensing nursing facilities in Iowa and with enforcing regulatory standards imposed upon those licensed facilities. At all times material to this case, DRC was a licensed assisted living program operating in Dubuque under DIA's jurisdiction. DIA received and investigated several complaints about DRC's assisted living program.

On March 12, 2009, DIA issued DRC a conditional certificate to allow DRC to operate as an assisted living program pursuant to Iowa Code section 231C.10(2) (2007). The conditional certificate contained restrictions on DRC's assisted living program. Under the terms of the conditional certificate, DRC was

required to have no new tenant admissions, have a delegating RN readily available to staff and tenants at all times, submit thirty-day nursing and medication reviews to DIA, and submit staff and management training documentation to DIA.

Between April 2009 and September 2009, DIA made numerous monitoring visits and complaint revisits to DRC. During eight of those visits, DIA found regulatory insufficiencies and assessed fines. DIA issued regulatory insufficiencies on each of the following dates in 2009: April 20, May 19–20, July 15–17, July 30, August 11, August 19, August 26, and September 2.

In June 2009, DRC notified DIA of its intent to discontinue its participation in DIA's assisted living certification program. DIA refused DRC's request to unilaterally withdraw from state regulation. The parties agreed DRC would no longer operate as an assisted living program effective October 1, 2009.

DIA issued three final monitoring or complaint evaluation reports. The reports confirmed the regulatory insufficiencies in each of the eight visits from April through September 2009. Based on those regulatory insufficiencies, DIA issued fines totaling \$65,500. DRC appealed all adverse findings in the each of the agency's decisions.

An administrative law judge (ALJ) consolidated proceedings on the eight separate appeals. The ALJ upheld the regulatory insufficiencies and fines. DRC timely appealed the ALJ's decision to the director of DIA. The director affirmed the ALJ's decision to uphold the regulatory insufficiencies and fines.

DRC then filed a petition for judicial review with the district court in Polk County. The district court held a hearing on the petition, and issued a ruling affirming in part, reversing in part, and remanding the matter to DIA. The district court ruled that substantial evidence supported DIA's findings of fact; DIA's conclusion of law about the regulatory insufficiencies were not irrational, illogical, or wholly unjustifiable; and DIA's regulatory requirements did not violate due process. However, the court found DIA's civil penalties were an abuse of discretion and unconstitutional. As a result, the court reversed the penalty assessments and remanded to DIA for reconsideration of appropriate penalties based on identified regulatory insufficiencies.

DRC appeals all adverse findings from the district court. Additional relevant facts and circumstances will be developed as necessary below.

II. Standards of Review

Iowa Code section 17A.19(10) (2011) governs our review of agency decision-making. *Renda v. Iowa Civil Rights Comm'n*, 784 N.W.2d 8, 10 (Iowa 2010). When the district court exercises its judicial review power, it acts in an appellate capacity. *Mycogen Seeds v. Sands*, 686 N.W.2d 457, 463 (Iowa 2004). Our review applies “the standards of chapter 17A to determine whether the conclusions we reach are the same as those of the district court.” *Id.* “If they are the same, we affirm; otherwise, we reverse.” *Id.* at 464.

This case involves the agency's interpretation of “consultative process” under Iowa Code section 231C.1(3), “significant change” under section 231C.2(11), and “substantial compliance” under section 231C.2(12). Our review

of the agency's statutory interpretation depends on whether such interpretation has "clearly been vested by a provision of law in the discretion of the agency." Iowa Code § 17A.19(10)(c). If the legislature has not clearly vested the agency with such discretion, we must reverse the board's decision if it is based on "an erroneous interpretation" of the law. *Id.* However, if such discretion has been clearly vested in the agency, we will only reverse if the board's interpretation of the statutory language is "irrational, illogical, or wholly unjustifiable." *Id.* § 17A.19(10)(h); see also Arthur E. Bonfield, *Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government* 62 (1998) [hereinafter Bonfield].

We will reverse, modify, or grant other appropriate relief if the agency action was "[b]ased upon a determination of fact clearly vested by a provision of law in the discretion of the agency that is not supported by substantial evidence in the record before the court when that record is viewed as a whole." Iowa Code § 17A.19(10)(f). Our review of the district court's substantial evidence finding is for correction of errors at law. *Henry v. Iowa Dep't of Transp.*, 426 N.W.2d 383, 385 (Iowa 1988). "Substantial evidence" is defined as "the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." Iowa Code § 17A.19(10)(f)(1). At issue is whether substantial evidence supports findings actually made, not whether the evidence supports a contrary finding. *Reed v. Iowa Dep't of Transp.*, 478 N.W.2d 844, 846 (Iowa 1991).

