

9-6-02

**STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION**

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Petitioner,

vs.

WESTMINSTER COMMUNITY CARE
SERVICES, INC., d/b/a WESTMINSTER
CARE OF ORLANDO,

Respondent.

_____ /

DSM-CLDS

DIVISION OF
ADMINISTRATIVE
HEARINGS

03 FEB 26 AM 10:08

FILED

DOAH CASE NO. 02-1638
AHCA CASE NO. 200105693
DOAH CASE NO. 02-0669
AHCA CASE NO. 2002011701
RENDITION NO.: AHCA-03 -0139-FOF-CON

FINAL ORDER

This cause was referred to the Division of Administrative Hearings and assigned to an Administrative Law Judge (ALJ) for a formal administrative hearing and the entry of a Recommended Order. The Recommended Order of September 6, 2002, is attached to this Final Order and incorporated herein by reference except as noted.

RULING ON EXCEPTIONS

This case concerns a nursing home (Westminster Care of Orlando) that was the subject of a complaint survey on September 14, 2001 by the Agency for Health Care Administration. The notice of intent to assign conditional licensure status and the administrative complaint seeking to impose a \$2,500.00 fine both allege failure by the nursing home to provide appropriate emergency care for a resident in respiratory distress and failure. The Agency filed exceptions to findings of fact 4, 17, 20, 22, 26, 27, 28, 29,

30, 32, 33, and 34 in the Recommended Order and to conclusions of law 36 and 37. Respondent filed a response to the exceptions. All exceptions to the findings of fact are rejected as they either attempts to recharacterize findings of fact as conclusions of law without adequate support or reargue the evidence presented. The Agency's argument that its testimony was un rebutted and, therefore, must be accepted is rejected because the trier of fact may reject even un rebutted expert testimony if he finds it unpersuasive. There is competent, substantial evidence in the record on which the ALJ could base his findings of fact and the Agency is bound by them. Further, the Agency's argument that no evidence to the contrary was presented does not address the proper standard of review and only invites the Agency to reweigh the evidence considered by the ALJ. This the Agency may not do. However, in finding of fact 9, the ALJ refers to the form 2567 as a charging document. This is incorrect and not capable of being supported by competent, substantial evidence. Form 2567 is the survey report. While it provides information that may be used to prepare charging documents such as the notice and administrative complaint in this case, it is not a charging document. Therefore, upon a review of the complete record, to the sole extent that finding of fact 9 refers to the form 2567 as a charging document, it is rejected.

While the Agency is largely bound by findings of fact except where they unsupported by any competent, substantial evidence, conclusions of law are a different matter. This is especially true where they concern statutes and rules over which an agency has substantive jurisdiction and/or special expertise. In this case, however, conclusions of law 37 and 36 are reasonable under the facts of this case and should not be rejected or modified.

FINDINGS OF FACT

The Agency adopts the Findings of Fact set forth in the Recommended Order except as noted.

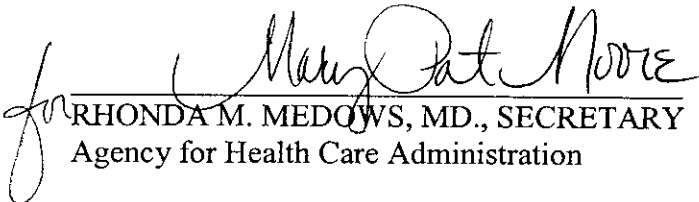
CONCLUSIONS OF LAW

The Agency adopts the Conclusions of Law set forth in the Recommended Order.

IT IS THEREFORE ADJUDGED THAT:

The determination by the Agency that there was a Tag F309 deficiency found in the September 14, 2001, survey is hereby reversed. The administrative complaint is dismissed, and the imposition of conditional licensure status effective September 14, 2001, is reversed and Respondent's licensure status for the relevant period is changed to standard.

DONE and ORDERED this 24th day of FEBRUARY, 2003, in Tallahassee, Florida.

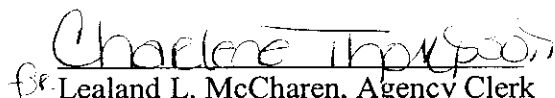

for RHONDA M. MEDOWS, MD., SECRETARY
Agency for Health Care Administration

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW, WHICH SHALL BE INSTITUTED BY FILING THE ORIGINAL NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A COPY, ALONG WITH THE FILING FEE 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 THE RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been furnished by U.S. Mail, or by the method indicated, to the persons named below on this 25 day of February, 2003.


for Lealand L. McCharen, Agency Clerk
Agency for Health Care Administration
2727 Mahan Drive, MS #3
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COPIES FURNISHED TO:

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