6-30-00

RO AP

FILED DEC -8 00

AHCA AGENCY CLERK

STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,
Petitioner,

v.

PINEHURST CONVALESCENT CENTER (BEVERLY ENTERPRISES-FLA. INC. d/b/a BEVERLY GULF COAST-FLORIDA),

Respondent.
______________________________/

CASE NO.: 99-2745, 99-2746, 00-0049
AHCA NO.: 10-99-102-NH, 10-99-204-NH, 02-99-009-NH
RENDITION NO.: AHCA-00-274-FOF-OLC

FINAL ORDER

This cause was referred to the Division of Administrative Hearings for a formal administrative hearing. The assigned Administrative Law Judge ("ALJ") has submitted a Recommended Order to the Agency for Health Care Administration ("Agency"). The Recommended Order of June 30, 2000, entered herein is incorporated by reference.

RULING ON EXCEPTIONS
AGENCY FOR HEALTH CARE ADMINISTRATION

Counsel for the Agency excepts to the finding in paragraph 67 that "[p]ressure sores in a terminally ill patient are unavoidable." Counsel for Pinehurst Convalescent Center ("Pinehurst") concurs that the record does not support this finding. The finding is rejected and the exception is granted.

Counsel excepts to the finding in paragraph 68 that "[n]o clinical measurements were available to indicate whether the reduction in the tube feeding negatively affected Resident number 3." The unchallenged findings of the ALJ are that Resident 3 was terminal, dying from end-stage cardiovascular disease and congestive heart failure, totally dependent, and receiving hospice care. She was being fed and medicated through

a tub inserted into her abdomen. The medication included continuous administration of morphine for pain. To reduce congestion and make her more comfortable, Resident 3's physician was willing to reduce the level of feeding. The family concurred. The challenged finding is supported by the record and is an appropriate comment on the weight of the evidence on whether Resident 3's pressure sores were unavoidable because of her clinical condition. The exception is denied.

PINEHURST

Pinehurst excepts to the ALJ's conclusion that the evidence established a violation of the regulatory requirement that a nursing home provide each resident with the care necessary for the resident to attain and maintain the highest practicable level of physical, mental, and psychosocial well-being in accordance with the nursing home's comprehensive assessment and plan of care for the resident. The citation for this violation is designated as Tag F309. Pinehurst alleges that there is a fatal variance between the facts alleged in the administrative complaint and the facts found by the ALJ as the basis for the violation regarding Resident 5, a patient with a history of accidental falls at Pinehurst. As the factual basis for the violation, the administrative complaint recited a detailed history of falls, measures taken per the care plan, a failure to sufficiently implement the care plan, and a failure to update the care plan after the resident continued to fall. There is no substantial variance between the ALJ's findings regarding Resident 5 and the facts as alleged in the administrative complaint (paragraphs 21, 22, 24, 25, 26, and 27). As the court found in *Bracey, Busby, and Herkal v. Dept. of Children and Families*, 25 Fla. L. Weekly D1890b (Fla. 5th DCA, August 11, 2000), "[t]he allegations were broad enough to include the findings . . ." Therefore, the exception is denied.

Pinehurst excepts to the ALJ's recommendation that a fine of $2,500 be imposed for the violation designated as Tag F309. The violation was cited as a Class II deficiency in the administrative complaint and this classification was sustained by the ALJ. See paragraph 112. Pinehurst points out that the ALJ found that the deficiency was timely corrected. See paragraph 112. The Agency may impose a fine for a Class II deficiency only if the licensee fails to timely correct or if the deficiency is a repeat violation. *See* § 400.23(8)(b), Fla. Stat. (1999). The deficiency having been timely corrected and there being neither allegation nor record to support that the deficiency is a repeat violation, the exception is granted and no fine is imposed.

Pinehurst excepts to the ALJ's finding that Pinehurst violated the regulatory requirement that a nursing home implement written policies and procedures to prevent abuse, mistreatment, and neglect of its residents. The citation for this violation is designated as Tag F224. Pinehurst maintains that the ALJ's finding is not supported by competent, substantial evidence. The factual basis arises out of the hospice care provided to Resident 3. The ALJ found that the care given Resident 3 was in several respects deficient to the extent that the deficient care constituted neglect. From the deficient care, it was reasonable for the ALJ to conclude by inference that Pinehurst failed to implement its policies and procedures. The Agency has no authority to reweigh the evidence at this level of review. *See* *Beverly d/b/a Emerald Oaks v. Agency for Health Care Admin.*, 745 So.2d 1133, 1136 (Fla. 1st DCA 1999). The challenged finding is supported by competent, substantial evidence; therefore, the exception is denied.

