STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE ADMINISTRATION,	)	
Petitioner,	)	
vs.	)	Case No. 02-1659
CASA FEBE RETIREMENT HOME, INC., d/b/a HOME IS WHERE THE HEART IS,	)	
Respondent.	)	

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the administrative hearing of this case on August 1, 2002, in St. Petersburg, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Michael P. Sasso, Esquire
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For Respondent: Colleen O'Rourke, Esquire
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STATEMENT OF THE ISSUES

The issues for determination are whether Respondent failed to make reasonable efforts to ensure that a prescription for a resident was refilled in a timely manner in violation of Florida Administrative Code Rule 58A-5.0185(7)(f); and, if so, whether Respondent should reclassify Respondent's license from standard to conditional, impose an administrative fine of $2,000, and impose a survey fee of $500 pursuant to Sections 400.419(1)(b) and 400.419(9), Florida Statutes (2001). (All references to chapters and statutes are to Florida Statutes (2001) unless otherwise stated. Unless otherwise stated, all references to rules are to rules promulgated in the Florida Administrative Code in effect on the date of this Recommended Order.)

PRELIMINARY STATEMENT

Petitioner filed an Administrative Complaint against Respondent some time in February 2002. Respondent timely requested an administrative hearing. On April 29, 2002, Petitioner referred the matter to DOAH to conduct the administrative hearing.

At the administrative hearing, Petitioner presented the testimony of three witnesses and submitted eight exhibits for admission into evidence. Respondent presented the testimony of four witnesses and submitted two exhibits for admission into evidence.

The identity of the witnesses and exhibits and any attendant rulings are set forth in the Transcript of the hearing filed on August 20, 2002. The Transcript identifies the resident involved in this case as Resident 2 in order to protect the confidentiality of the resident.

At the conclusion of the hearing, the ALJ required each party to file a proposed recommend order (PRO) no later than 10 days from the date that the Transcript was filed with DOAH. On August 26, 2002, the parties filed an Agreed Upon Motion for Extension of Time in which to file their respective PROs. By order issued on August 26, 2002, the ALJ extended the deadline for filing PROs until September 6, 2002. The parties timely filed their respective PROs on September 6, 2002.

FINDINGS OF FACT

1. Petitioner is the state agency responsible for regulating assisted living facilities (ALFs) and for investigating complaints received anonymously by a state hotline in accordance with Chapter 400, Part III, and Rule 58A-5. Respondent is an ALF located at 312 East 124th Avenue, Tampa, Florida 33612 (the facility).

2. Petitioner conducted a complaint survey of the facility on August 10, 2001. Petitioner noted the results of the survey on a form entitled Form 3020-0001 "Statement of Deficiencies and Plan of Correction" (the 3020).

3. The 3020 is the document used to charge ALFs with deficiencies that violate applicable law. The 3020 identifies each alleged deficiency by reference to a tag number. Each tag number on the 3020 includes a narrative description of the allegations against the ALF and cites a provision of the relevant rule or rules that the alleged deficiency violates.

4. The 3020 in this case involves one allegation in Tag A630. Tag A630 alleges that Respondent violated Rule 58A-5.0185(7)(f) by failing to make every reasonable effort to ensure that prescriptions for residents who receive assistance with self-administration or medication administration are "refilled" in a timely manner.

5. Resident 2 receives assistance with the self-administration of medication. Resident 2 suffers from dementia and chronic obstructive pulmonary disease. Tag A630 alleges that Respondent failed to make reasonable efforts to ensure that a prescription for an antibiotic known as Tequin was refilled in a timely manner on or about August 2, 2001.

6. University Community Hospital (the hospital) admitted Resident 2 on June 27, 2001, with relevant diagnoses of urinary tract infection and sepsis. The hospital administered Tequin to Resident 2 intravenously and discharged Resident 2 to the facility on August 2, 2001. On August 6, 2001, the hospital

readmitted Resident 2 for treatment of the urinary tract infection.

7. The discharge instructions from the hospital on August 2, 2001, included instructions for several medications. The instructions indicated that Resident 2 was to continue taking Tequin 200 mg one tab a day for 11 days; Prednisone 20 mg tab take as needed; Albuterol and Atrovent nebulizer every 6 hours as needed; and home O2 2 liters by nasal canula [sic] 24 hours. Resident 2 had prescriptions for all of the medications included in the discharge instructions except Tequin.

8. The hospital discharged Resident 2 late in the evening on August 2, 2001. The next morning, the facility manager faxed the new prescriptions for Resident 2 to the pharmacy that the facility used in the ordinary course of its business. The pharmacy timely filled the new prescriptions.