We review constitutional issues in an appeal of an agency action de novo. *Insituform Techs., Inc. v. Emp't Appeal Bd.*, 728 N.W.2d 781, 788 (Iowa 2007). We need not give deference to the agency's determination of whether a statute or administrative rule is constitutional, "because it is exclusively up to the judiciary to determine the constitutionality of legislation and rules enacted by other branches of government." *ABC Disposal Sys., Inc. v. Dep't of Natural Res.*, 681 N.W.2d 596, 606 (Iowa 2004).

III. Substantial Evidence of Regulatory Insufficiencies

DRC contends DIA failed to present substantial evidence of alleged regulatory insufficiencies. More specifically, DRC argues DIA did not present substantial evidence of the following: (1) significant changes warranting evaluation of tenants, updated service plans, or nurse reviews; (2) failure to provide appropriate documentation; (3) failure to substantially comply with medication administration requirements; (4) violation of certain staffing requirements; (5) failure to encourage tenants to self-direct care; (6) violation of the conditional certificate's prohibition of new tenant admission; and (7) repeated falls resulting in regulatory insufficiencies.

A. Significant Changes

DRC asserts DIA issued regulatory insufficiencies for failure to complete a tenant evaluation, service plan, and nurse review each time DRC failed to respond to a significant change in a tenant condition. Section 231C.2(11) defines a significant changes as

a major decline or improvement in the tenant's status which does not normally resolve itself without further interventions by staff or by

implementing standard disease-related clinical interventions that have an impact on the tenant's mental, physical or functional health status.

Iowa Administrative Code rule 321-25.23(2) (2008) provides that “[a] program shall evaluate each tenant’s functional, cognitive and health status within 30 days of occupancy and as needed . . . to determine any modification to services needed.”¹ Assisted living programs must also develop a service plan “for each tenant based on the evaluations conducted in accordance with 25.23(1) and 25.23(2), and shall be designed to meet the specific needs of the individual tenant.” Iowa Admin. Code r. 321-25.28. An assisted living program must also provide a registered nurse to “[a]ssess and document the health status of each tenant, make recommendations and referrals as appropriate, and monitor progress on previous recommendations at least every 90 days or if there are changes in health status.” *Id.* r. 321-25.30. DIA may issue a regulatory insufficiency for a violation of a statutory or rule provision within the Iowa Code or Iowa Administrative Code governing assisted living programs. Iowa Code § 231C.14.

DRC identifies three separate occasions in which DIA issued regulatory insufficiencies for failure to complete tenant evaluations, service plans, and nurse review after three tenants had been admitted to the hospital. DRC argues DIA failed to present substantial evidence of a significant change in the tenant's health status after each hospitalization to support the regulatory insufficiencies.

¹ Subsequent to the issues arising from this case, the legislature made changes to the administrative rules. The parties stipulated that the administrative rules in effect on July 2, 2008 applied throughout these proceedings.

DRC argues not all hospitalizations constitute a significant change in the patient's condition. While that may be true as a general matter, all three hospitalizations here involved tenants of advanced age and vulnerable health status. Tenant 8 was hospitalized for back pain, recovering from a compression fracture, and taking numerous medications. Tenant 14, a person with Alzheimer's dementia and moderately severe cognitive impairment, was hospitalized and away from DRC for over a month. Tenant 3 was hospitalized with an infected wound. All three conditions would not normally resolve themselves without further staff interventions. See Iowa Code § 231C.2(11). We find DIA presented substantial evidence to support a finding of significant change in these tenant's conditions, and that the service plans developed by DRC were not based on tenant evaluations and signed as required.² See *id.*; Iowa Admin. Code r. 321-25.23(2), .28, .30; *Reed*, 478 N.W.2d at 846 (finding issue is whether substantial evidence supports findings actually made, not whether the evidence supports a contrary finding).

