

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE)
ADMINISTRATION,)
)
Petitioner,)
)
vs.) Case No. 03-0165
)
TAMPA HEALTH CARE ASSOCIATES,)
LLC., d/b/a HABANA HEALTH CARE)
CENTER,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On March 13, 2003, a formal administrative hearing in this case was held in Tampa, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Gerald L. Pickett, Esquire
Agency for Health Care Administration
525 Mirror Lake Drive, North
Sebring Building, Suite 310H
St. Petersburg, Florida 33701

For Respondent: Donna H. Stinson, Esquire
Broad & Cassell
215 South Monroe Street, Suite 400
Post Office Drawer 11300
Tallahassee, Florida 32302

STATEMENT OF THE ISSUES

The issues in the case are whether the allegations of the Administrative Complaint filed by the Petitioner against the Respondent are correct, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated December 5, 2002, the Agency for Health Care Administration (Petitioner) alleged that Tampa Health Care Associates, LLC, d/b/a Habana Health Care Center (Respondent) failed to correct three deficiencies identified during an earlier facility survey. The Petitioner asserted that the alleged failure warranted rating the facility as "conditional" and imposing an administrative fine. By Petition for Formal Administrative Proceeding dated December 20, 2002, the Respondent challenged the allegations and requested a formal hearing. The Petitioner forwarded the request to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

At the hearing, the Petitioner presented the testimony of one witness and had Exhibits numbered 1 through 5 admitted into evidence. The Respondent presented the testimony of two witnesses and had Exhibits numbered 1 through 3 admitted into evidence.

The one-volume Transcript of the hearing was filed on March 28, 2003. Both parties filed Proposed Recommended Orders that were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner is the state agency responsible for

licensure and regulation of nursing homes operating in the State of Florida.

2. The Respondent operates a licensed nursing home at 2916 Habana Way, Tampa, Florida 33614. The facility is approximately 30 years old. It is not built to current standards.

3. On March 13, 2002, the Petitioner inspected the Respondent facility. Based on the inspection, the Petitioner determined that there were life safety code deficiencies at the facility and cited the deficiencies as "tag numbers K 020, K 067, and K 130." The deficiencies were identified as Class III deficiencies.

4. The Respondent did not dispute the inspection findings and submitted a Plan of Correction (POC) to the Petitioner, which approved the POC.

5. The Petitioner conducted a follow-up inspection on April 25, 2002, and cited the facility for the same three tag numbers.

TAG K 020

6. The Petitioner alleged in Tag K 020 that the Respondent failed to meet a standard that requires vertical openings between floors be enclosed with construction so as to provide fire-resistance of at least one hour. The purpose of the standard is to prevent fire from spreading through the floors of the facility via the laundry chute.

7. The approved POC required that the specifically identified broken hardware and improper closing doors be repaired, that the doors be inspected on a monthly basis, and that the staff be trained to notify the facility's maintenance man if any additional hardware malfunctioned.

8. During the March 13, 2002, inspection, the "fourth floor laundry chute corridor door" failed to function properly. (Emphasis supplied.)

9. During the April reinspection, the "fourth floor laundry chute door . . . did not close to a positive latch, in that part of the latching hardware was missing to insure closure."

10. The laundry chutes are contained within a small closeted area. There is a door from the corridor into the closet and another door inside the closet that opens to the laundry chute.

11. The malfunctioning fourth floor doors identified in the March inspection and the April reinspection are different doors.

12. The evidence establishes that the fourth floor corridor door cited in the March inspection was repaired

according to the POC and was functioning properly at the time of the April reinspection.

13. During the March inspection, the "first floor west stairwell exit door" did not "consistently" latch into its frame. This door was not cited in the April reinspection and it is reasonable to infer from the lack of re-citation that the door was apparently functioning properly at that time.

14. During the March inspection, the hardware on the second floor "laundry chute access door" was broken and did not close automatically. During the April reinspection, the same door was again malfunctioning.