9. Facility staff never saw a written prescription for Tequin. Resident 2 was in good spirits and had no signs of a urinary tract infection or other signs of infection such as a change in mental status or a loss of appetite. Facility personnel reasonably believed that the hospital had successfully treated the urinary tract infection.

10. Petitioner's surveyor testified that he saw a prescription for Tequin in the facility files for Resident 2 and

wrote down the exact wording of the prescription. That testimony is neither credible nor persuasive.

11. Even if the testimony of Petitioner's surveyor were credible and persuasive, other evidence in the case outweighs that testimony. Neither Petitioner's agents, the facility Manager, the facility administrator, the owner of the facility, the hospital, the discharging physician, nor the pharmacy, is able to produce a prescription for Tequin, a copy of the prescription, or a record that the physician ever wrote such a prescription. In addition, a discharge instruction is not a prescription. Finally, Petitioner admits in its PRO that a prescription for Tequin was "missing" when Resident 2 returned to the facility. Respondent could not have failed to refill a prescription for Tequin because there is no credible and persuasive evidence that a prescription for Tequin ever existed between August 2 and 6, 2001.

12. The facility Manager did not compare the discharge instructions with the written prescriptions that accompanied Resident 2 on her discharge from the hospital. While that omission may constitute a violation of some law or rule, it is not the violation alleged in the Administrative Complaint and Tag A630.

13. The omission alleged in the Administrative Complaint and Tag A630 is that Respondent failed to ensure that an

existing prescription for Tequin was "refilled." That allegation, in the context of this case, requires Petitioner to show that Respondent failed to ensure that the pharmacist refilled an existing prescription previously issued by a physician and on file with the pharmacist. Petitioner failed to prove that factual allegation.

14. The factual allegations that Petitioner sought to prove in the administrative hearing are substantially different from those contained in either the Administrative Complaint or Tag A630. The Administrative Complaint alleges at paragraph 8 that Respondent failed to make reasonable efforts to ensure that a prescription for Resident 2 was refilled. Tag A630 alleges in relevant part:

> Based on a review of resident records and on interview with the facility's Owner, Administrator and Manager, the facility failed to fill a prescription for one resident upon the resident's return from the hospital.
>
> Per interview with the three employees noted above, on 8/10/01 at 12:45pm, and based on a review of the Resident's files, Resident #2 was admitted to University Community Hospital on 7/27/01, and was there diagnosed with a urinary tract infection and sepsis . . . The Resident was discharged from UCH on 8/2/01, with the following medication instructions; Tequin 200mg one tab a day for 11 X days. . . . These discharge instructions were found in the Resident's file. Also observed in the Resident's file were the prescriptions for the above-noted medications. However, when asked, none of

> the three employees noted above were aware of the prescription for the wide-spectrum antibiotic; each stated the belief that the Resident's infections had been treated and resolved in the hospital and that an antibiotic wasn't needed. A review of the Resident's Medication Observation Record for 8/01 showed the entry of the other medications per the discharge instructions except for the Tequin. On 8/7/01 the Resident was readmitted to the hospital with symptoms of a urinary tract infection, per Owner, the Administrator and the Manager. (emphasis supplied)
>
> It can be reasonably assumed that the facility's failure to note either the Resident's discharge instructions or the prescription slip for the antibiotic (Tequin) resulted in the Resident's continued suffering of a urinary tract infection and the Resident's return to the hospital. Regardless of whether this failure to give the Resident his prescribed medication was primarily responsible for the Resident's continued UTI, the facility failed to properly note the physician's orders and to fill the prescription.

Petitioner's Exhibit 4 at pages 2-3.

15. Before the administrative hearing, Tag A630 expressly alleged that a prescription for Tequin existed in the file of Resident 2 at the facility and charged that Respondent failed to fill the existing prescription. The Administrative Complaint alleges that the failure to fill an existing prescription violates the requirement in Rule 58A-5.0185(7)(f) to ensure that prescriptions are refilled.

16. At the hearing, Petitioner sought to prove factual allegations that are different from those in Tag A630 and the Administrative Complaint. Rather than proving that Respondent failed to fill a prescription that existed in the file of Resident 2, as alleged in Tag A630, Petitioner sought to prove that Respondent failed to compare the discharge instructions with the prescriptions issued by the treating physician, remind the physician that he or she failed to issue a prescription for Tequin, retrieve the pretermitted prescription, deliver it to the pharmacist, and then ensure that the pharmacist timely "filled" the new prescription.

17. Petitioner cannot put Respondent on notice in the Administrative Complaint and Tag A630 that Respondent must be prepared to defend the factual allegation that Respondent failed to refill an existing prescription and then prove at the administrative hearing that Respondent committed acts or omissions not alleged in either the Administrative Complaint or Tag A630. To do so, is a violation of fundamental notions of due process and adequate notice of the charges against Respondent in a penal proceeding.

