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STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Petitioner, **AP**

FILED
05 APR 29 AM 9:29
ADMINISTRATIVE
SERVICES

DOAH CASE NOS. **PMR** 02-3510 **Closed**
02-3512
AHCA NO. 2001041101
RENDITION NO.: AHCA-05-

vs.

AMERICAN SENIOR LIVING OF
FORT WALTON BEACH, d/b/a
WESTWOOD HEALTH CENTER,

Respondent.

_____ /

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 entry of a Recommended Order. The Recommended Order of July 9, 2003, is attached to this Final Order and incorporated herein by reference except as noted below.

RULING ON EXCEPTIONS

Counsel for the Agency filed exceptions to the Conclusions of Law in Paragraphs 35, 36, 39, 40, 41, 42, and 44 of the Recommended Order. The exception to the Conclusion of Law in Paragraph 35 is granted in part because it is well-established that the preponderance of the evidence standard (rather than the clear and convincing evidence standard utilized by the ALJ in Paragraph 35) applies to conditional licensure cases. See Heritage Health Care and Rehabilitation Center – Naples v. AHCA, 22 FALR

2171 (AHCA 2000); AHCA v. Heritage Health Care Center – Venice, 24 FALR 1849 (AHCA 2002); Tampa Health Care Center v. AHCA, 24 FALR 2552 (AHCA 2002); AHCA v. Beverly Healthcare Lake Mary, 24 FALR 2888 (AHCA 2002).

However, there is no need to remand the instant case for the ALJ to apply the correct standard of proof. While the ALJ concluded in Paragraphs 39 and 40 that the Petitioner could have taken other measures to prevent the resident in question from falling and that the deficiency in question had the potential to compromise the resident's well-being, he also found in Paragraphs 15, 16, and 17 there was no evidence demonstrating the resident suffered the actual harm necessary to establish the Class II deficiency sought by the Agency. See §400.23(8)(b) & (c), Fla. Stat. (2001). Thus, the Class III deficiency stands.

The Agency's remaining exceptions to the Conclusions of Law in Paragraphs 35, 36, 39, 40, 41, 42, and 44 of the Recommended Order are denied because the undersigned does not find the Agency's proposed conclusions are "as or more reasonable" than those reached by the ALJ. See §120.57(1)(l), Fla. Stat. (2004).

The Respondent filed an exception to the Conclusion of Law in Paragraph 45 arguing the ALJ erroneously concluded that a \$500.00 fine should be imposed for the Class III deficiency. First of all, the ALJ cited the 2000 version of section 400.23 rather than the 2001 version that took effect shortly before the June 2001 survey at issue in this case. See Ch. 2001-45, §30, at 256 & 291. Second, the 2001 version of section 400.23(8)(c), Florida Statutes, provides that "[i]f a class III deficiency is **corrected** within the time specified, no civil penalty shall be imposed." (emphasis added). Because the ALJ concluded in Paragraph 44 that the Class III deficiency at issue in the instant

case was not of a continuing and uncorrected nature, it cannot serve as the basis for a fine. As a result, AHCA must grant this exception because it pertains to a conclusion of law within the Agency's substantive jurisdiction, and AHCA's conclusion of law is more reasonable than the ALJ's. See §120.57(1)(l), Fla. Stat. (2004).

FINDINGS OF FACT

The Agency adopts the Findings of Fact set forth in the Recommended Order, which is attached hereto and incorporated by reference.

CONCLUSIONS OF LAW

The Agency adopts the Conclusions of Law set forth in the Recommended Order except as noted herein.

IT IS THEREFORE ADJUDGED THAT:

As discussed in the Recommended Order, the Respondent committed a Class III deficiency. However, because that deficiency was not of a continuing, uncorrected nature, AHCA shall not impose a fine or conditional licensure status.

DONE and ORDERED on this the 15 day of April, 2005, in Tallahassee, Florida.



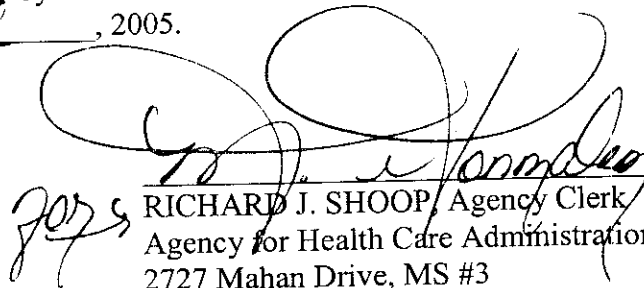
ALAN LEVINE, SECRETARY
AGENCY FOR HEALTH CARE ADMINISTRATION

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 the 27 day of April, 2005.


RICHARD J. SHOOP, Agency Clerk
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