Pinehurst excepts to the ALJ's finding that Pinehurst violated the regulatory requirement that a comprehensive care plan be developed and updated for each resident. The citation for this violation is designated as Tag F280. Pinehurst again

alleges a variance between the alleged facts and the ALJ's findings. Based on a careful review of the allegations, findings, and Pinehurst's argument, it is concluded that there is no substantial variance; therefore, the exception is denied.

Pinehurst excepts to the ALJ's finding that Pinehurst violated the regulatory requirement that a nursing home maintain acceptable parameters of nutritional status, such as body weight and protein level, for each resident unless foreclosed by a resident's clinical condition. This violation is designated as Tag F325. Pinehurst suggests that the lack of periodic review of the decision to reduce the feeding level of Resident 3 and the failure to fully inform the resident's son of the effects of the reduced feeding do not constitute a violation of the regulatory requirement. Pinehurst implies that a violation can only be established by a showing that a resident failed to maintain an appropriate range of body weight or protein level. The Agency declines to interpret the regulatory requirements as suggested by Pinehurst. The facts proved establish a violation; therefore, the exception is denied.

Pinehurst excepts to the ALJ's finding that Pinehurst violated the regulatory requirement that each resident be provided with appropriate care to prevent the development of pressure sores and promote healing of pressure sores. This violation is designated as Tag F314. The finding is based on Resident 1 who was admitted to Pinehurst with a stage IV pressure sore, the most advanced stage. Among the treatment interventions undertaken was a protein supplement ordered by Resident 1's physician. The ALJ found that she was not drinking the protein supplement and further that Pinehurst had no system in place to track whether the physician's order was effectively implemented. Because of this, the resident's physician was not notified of the ineffectiveness of this intervention. See paragraphs 75, 76, and 83 through 86. The

challenged finding is supported by competent, substantial evidence; therefore, the exception is denied.

Pinehurst excepts to the ALJ's finding that Pinehurst violated the regulatory requirement that a nursing home investigate any resident injury for possible abuse or neglect and report the results of each investigation to the facility's administrator or his designated representative. This violation is designated as Tag F225. The finding is based on observation of a large bruise on Resident 1's forehead by one of the Agency's inspectors. Pinehurst had no documentation or knowledge of the bruise and conducted an investigation only after the bruise was brought to Pinehurst's attention. See paragraph 77. In paragraph 80 the ALJ found that "[t]he bruise was quite obvious and not hidden." The ALJ's conclusion that Pinehurst should have been aware of the bruise prior to it being seen by the Agency's inspector is a reasonable inference. The finding of a violation of the regulatory requirement is supported by competent, substantial evidence; therefore, the exception is denied.

Pinehurst excepts on multiple grounds to the ALJ's findings that the violations in Tags F224, F225, F280, F314, and F325 are Class II deficiencies. First, Pinehurst maintains that there is no evidence in the record regarding the seriousness of the violations. More specifically, Pinehurst suggests that the findings are flawed because the ALJ's findings did not track the rule and statutory language. There is no merit to this contention. The facts and circumstances surrounding each violation fully support the ALJ's findings. It is noted that the ALJ in paragraph 100 recited with emphasis the statutory definition of a Class II deficiency. Next, Pinehurst maintains that as a matter of law a deficiency can only be cited as a Class II if the record demonstrates that it was part of a pattern of sub-standard care. Pinehurst cites no authority for this proposition

and the Agency does not interpret the statute in this manner. Rather the Agency concurs with the ALJ. Depending on the circumstances it may be reasonable to infer that an isolated deficiency poses a sufficient threat to the residents of the facility to justify classification as a Class II deficiency. Whether a deficiency is isolated or part of a pattern pertains to the weight of the evidence and the seriousness of the offense, not its legal sufficiency. *See* Vista Manor v. Agency for Health Care Admin., 21 F.A.L.R. 3164, 3165 (AHCA 1999). Next, Pinehurst maintains that the classification of deficiency under state law is dependent on the federal "scope and severity rating". There is no merit to this contention. *See* Daytona Manor v. Agency for Health Care Admin., 21 F.A.L.R. 119, 131 (AHCA 1998); Beverly Enterprises d/b/a Eastbrooke v. Agency for Health Care Admin., 20 F.A.L.R. 873, 874 (AHCA 1998). Finally, as to the classification of the deficiencies, Pinehurst maintains that as a matter of law a deficiency cannot be classified as Class II if there was no actual harm to a resident of the facility. There is no merit for this contention and Respondent offers no authority to support it. The statutory definition for a Class II deficiency carries no such limitation. While actual harm could be relevant to the classification of a deficiency, it is not dispositive. Again, this issue pertains to the weight of the evidence and the seriousness of the offense, not its legal sufficiency. The exceptions to the classification of the deficiencies are denied.