CONCLUSIONS OF LAW

18. DOAH has jurisdiction over the parties and subject matter in this proceeding. Sections 120.569 and 120.57(1).

DOAH provided the parties with adequate notice of the administrative hearing.

19. Petitioner has the burden of proof. Petitioner must show by a preponderance of the evidence that Respondent committed a Class II deficiency for which a change in Respondent's license from standard to conditional is authorized. Petitioner must show by clear and convincing evidence that Respondent committed the acts and omissions alleged in the Administrative Complaint and Tag A630 for which an administrative fine is authorized. Department of Banking and Finance v. Osborne Stern, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

20. Petitioner failed to show by a preponderance of the evidence that Respondent failed to make reasonable efforts to ensure that a prescription for Tequin in the facility file of Resident 2 was refilled. Petitioner admits in its PRO at paragraph 26 that no prescription for Tequin existed. In relevant part, Petitioner states:

> The evidence adduced at the hearing demonstrate [sic] that the Respondent, through its agent, failed to compare the discharge summary with the actual prescriptions present at the time of the resident's re-admittance to the facility on

> August 2, 2001, and determine that there was a prescription for Tequin missing. (emphasis supplied)

Respondent could not have failed to ensure that the pharmacist refill a prescription that did not exist.

21. Petitioner cannot charge in the Administrative Complaint and Tag A630 that Respondent failed to fill an existing prescription and then find Respondent guilty of failing to remind the physician to write the prescription and then fill it; a different offense for which Respondent had no notice either in the Administrative Complaint or Tag A630. The charges against Respondent in a penal proceeding must be specific and any ambiguities in the charging documents must be construed against the prosecuting agency. Ghani v. Department of Health, 714 So. 2d 1113, 1115 (Fla. 1st DCA 1998); Davis v. Department of Professional Regulation, 457 So. 2d 1074, 1078 (Fla. 1st DCA 1984); Lester v. Department of Professional Regulation, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

22. Even if the factual allegations against Respondent were sufficient to provide Respondent with adequate notice of the charges against it, Petitioner's case fails because Petitioner bases its prosecution upon two flawed interpretative statements of Rule 58A-5.0185(7)(f).

23. The first interpretive statement construes the term "refilled" in Rule 58A-5.0185(7)(f) to include a requirement for

Respondent to ensure that new prescriptions are "filled." At paragraph 28 of the PRO Petitioner states in relevant part:

> The evidence also adduced indicate [sic] that the clear intent of Rule 58A5.0185(7)(f) [sic] is to ensure that all prescriptions for medications for facility residents who are either receiving supervision of medications or administration of medications, are filled or refilled in a timely manner.

24. Assuming arguendo that a prescription for Tequin were to exist, the agency's interpretive statement of Rule 58A-5.0185(7)(f) effectively amends the promulgated requirement for Respondent to ensure that a previously issued prescription is refilled to include the unpromulgated requirement for Respondent to ensure that a new prescription is "filled." The distinction between filling and refilling a prescription may have little difference for a pharmacist. However, Respondent is not a pharmacist.

25. An interpretation of the refill requirement to include a requirement to fill a prescription enunciates distinctly different standards of compliance when considered in the context of the facts and circumstances surrounding this case. The requirement to ensure that a prescription is refilled requires Respondent to ensure that the pharmacist used by Respondent in the ordinary course of business actually refills a prescription previously issued by a physician and on file with the

pharmacist. The requirement to ensure that a new prescription is filled requires Respondent to ensure that a new prescription actually received by Respondent is delivered to the pharmacist and filled by the pharmacist. The different requirements involve not only different standards, but the violation of each standard involves different types of omissions that involve different facts and that vary in severity.

26. Petitioner's interpretive statement that Rule 58A-5.0185(7)(f) requires Respondent to ensure both the filling and refilling of a prescription modifies and enlarges the literal terms of the promulgated rule. An agency statement that amends a promulgated rule is itself a rule. Section 120.52(15). An agency statement is itself a rule if the statement interprets a promulgated rule in a manner that is clearly contrary to the unambiguous language of the promulgated rule. Kearse v. Department of Health and Rehabilitative Services, 474 So. 2d 819, 820 (Fla. 1st DCA 1985)(agency must comply with its own rules).