DRC argues DIA failed to present substantial evidence of a significant change in the tenant's health status to support regulatory insufficiencies on two other occasions. The first involved tenant 15, who had fallen in April 2009. DIA issued a regulatory insufficiency for failure to complete a nurse review when the

² The legislature added the phrase "significant change" to chapter 231C effective July 1, 2009. 2009 Iowa Acts ch. 156, § 11 (codified at Iowa Code § 231C.2(11) (2009)). Prior to the July 2009 amendment, the statute did not include the word "significant." *Id.* The appellee contends the amendment replacing "change" with "significant change" does not apply to the agency's April 20, 2009 and May 19–20, 2009 DRC visits. Having found substantial evidence of "significant change," an ostensibly higher standard, we do not reach the question of the amendment's retroactive effect.

fall occurred. See Iowa Admin. Code r. 321-25.30. Then, in July, he was treated for a urinary tract infection. The physician wrote an order for antibiotics, encouraged the tenant to drink fluids, and indicated staff should check vital signs every shift for twenty-four to forty-eight hours. DIA issued regulatory insufficiencies for failure to evaluate the tenant and failure to update the service plan after the urinary tract infection diagnosis. See *id.* r. 321-25.23(2), .28.

The second incident involved tenant 3. Tenant 3 was ninety years old and had Alzheimer's, among other ailments. The tenant had a skin tear on the lower left calf which was treated three weeks later with a band-aid. Three days after the application of the band-aid, the tenant complained of burning pain in the left leg. Although staff later changed the bandages, DRC did not complete an evaluation to determine if a change in services were needed to prevent the tear. See *id.* r. 321-25.23(2). Nor did the DRC conduct a nurse review and update the service plan. See *id.* r. 321-25.28, .30. We find substantial evidence supports the agency's findings of regulatory insufficiencies in both of these cases for failure to complete tenant evaluations, nurse reviews, and updated service plans after a significant change in the tenant's condition. See *Myers*, 592 N.W.2d at 356.

B. Documentation Errors

DRC contends it received regulatory insufficiencies for inadequate documentation of medication administration, nurse reviews, tenant evaluations, and service plan updates despite having comprehensive documentation system. DRC argues all of the necessary documentation was available in decentralized

locations. DRC does not, however, assert how its decentralized method of documentation led to any unjustified regulatory insufficiencies. We decline the invitation to comb through the record in search of regulatory insufficiencies issued as a result of inadequate documentation that may have been documented elsewhere in DRC's facility. Pursuant to Iowa Rule of Appellate Procedure 6.903(2)(g)(3), we find the appellant waived this issue.

C. Medication Administration Requirements

DRC argues DIA did not present substantial evidence of DRC's failure to substantially comply with medication administration requirements. DRC argues that during the April 20, 2009 visit, there were fourteen incidents of inappropriate documentation, but only five tenants at issue. DRC terminated the employee responsible for nearly all of the noted documentation insufficiencies and made significant improvements over time. DRC further alleges most of the medication was actually given and there was no risk to the tenants' health or safety.

For the reasons articulated below, the "substantial compliance" statutory standard does not apply to findings of regulatory insufficiencies or civil penalties under section 231C.14.³ We find DIA presented substantial evidence to support the agency's finding of DRC's failure to document medication administration.

D. Staffing Requirements

DRC argues it substantially complied with staffing requirements. Iowa Administrative Code rule 321-25.33(1) requires assisted living programs to have

³ See *infra* Part IV.B.

“[s]ufficient trained staff . . . available at all times to fully meet tenants’ identified needs.” In affirming the agency’s decision the district court found,

25.33(1) provides that an assisted living program must have sufficient trained staff available at all times to meet tenant needs. The program nurse is responsible for training staff, either in person or through appropriate delegation because the nurse is the licensed professional in the organization. The rules of DIA require a certain degree of flexibility in regulating the staffing requirements of assisted living programs. The rule is sufficient to provide DRC with notice of the required levels of staffing.

During DIA’s on-site visit at DRC from July 15 through July 17, 2009, DIA interviewed four staff members. Staff members 1, 2, and 3 each stated there was not enough staff to meet the needs of the tenants. Staff members 1, 2, and 4 indicated tenants had complained regarding a lack of help. Prior to the visit, there were not enough staff members on duty to give tenants their regularly scheduled baths and showers. Staff member 3 stated a staff person “might not want to give a shower so would document the tenant refused.” Tenant 15’s resident service notes indicated, “Resident did not get shower today, short staffed.” As will be discussed below, the substantial compliance standard does not apply to regulatory insufficiencies and penalties under section 231C.14.⁴ Thus, we find DIA presented substantial evidence to support the agency’s findings of a failure to provide sufficient trained staff to meet the tenants’ identified needs.