15. The age of the facility apparently makes maintenance of laundry chute locks difficult. The chute doors were not built to current standards and some malfunctioning lock parts are difficult to replace.

16. The problem on the second floor laundry chute access door was due to a broken spring. The Respondent's administrator and maintenance supervisor testified that the door had been repaired and had broken again. Their testimony was persuasive and is credited.

17. During the April reinspection, the Petitioner found other doors that were not functioning properly. The additional doors include a third floor laundry chute door that "did not close to a positive latch" because of a missing lock mechanism.

The Petitioner also found that a laundry chute door in the first floor laundry chute collection room was using only one of two locking devices and that hardware was missing from what is apparently the unused locking device. The evidence fails to establish that these items were not functioning properly at the time of the March survey or that they were not repaired on a timely basis after the April survey.

18. As of the date of the hearing, the doors are inspected on a weekly basis in an attempt to maintain and repair broken parts on an expedited basis.

TAG K 067

19. Tag K 067 alleges that the Respondent failed to meet a standard requiring that air handlers automatically shut down in the event of a fire alarm. The purpose of the standard is to prevent distribution of smoke through the facility via the air conditioning system in the event of a fire.

20. During the March inspection, three of fifteen air handlers failed to shut down automatically when the fire alarm was set off. The specific handlers that failed to shut down were identified as two on the fourth floor and the "east" air handler on the second floor.

21. The approved POC provided that the specified air handlers would be serviced to shut down when the fire alarm went

off. The air system was serviced on April 4, 2002, after which the system functioned properly.

22. During the April reinspection, the air conditioning compressor and fan in the fourth and second floors were not functioning at all, and therefore it was not possible to determine whether or not the air handlers would shut down as required. Because the system was not working, the test was not performed. The evidence fails to establish that this deficiency existed at the time of the April reinspection.

23. At the hearing, the Respondent provided persuasive testimony and evidence establishing that the air conditioning system was subsequently returned to working order and that the system properly shut down upon activation of the fire alarm system.

TAG K 130

24. Tag K 130 alleges that the Respondent failed to meet a standard requiring that electrical equipment be in accordance with the "National Electrical Code."

25. During the March inspection, the Petitioner found that some electrical outlets were loose in the wall mounting boxes or did not have sufficient tension to retain electrical cord plugs. Also during the March inspection, the Petitioner found that some residents of the facility were using household-type extension cords.

26. The approved POC provided that outlets would be repaired and extension cords would be removed.

27. During the April reinspection, the Petitioner found that the cited deficiencies had been repaired but that household-type extension cords were in use in resident rooms other than those originally cited in March.

28. As of the date of the hearing, room inspections are performed on a weekly basis to prevent improper extension cord use.

29. Although the Respondent asserted that relatives of facility residents bring in the extension cords despite the instructions to the contrary, the evidence fails to establish that the facility is unable to prevent the use of household-type extension cords in residents rooms.

CONCLUSIONS OF LAW

30. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. Sections 120.569 and 120.57(1), Florida Statutes.

31. The Petitioner asserts that the alleged Class III deficiencies at issue in this proceeding are violations of Section 400.23(8)(c), Florida Statutes (2001), and warrant imposition of an administrative fine.

32. As to the imposition of an administrative fine, the Petitioner has the burden of establishing facts sufficient to

warrant the fine by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern, 670 So. 2d 932 (Fla. 1996).