27. An agency is not free to deviate from a valid existing rule but must follow its own rules. See, e.g., Section 120.68(7)(e)2; Vantage Healthcare Corporation v. Agency for Health Care Administration, 687 So. 2d 306, 308 (Fla. 1st DCA 1997)(agency statement that does not follow its own rules is an invalid rule); Cleveland Clinic Florida Hospital v. Agency for

Health Care Administration, 679 So. 2d 1237, 1242 (Fla. 1st DCA 1996)(change in procedure expressed in adopted rule must be undertaken by rulemaking), reh'g denied; Regal Kitchens, Inc. v. Florida Department of Revenue, 641 So. 2d 158, 162 (Fla. 1st DCA 1994)(agency cannot use declaratory statement to alter exemption authorized in rule); Florida H-Lift v. Department of Revenue, 571 So. 2d 1364, 1366-1367 (Fla. 1st DCA 1990)(agency statement imposing requirements not in agency rule is an invalid rule); Decarion v. Martinez, 537 So. 2d 1083, 1084 (Fla. 1st DCA 1989)(agency interpretation of its own rule to impose different requirements is an invalid rule); Williams v. Department of Transportation, 531 So. 2d 994, 996 (Fla. 1st DCA 1988)(agency deviation from a rule is an invalid rule).

28. Petitioner has not promulgated its explicated amendment of Rule 58A-5.0185(7)(f) in accordance with the rulemaking procedures prescribed in Section 120.54. Petitioner's amendment of its existing rule is an unpromulgated rule. An agency cannot rely on an unpromulgated rule in a proceeding that is penal in nature. Anglickis v. Department of Professional Regulation, 593 So. 2d 298 (Fla. 2d DCA 1992).

29. The purpose of rejecting unpromulgated standards as invalid rules is to ensure the transparency that Chapter 120 is

intended to achieve. Courts have long held that Chapter 120 has as one of its principal goals:

> . . . the abolition of "unwritten rules" by which agency employees can act with unrestrained discretion to adopt, change and enforce governmental policy. . . .

Straughn v. O'Riordan, 338 So. 2d 832, 834 n. 3 (Fla. 1976). The requirement to invalidate an unadopted rule is intended to:

> . . . close the gap between what the agency and its staff know about the agency's law and policy and what an outsider can know.

McDonald v. Department of Banking and Finance, 346 So. 2d 569, 580 (Fla. 1st DCA 1977). The transparency intended as one of the principal goals of Chapter 120 is a significant consideration in any administrative hearing, including one that is penal in nature.

30. The second flawed interpretive statement of Rule 58A-5.0185(7)(f) construes the refill requirement in a manner that requires Respondent to ensure that the physician writes the prescription. Petitioner's argument in its PRO is illuminating.

> The evidence . . . demonstrate [sic] that the Respondent . . . failed to compare the discharge summary with the actual prescriptions present . . . and determine . . . there was a prescription for Tequin missing.

Petitioner's PRO at paragraph 28.

31. The second interpretive statement by Petitioner seeks to further amend the terms of Rule 58A-5.0185(7)(f). Petitioner

argues that Respondent violated the refilling requirement by failing to: review the discharge notes, remind the treating physician to write the missing prescription, retrieve the missing prescription, deliver the prescription to the pharmacist, and then ensure that the pharmacist timely filled the new prescription. The second interpretive statement of Petitioner's existing rule is also rejected.

32. The ALJ does not have jurisdiction in this proceeding to determine the validity of Petitioner's promulgated rule. Respondent did not file a rule challenge in this case. However, the ALJ does have jurisdiction to interpret the promulgated rule in a manner that preserves the validity of the rule under Chapter 120.

33. The legal principle that guides an ALJ in the interpretation of a rule is similar to that which guides an ALJ in the interpretation of a statute. Although an ALJ does not have jurisdiction to determine that a statute is invalid under the state or federal constitutions, an ALJ should interpret a statute, whenever possible, in a manner that preserves the validity of the statute under the applicable constitution. A properly adopted and promulgated rule has the force and effect of law. State v. Jenkins, 469 So. 2d 733, 734 (Fla. 1985); Florida Livestock Board v. Gladden, 76 So. 2d 291, 293 (Fla. 1954); Canal Insurance Company v. Continental Casualty Company,

489 So. 2d 136, 137 (Fla. 2d DCA 1986). The ALJ should interpret a properly adopted and promulgated rule, whenever possible, in a manner that preserves the validity of the rule under Chapter 120.

34. Petitioner's interpretative statement of its promulgated rule would render the rule invalid under Chapter 120 and is therefore rejected. Alternatively, the interpretative statement itself is an invalid, unpromulgated rule on which Petitioner cannot rely in a penal proceeding.

35. The requirement in Petitioner's promulgated rule for Respondent to ensure the timely refilling of a prescription does not require Respondent either to ensure that a new prescription is filled or to remind a physician to write the prescription. Such omissions may violate other rules but do not violate Rule 58A-5.0185(7)(f).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that Petitioner enter a Final Order finding Respondent not guilty of the acts and omissions alleged in the Administrative Complaint and Tag A630 and restoring Respondent's previous license rating nunc pro tunc.

DONE AND ENTERED this 21st day of October, 2002, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.