DRC also argues DIA failed to present substantial evidence to support regulatory insufficiencies based on proper nurse delegation. At issue is whether

⁴ See *infra* Part IV.B.

DRC's program nurse or DRC's pharmacy nurse was required to conduct insulin administration training. Rule 321-25.33(5) provides that "[t]he owner or management corporation of the program is responsible for ensuring that all personnel employed by or contracting with the program receive training appropriate to assigned tasks and target population." DRC's pharmacy nurse, a registered nurse licensed in Iowa, conducted insulin administration training. DRC's program nurse was present during, and participated in, the training. DIA does not allege the training was substantively insufficient. DIA issued regulatory insufficiencies because the program nurse delegated her training responsibilities to the pharmacy nurse, rather than conducting the training herself. DIA has failed to demonstrate any statutory or regulatory authority which requires that the program nurse must be the person who provides such training. As to this issue, the facts do not support a finding of regulatory insufficiency.

E. Self-Directed Care

DRC argues DIA failed to present substantial evidence of failure to encourage tenants to self-direct care during DIA's May 2009 visit. DIA reviewed tenant 8's resident service notes which indicated that on March 16, 2009, tenant 8 "had been very confused," was on numerous medications, and was recovering from a compression fracture. The tenant requested to go to the hospital. Because the family had concerns about exacerbating the tenant's back condition during the anticipated emergency room wait, the tenant eventually agreed not to go to the hospital. The tenant's daughter signed a waiver indicating refusal to go to the hospital against medical recommendations. The tenant did not sign the

waiver and the daughter was not a legal representative authorized to refuse medical treatment on the tenant's behalf. DIA issued a regulatory insufficiency to DRC for failure to encourage tenants to self-direction and participation in care decisions under section 231C.2(2).

Section 231C.2(2) defines assisted living as including "encouragement of family involvement, tenant self-direction, and tenant participation in decisions that emphasize choice, dignity, privacy, individuality, shared risk, and independence." Although DRC presented evidence of encouraging family involvement in care, at issue is whether substantial evidence supports findings actually made—failure to encourage self-directed care—not whether the evidence supports a contrary finding. *Reed*, 478 N.W.2d at 846. We find a reasonable fact finder could accept the evidence as sufficient to support the findings actually made by the agency.

F. No New Tenant Admissions

DRC asserts DIA failed to present substantial evidence of new tenant admissions in violation of the conditional certificate. During the May 2009 visit, DIA found a regulatory insufficiency regarding tenant 26. DRC admitted tenant 26 to respite care in late 2008. The tenant decided to extend his stay and signed a rental agreement for an independent apartment in January 2009. The tenant signed another amendment to extend his respite care stay from March 1 through March 31, 2009. DRC records indicated DRC admitted the tenant to the assisted living program on May 1, 2009, with the tenant signing a residency agreement for assisted living care on May 8, 2009.

DRC argues tenant 26 was not a new tenant because the tenant had signed an agreement for respite care prior to signing the agreement for assisted living care. The conditional certificate, signed March 12, 2009, clearly prohibits new tenant admission to the assisted living program. Prior to May 1, 2009, tenant 26 was not in assisted living care. DRC then admitted the tenant into the assisted living program. We find substantial evidence supports the agency's finding that DRC admitted a new tenant in violation of the terms of the conditional certificate issued under section 231C.10(2).

DRC also contends DIA failed to present substantial evidence of new tenant admissions relating to eight other tenants. During DIA's July 15 through July 17, 2009 visit, DRC's records indicated tenants 1 and 2 were admitted as assisted living tenants on May 16, 2009. Tenants 3 and 4 were admitted to assisted living and respite care on July 5, 2009. Tenant 8 was admitted on May 1, 2009, and listed as an assisted living tenant. With respect to these tenants, we find DIA presented substantial evidence to support findings that DRC admitted new tenants to its assisted living program in violation of the terms of the conditional certificate issued under section 231C.10(2).