Pinehurst excepts to the imposition of fines for violations cited as a result of the April 21, 1999 survey. Pinehurst's exception is based on the fact that the correction deadline was given verbally, rather than in writing. Pinehurst knew of the deadline. There is no requirement that notification of the correction deadline be given in writing. The ALJ's finding that the violations were not timely corrected is supported by competent, substantial evidence; therefore, the exception is denied.

Finally, Pinehurst maintains that if the Agency accepts the ALJ's recommendation that Pinehurst be rated as conditional based on the April 21, 1999 survey, the conditional rating should end on May 24, 1999, the day Pinehurst's witnesses testified that corrective action had been completed, rather than July 2, 1999, the day the Agency verified the correction. The ALJ made no finding that the corrections were complete before July 2, 1999, and the Agency has no authority to make supplemental findings of fact. *See e.g.* Friends of Children v. Dept. of Health and Rehabilitative Services, 504 So.2d 1345, 1348 (Fla. 1st DCA 1987). The correction was verified on July 2, 1999 and the conditional rating should end on that date. The exception is denied.

FINDINGS OF FACT

The Agency hereby adopts the findings of fact set forth in the Recommended Order except for the finding in paragraph 67 that "[p]ressure sores in a terminally ill patient are unavoidable."

CONCLUSIONS OF LAW

The Agency hereby adopts the conclusions of law set forth in the Recommended Order. Counsel for the Agency filed a "Motion to Strike" an excerpt of Susan Acker's deposition testimony given in an unrelated case. The testimony was not received into evidence in the present proceeding, but was submitted as only an attachment to Pinehurst' exceptions. The Motion to Strike is granted.

Based on the foregoing, Pinehurst Convalescent Center is rated as conditional from April 21 to July 2, 1999. A total fine of $20,000 is imposed. Payment in full is due within 30 days of the filing of this Final Order. Payment shall be by check payable to

Agency for Health Care Administration, Office of Finance and Accounting, Attention: Gloria Collins, 2727 Mahan Drive, Fort Knox Building 2, MS 14, Tallahassee, Florida 32308.

DONE and **ORDERED** this 2 day of November, 2000, in Tallahassee, Florida.

STATE OF FLORIDA, AGENCY FOR
HEALTH CARE ADMINISTRATION

RUBEN J. KING-SHAW, JR., SECRETARY

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO A JUDICIAL REVIEW WHICH SHALL BE INSTITUTED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A SECOND COPY ALONG WITH THE FILING FEE AS PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR WHERE A PARTY RESIDES. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

COPIES FURNISHED TO:

Christine T. Messana, Esquire
Mark S. Thomas, Esquire
Senior Attorney, Agency for
Health Care Administration
2727 Mahan Drive, Suite 3431
Fort Knox Building III
Tallahassee, Florida 32308

R. Davis Thomas, Jr.
Qualified Representative
Broad and Cassel
Post Office Drawer 11300
Tallahassee, Florida 32302

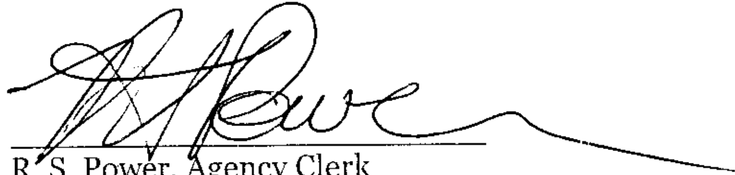
Errol H. Powell
Administrative Law Judge
DOAH, The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

Molly McKinstry
HQA - Long Term Care Section
2727 Mahan Drive
Fort Knox Building I, MS 33
Tallahassee, Florida 32308

Gloria Collins
Office of Finance & Accounting
Agency for Health Care Administration
2727 Mahan Drive, MS 14
Fort Knox Building II
Tallahassee, Florida 32308

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that U. S. Mail served a copy of the foregoing on the above-named people this 7th day of December 2000.



R. S. Power, Agency Clerk
State of Florida, Agency for
Health Care Administration
2727 Mahan Drive, Suite 3431
Fort Knox Building III, MS 3
Tallahassee, Florida 32308
850/922-5865

power/31-Oct-00