33. Section 400.23(8)(c), Florida Statutes (2001), provides as follows:

(8) The agency shall adopt rules to provide that, when the criteria established under subsection (2) are not met, such deficiencies shall be classified according to the nature and the scope of the deficiency. The scope shall be cited as isolated, patterned, or widespread. An isolated deficiency is a deficiency affecting one or a very limited number of residents, or involving one or a very limited number of staff, or a situation that occurred only occasionally or in a very limited number of locations. A patterned deficiency is a deficiency where more than a very limited number of residents are affected, or more than a very limited number of staff are involved, or the situation has occurred in several locations, or the same resident or residents have been affected by repeated occurrences of the same deficient practice but the effect of the deficient practice is not found to be pervasive throughout the facility. A widespread deficiency is a deficiency in which the problems causing the deficiency are pervasive in the facility or represent systemic failure that has affected or has the potential to affect a large portion of the facility's residents. The agency shall indicate the classification on the face of the notice of deficiencies as follows:

* * *

(c) A class III deficiency is a deficiency that the agency determines will result in no more than minimal physical, mental, or

psychosocial discomfort to the resident or has the potential to compromise the resident's ability to maintain or reach his or her highest practical physical, mental, or psychosocial well-being, as defined by an accurate and comprehensive resident assessment, plan of care, and provision of services. A class III deficiency is subject to a civil penalty of \$1,000 for an isolated deficiency, \$2,000 for a patterned deficiency, and \$3,000 for a widespread deficiency. The fine amount shall be doubled for each deficiency if the facility was previously cited for one or more class I or class II deficiencies during the last annual inspection or any inspection or complaint investigation since the last annual inspection. A citation for a class III deficiency must specify the time within which the deficiency is required to be corrected. If a class III deficiency is corrected within the time specified, no civil penalty shall be imposed.

34. In this case, the burden has not been met as to imposition of a fine for the laundry chute doors and for the air handling system. The burden has been met as to the residents' use of household-type extension cords.

35. The evidence establishes that the malfunctioning doors cited in the March inspection were repaired by the April reinspection. Only the second floor laundry chute access door was not working properly. Testimony that the door was repaired subsequent to the March inspection was credited.

36. As to the air handling system, because the air handlers were not functioning at the time of the April reinspection, the Petitioner has failed to meet the burden of

establishing that the system would not properly shut down during activation of the fire alarm. Given that the air handlers were not working at all, it is not possible to find that they would not have shut down under a fire test.

37. Finally, as to the use of household extension cords, such use would likely be clearly visible to anyone entering a resident's room. Although the Respondent asserted that families bring in such items contrary to instructions from the facility, the fact that they are brought in does not establish that the Respondent can not prevent their use. Accordingly, an administrative fine of \$1,000 is appropriate under these circumstances.

38. The Petitioner also asserts that the failure to correct the Class III deficiencies within the time established for correction constitutes a violation of Section 400.23(7)(b), Florida Statutes (2001), and warrants rating the facility as "conditional."

39. Section 400.23(7)(b), Florida Statutes (2001), provides as follows:

(7) The agency shall, at least every 15 months, evaluate all nursing home facilities and make a determination as to the degree of compliance by each licensee with the established rules adopted under this part as a basis for assigning a licensure status to that facility. The agency shall base its evaluation on the most recent inspection report, taking into consideration findings

from other official reports, surveys, interviews, investigations, and inspections. The agency shall assign a licensure status of standard or conditional to each nursing home.

* * *

(b) A conditional licensure status means that a facility, due to the presence of one or more class I or class II deficiencies, or class III deficiencies not corrected within the time established by the agency, is not in substantial compliance at the time of the survey with criteria established under this part or with rules adopted by the agency. If the facility has no class I, class II, or class III deficiencies at the time of the followup survey, a standard licensure status may be assigned.

40. As to the imposition of a conditional rating on the facility, the Petitioner has the burden of establishing by a preponderance of the evidence, entitlement to the relief sought. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). In this case, because the deficiencies cited in the March inspection were corrected by the time of the April reinspection, the imposition of a conditional rating is not warranted.

RECOMMENDATION

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

RECOMMENDED that the Agency for Health Care Administration enter a Final Order imposing an administrative fine of \$1,000 on the Respondent.

DONE AND ENTERED this 30th day of May, 2003, in Tallahassee, Leon County, Florida.

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of May, 2003.

COPIES FURNISHED:

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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.