Assisted Living Concepts, Inc. (ALC) is the parent company of DRC. Swan Home Health was established as a wholly owned subsidiary of ALC. DRC gave several tenants the option to live in the DRC facility as independent living residents, and to receive assisted living care from Swan Home Health. DRC explained to the residents that they would not notice a difference in treatment from DRC's other assisted living tenants. On April 20, 2009, DRC decertified

several of its apartments from the assisted living program.⁵ On June 16, 2009, DRC notified DIA of its intent to discontinue its participation as an assisted living program under DIA's jurisdiction. DIA refused DRC's request to unilaterally remove itself from agency regulation. The parties then agreed DRC would voluntarily decertify on October 1, 2009.

The July 15 through July 17, 2009 DIA visit records indicate tenant 5 was admitted to a decertified apartment on April 24, 2009. However, on July 14, 2009, tenant 5 was listed as an assisted living tenant and was receiving medication management from Swan Home Health. Tenant 7 was admitted to a decertified apartment on May 22, 2009, and was listed as an independent living tenant. Tenant 6 was admitted on July 7, 2009, and was also listed as an independent living tenant.

DRC's label of "independent living" or "respite care" is not dispositive on the issue of whether or not DRC admitted new tenants to the assisted living program. DRC concedes these tenants would not notice a difference in care from other assisted living program tenants. DRC's attempt to label new tenants as independent living tenants rather than assisted living tenants—while providing all of the same services as assisted living tenants through a sister company—is contrary to the terms of the conditional certificate prohibiting new tenant admissions. We find DRC's attempt to circumvent agency regulation of its conditional assisted living program through decertification of individual units and the use of a wholly owned subsidiary of ALC to offer assisted living services to

⁵ The terms of DRC's conditional certificate did not prohibit decertification of individual units.

tenants in DRC's facility is a violation of the conditional certificate's prohibition against new tenant admissions. Thus, we find substantial evidence in support of the agency's findings.

G. Repeated Falls

DRC contends DIA failed to present substantial evidence of repeated falls of certain tenants resulting in regulatory insufficiencies. DRC concedes "there were a few falls that lacked an incident report or had an incomplete incident report in the first regulatory insufficiency related to this matter." DRC argues it was not required to complete nurse review, evaluations, and updated service plans after each fall because there was not a significant change in the tenant's condition. See Iowa Code § 231C.2(11). Alternatively, DRC argues it substantially complied with the requirements of chapter 231C.

Although DRC alleges error in five DIA visits relating to repeated falls, DRC did not indicate which tenants are at issue or argue why each of these falls did not constitute a significant change in health status sufficient to warrant a regulatory insufficiency. We will not speculate as to DRC's arguments with respect to each fall. Accordingly, DRC has not preserved this issue in a way that facilitates judicial review pursuant to Iowa Rule of Appellate Procedure 6.903(2)(g)(3).

IV. Interpretation and Application of Law

A. Consultative Process

DRC contends the agency erroneously interpreted and applied the consultative process set forth in section 231C.1(3) in a way that was "irrational,

illogical, or wholly unjustifiable.” See *id.* § 17A.19(10)(i), (l), (m). Section 17A.19(10)(j) also requires the court to reverse, modify, or grant other appropriate relief if the agency’s decision is the product of a decision-making process where the agency did not consider “a relevant and important matter relating to the propriety or desirability of the action in question that a rational decision maker in similar circumstances would have considered proper to taking that action.” Section 231C.1(3) provides that “[i]t is the intent of the general assembly that the department promote a social model for assisted living programs and a consultative process to assist with compliance by assisted living programs.” Section 231C.14 allows DIA to issue civil penalties for “continued failure or refusal to comply within a prescribed time frame with regulatory requirements that have a direct relationship to the health, safety, or security of program tenants.”

DRC argues the consultative process is intended to be one of learning and assistance with compliance, and is not intended to be punitive in nature. DRC repeatedly failed to comply with chapter 231C. DRC’s failure to comply with chapter 231C resulted in regulatory insufficiencies and civil penalties under section 231C.14. After each visit, DIA’s investigators and monitors met with DRC staff to explain the regulatory insufficiencies. DIA also worked with DRC to put together corrective plans to address the regulatory insufficiencies. The imposition of regulatory insufficiencies is consistent with the consultative process described in section 231C.1(3). We find no error in the agency’s interpretation

and conclusions of law relating to the consultative process, and no error its application of law to the facts.

B. Substantial Compliance

DRC asserts the agency's interpretation of chapter 231C and its findings of regulatory insufficiencies for noncompliance under section 231C.14 as opposed to a lack of substantial compliance under section 231C.10(2) was "irrational, illogical, or wholly unjustifiable." See *id.* To determine whether the agency has the discretion to interpret the statutory phrase, we look first to whether the legislature expressly granted the agency with such discretion. *Renda*, 784 N.W.2d at 14. In the absence of an express grant, we look to the precise language of the statute, its context, and its purpose. *Id.*

Chapter 231C does not expressly grant DIA broad interpretative authority. The legislature added the term "substantial compliance" to chapter 231C effective July 1, 2009. 2009 Iowa Acts ch. 156, § 11 (codified as amended at Iowa Code § 231C.2(11) (2009)). "Substantial compliance" is defined as

a level of compliance with this chapter and rules adopted pursuant to this chapter such that any identified insufficiencies pose no greater risk to tenant health or safety than the potential for causing minimal harm. Substantial compliance constitutes compliance with the rules of this chapter.

Iowa Code § 231C.2(12). The only other time the term "substantial compliance" appears in chapter 231C is in the section discussing the conditional operation of an assisted living program. *Id.* § 231C.10(2). As an alternative to suspension or revocation, section 231C.10(2) allows DIA to issue a conditional certificate to a program "pending substantial compliance with this chapter." *Id.* Prior to the

2009 amendment, section 231C.10(2) allowed DIA to issue a conditional certificate to a program “pending full compliance with the chapter.” *Id.* § 231C.10(2) (2007).⁶ Section 231C.14 (2009) authorizes DIA to assess civil penalties for regulatory insufficiencies, but does not mention substantial compliance.

DIA issued a conditional certificate to DRC as a result of prior complaints about the program. The conditional certificate allowed DRC to continue operation as an assisted living program, but required it to substantially comply with certain conditions in order to avoid denial, suspension, or revocation of the certificate. *Id.* § 231C.10(2). The conditional certificate did not, however, permit DRC to avoid civil penalties for regulatory insufficiencies under section 231C.14 through application of the lesser “substantial compliance” standard. The legislature’s inclusion of a definition of substantial compliance cannot reasonably be read to apply to provisions making no mention of the phrase. The legislature could have amended section 231C.14 to include a substantial compliance provision, but it did not. Thus, we find the substantial compliance standard does not apply to the imposition of regulatory insufficiencies under section 231C.14. We find no error in the agency’s conclusions of law relating to substantial compliance, and no error in its application of the law to the facts.

C. Significant Changes

⁶ Amended by 2009 Iowa Acts ch. 156, §15.

DRC alleges DIA applied an inappropriately strict construction of the terms “significant change” in imposing regulatory insufficiencies. To determine whether the agency has the discretion to interpret the statutory phrase, we look first to whether the legislature expressly granted the agency with such discretion. *Renda*, 784 N.W.2d at 14. In the absence of an express grant, we look to the precise language of the statute, its context, and its purpose. *Id.*

As previously mentioned, the legislature did not expressly grant broad interpretive discretion to the agency. See Iowa Code § 231C.3. Iowa Code section 231C.2(11) defines significant change as

a major decline or improvement in the tenant’s status which does not normally resolve itself without further interventions by staff or by implementing standard disease-related clinical interventions that have an impact on the tenant’s mental, physical or functional health status.

Assisted living programs in Iowa help individuals, often of advanced age and vulnerable health status, pursue independent living. *Id.* § 231C.1(2)(a). The purpose of chapter 231C is, in part, “to establish standards for assisted living programs that allow flexibility in design which promotes a social model of service delivery by focusing on independence, individual needs and desires, and consumer-driven quality of service.” *Id.* § 231C.1(2)(b). Each time there is a significant change in the tenant’s health status, the assisted living program staff must conduct a patient evaluation, update the service plan, and complete a nurse review to determine whether any changes in service are necessary. Iowa Admin. Code r. 321-25.23(2), .28, .30.

We find the legislature intended to vest the agency with the discretion to interpret significant change to accomplish the chapter's flexible design and best protect the vulnerable assisted living population. Thus, we will give deference to the agency's special expertise in interpreting what constitutes significant change in a tenant's health status. See *Renda*, 784 N.W.2d at 14. Accordingly, we will not reverse unless the agency's interpretation is "irrational, illogical, or wholly unjustifiable." Iowa Code § 17A.19(10)(f); see also *Bonfield* at 62.

The agency's interpretation applied a prophylactic definition of significant change to prevent harm to the tenant. The final agency decision found

[DIA]'s view of what constitutes significant change is appropriate. Considering the nature of assisted living programs, the general frailty of the population served by such programs, it is entirely possible that changes in condition, even routine or seemingly inconsequential changes, could have the potential to develop into significant changes causing lasting harm if not properly addressed at the outset. Additionally, taking a casual attitude toward seemingly minor changes, such as the discovery of bruising on a demented tenant, could result in the failure to discover significant underlying changes in condition. Therefore, nurse review is critical in evaluating whether a significant change has occurred or could occur and whether additional interventions or service-planning is necessary.

DRC argues the interpretation equates significant change with any change. We disagree. The agency's final decision recounted the DIA bureau chief's testimony that

the requirement is not that a full and complete nurse review be conducted for every change in tenant condition; rather, she testified that the purpose of initiating nurse review is to respond appropriately to various triggers that signal the potential for a significant change. As [the bureau chief] testified, it is more about foreseeability and prevention of harm than whether the change manifesting itself is significant, although that will at times be the case. Additionally, [the bureau chief] testified that the importance

of responding to these triggers is even more pronounced in the assisted living context due to the fact that licensed healthcare professionals are not on site at all times of the day. Therefore, when an aide who is with the tenants on a regular basis indicates that a change has occurred, it falls upon the nurse to evaluate the tenant to determine whether additional care is necessary.

We find the agency's interpretation of significant change is reasonable and not so broad as to include *any* change in health status. Thus, we do not find the agency's preventative interpretation of significant change "irrational, illogical, or wholly unjustifiable." Iowa Code § 17A.19(10)(f). We find no error in the agency's conclusions of law relating to significant changes, and no error in its application of law to the facts as set forth above.

V. Unreasonable, Arbitrary, Capricious, or an Abuse of Discretion

DRC contends every agency finding of a regulatory insufficiency was unreasonable, arbitrary, capricious, or an abuse of discretion. A finding is "arbitrary or capricious when the decision was made without regard to the laws or facts." *Doe v. Iowa Bd. of Med. Exam'rs*, 733 N.W.2d 705, 707 (Iowa 2007) (internal citations omitted). An agency action is "unreasonable if the agency acted 'in the face of evidence as to which there is no room for difference of opinion among reasonable minds . . . or not based upon substantial evidence.'" *Id.* As we find substantial evidence supports the regulatory insufficiencies described above, we find the agency's actions were not unreasonable, arbitrary, or capricious. See *Loehr v. Mettillie*, 806 N.W.2d 270, 277 (Iowa 2011) ("[A]n unreasonable decision is one that is not based on substantial evidence."). To the extent DRC failed to assert specific facts and articulate arguments in support of alleged error in the agency's findings of regulatory insufficiencies, we find DRC

waived these issues pursuant to Iowa Rule of Appellate Procedure 6.903(2)(g)(3).

VI. Constitutional Issues

DRC contends certain statutes and regulations relating to sufficient staffing requirements and the phrase significant change are unconstitutionally vague. Under the Due Process Clause, a civil statute is unconstitutionally vague “when its language does not convey a sufficiently definite warning of the proscribed conduct.” *ABC Disposal Sys., Inc.*, 681 N.W.2d at 605. Due process is satisfied when “the statute’s meaning is fairly ascertainable by reliance on generally accepted and common meaning of words used, or by reference to the dictionary, related or similar statutes, the common law, or previous judicial constructions.” *Id.* When a statute can result in penalties, the statute must satisfy “two criteria: (1) It must give a person of ordinary intelligence fair warning of what is prohibited, and (2) it must provide explicit standards for those who enforce it.” *Pottawattamie County v. Iowa Dep’t of Env’tl. Quality*, 272 N.W.2d 448, 452 (Iowa 1978). The party attacking the constitutionality of a statute or rule must overcome a presumption of constitutionality by negating every reasonable basis upon which the statute or rule can be maintained. *Eaves v. Bd. of Med. Exam’rs*, 467 N.W.2d 234, 236 (Iowa 1991).

A. Sufficiently Trained Staff

DRC contends the term “sufficient trained staff” under Iowa Administrative Code rule 25.33(1) is unconstitutionally vague. Iowa Administrative Code rule 321-25.33(1) requires an assisted living program to have “sufficient trained staff .

. . . available at all times to fully meet tenants' identified needs.” DRC argues regulatory insufficiencies for failure to provide sufficient staff and regulatory insufficiencies for failure to provide proper nurse delegation are unconstitutional. We deal with each argument in turn.

First, DRC asserts “sufficient trained staff” does not indicate a specific nurse-to-tenant ratio necessary to comply with the rule.⁷ DRC argues this does not give a person of ordinary intelligence fair warning of what is prohibited. See *Pottawattamie County*, 272 N.W.2d at 452. The language of the rule in question requires the assisted living program to have “sufficient trained staff . . . available at all times to fully meet the tenants' identified needs.” Iowa Admin. Code r. 321-25.33(1). Our supreme court has recognized that the “[r]egulation of the medical profession requires flexibility.” *Eaves*, 467 N.W.2d at 236. We acknowledge “a degree of indefiniteness is necessary to avoid unduly restricting the applicability of the rule.” *Pottawattamie County*, 272 N.W.2d at 453.

DIA issued regulatory insufficiencies for failure to have adequate staff to meet the tenants' identified needs in the form of daily showers and other cares. Several staff members and tenants indicated DRC had insufficient staff. Although the statute does not mandate a particular nurse-to-tenant ratio, we find the language of the statute is sufficient to guide a person of ordinary intelligence

⁷ At least two states, California and Connecticut, mandate a specific nurse-to-patient ratio in certain clinical care settings. Cal. Health & Safety Code § 1276.4 (2012); Conn. Gen. Stat. § 19a-269a (2012). Although Iowa has proposed legislation that would establish a collaborative nurse council to “recommend to the hospital appropriate nurse-to-patient ratios based upon patient acuity and other factors as determine by the council,” our laws do not currently mandate a particular nurse-to-patient ratio. House File 272 (proposed Feb. 15, 2011).

to provide enough staff to meet the tenants' needs. *Id.* Further, under the facts of this case, we have already found substantial evidence that there were insufficient staff to provide tenants with their regularly scheduled baths and showers. Accordingly, we find no due process violation in DIA's imposition of regulatory insufficiencies for failure to provide sufficient staff.

Second, DRC argues rule 25.33(1) does not provide a person of ordinary intelligence with fair warning of what is prohibited under nurse delegation requirements. We decline to address this constitutional claim as we have already ruled in favor of DRC on the nurse delegation issue.⁸

B. Significant Change

DRC contends DIA applied a stricter definition of "significant change" than required under the statute and that the term is void for vagueness. See Iowa Code § 231C.2(11). DRC bears the burden of overcoming a presumption of constitutionality and must negate every reasonable basis upon which the statute or rule can be maintained. *Eaves*, 467 N.W.2d at 236. The district court's well-reasoned analysis found

DIA's interpretation of Iowa Code [s]ection [23]1C.2(11) regarding the definition of significant change to incorporate a degree of foreseeability is not void for vagueness. As the regulatory agency charged with the responsibility for the health, safety and welfare of tenants of assisted living programs, DIA is entitled to a degree of flexibility necessary to prevent harm and is not required to wait until harm occurs before acting.

We find the agency's interpretation of section 231C.2(11) is reasonable and sufficient to place a person of ordinary intelligence on notice of what the law

⁸ See *supra* Part III.D.

requires. We find DRC has not met its burden, and find no due process violation.

Id.

VII. Conclusion

We find DIA failed to present substantial evidence to support regulatory insufficiencies based on proper nurse delegation for insulin administration training conducted by the pharmacy nurse rather than the program nurse. To the extent DRC preserved error on all other regulatory insufficiencies, we find DIA presented substantial evidence to support such regulatory insufficiencies; the agency's conclusions of law and application of law to the facts were not irrational, illogical, or wholly unjustifiable; and the agency's findings were reasonable. We find no due process violations. Thus, we affirm on all other issues. For the foregoing reasons, we affirm in part, reverse in part, and remand.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.