

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE, )  
ADMINISTRATION, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 03-3319  
 )  
RICHMOND HEALTH CARE, INC., )  
d/b/a SUNRISE HEALTH & )  
REHABILITATION CENTER, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on January 14, 2004, in Fort Lauderdale, Florida, before Errol H. Powell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Nelson E. Rodney, Esquire  
Agency for Health Care Administration  
8355 Northwest 53rd Street, First Floor  
Miami, Florida 33166

For Respondent: James B. Boone, Esquire  
Post Office Box 451335  
Sunrise, Florida 33345-1335

STATEMENT OF THE ISSUE

The issue for determination is whether Respondent committed the offenses set forth in the Administrative Complaint and, if so, what action should be taken.

PRELIMINARY STATEMENT

The Agency for Health Care Administration (AHCA) issued a one-count Administrative Complaint against Richmond Health Care, Inc., d/b/a Sunrise Health & Rehabilitation Center (Sunrise) on July 23, 2003.<sup>1</sup> The Administrative Complaint charged Sunrise with the failure to correct a Class III deficiency, as classified pursuant to Section 400.23(8), Florida Statutes, thereby violating 42 CFR Section 483.25(m), as incorporated by Florida Administrative Code Rules 59A-4.1288 and/or 59A-4.112(1) and/or 59A-4.107(5). Further, the Administrative Complaint sets forth that the penalty for the alleged violation is a fine of \$1,000 and the assignment of a conditional license pursuant to Section 400.23(7)(b), Florida Statutes. Sunrise disputed the material allegations of fact in the Administrative Complaint and requested a hearing. On September 16, 2003, this matter was referred to the Division of Administrative Hearings.

At hearing, AHCA presented the testimony of two witnesses and entered two exhibits (Petitioner's Exhibits numbered 4 and 5) into evidence. Sunrise presented the testimony of two witnesses and entered eight exhibits (Respondent's Exhibits numbered 1-8) into evidence. Official recognition was taken and copies were provided of Guidance to Surveyors - Long Term Care Facilities, PP-129 and PP-135, referred to as the "Red Book"; 42 CFR Section 483.25(m); Section 400.23(7)(a) and (8)(a), Florida

Statutes; and Florida Administrative Code Rules 59A-4.112 and 59A-4.107(5).

A transcript of the hearing was ordered. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the filing of the transcript. The Transcript, consisting of one volume, was filed on January 27, 2004. An extension of time was granted for the parties to file their post-hearing submissions. The parties filed their post-hearing submissions, which have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Sunrise operates as a skilled nursing facility at 4800 Nob Hill Road in the city of Sunrise, Florida. Sunrise is licensed by the State of Florida pursuant Chapter 400, Part II, Florida Statutes.

2. Sunrise has 325 beds. At all times material hereto, Sunrise had approximately 275 to 285 residents.

3. AHCA conducted a Standard survey of Sunrise on April 14 through 17, 2003, to determine if Sunrise was "in compliance with Federal participation requirements for nursing homes participating in the Medicare and/or Medicaid programs."<sup>2</sup> AHCA determined that Sunrise was not in "substantial compliance" with the federal requirements in that, material hereto, Class III deficiencies had occurred, citing (1) Tag F-332, having a

medication error rate of five percent or greater and (2) Tag F-333, having significant medication errors.

4. Further, the following Florida Administrative Code Rules were cited for the Class III deficiencies: Tag F-332, 59A-4.112(1), 59A-4.107(5), and 59A-4.1288; and Tag F-333, 59A-4.1288.

5. As to Tag F-332, two medication errors were found. Resident PR received Sorbitol Solution without a physician's order, instead of Lactulose, as ordered by the physician. Resident GW did not receive Reglan prior to eating breakfast as ordered by the physician. On the survey, Resident No. 31 is Resident PR and Resident No. 32 is Resident GW.

6. As to Tag F-333, two medication errors were found. Resident MZ received Potassium Chloride Elixir in undiluted form or without water, contrary to the instructions on the medication. Resident GW did not have her Nitroglycerin Patch removed the prior evening, as ordered by the physician. On the survey, Resident No. 33 is Resident MZ.

7. Moreover, AHCA determined that the medication errors, involving Potassium Chloride and Nitroglycerin, were significant medication errors because Potassium Chloride and Nitroglycerin are medications affecting the cardiovascular system.

8. Significant medication error is defined by the Guidance to Surveyors - Long Term Care Facilities, in pertinent part, as follows:

[O]ne which causes the resident discomfort or jeopardizes his or her health and safety. . . .Discomfort may be a subjective or relative term used in different ways depending on the individual situation.

9. The evidence presented was insufficient to show that an individual Resident experienced discomfort due to the medication errors or to show that the medication errors had the potential to cause an individual Resident discomfort.

10. The evidence presented was insufficient to show that the medication errors jeopardized an individual Resident's health and safety. Nevertheless, the medication errors had the potential to jeopardize the health and safety of the Residents.

11. Also, material hereto, Sunrise was not cited by AHCA for failure to follow physicians' orders.

12. The percentage of errors is calculated by dividing the number of medication errors by the total number of medication opportunities.

13. In the survey of Sunrise, AHCA's surveyors used the "Medication Pass Worksheet" (MPW). If one or more errors are found, the MPW provides that another 20 to 25 opportunities should be observed.

14. Four medication errors were observed. Sixty-two medication opportunities were observed, which included the additional opportunities observed by the surveyors. The percentage of medication errors was 6.45 percent.

15. AHCA required Sunrise to correct the deficiencies cited by May 17, 2003.

16. Further, a Plan of Correction (POC) was required to be submitted by Sunrise to correct the deficiencies cited. Sunrise submitted a POC.

17. By certified letter dated, April 25, 2003, AHCA notified Sunrise, among other things, that the survey found that Sunrise was not in substantial compliance; that a POC was required to be submitted by a time certain; that remedies would be recommended if substantial compliance was not achieved by May 17, 2003; that the recommended remedies would include a mandatory denial of payment for new admissions being imposed on July 17, 2003, if substantial compliance was not achieved by that time; and that AHCA may accept the POC as Sunrise's allegation of compliance until substantiated by a revisit or other means.

18. On May 22, 2003, a re-survey was conducted by AHCA. AHCA determined that Sunrise was not in substantial compliance with the federal requirements.

19. Material hereto, AHCA found Class III deficiencies during the survey of May 22, 2003, citing (1) Tag 281, providing or arranging services that fail to meet professional standards of quality, including failing to follow physician's orders and having significant medication errors, and (2) Tag F-332, having a medication error rate of five percent or greater.

20. Further, the following Florida Administrative Code Rules were cited for the Class III deficiencies: Tag F-281 and Tag F-332, 59A-4.112(1), 59A-4.107(5), and 59A-4.1288.

21. As to Tag F-281, pertinent hereto, Resident BC was administered five medications prescribed for Resident HF. The medications were Provera, Prednisone, Claritin, Multivitamin with Mineral, and Flomax. On the survey, Resident No. 2 is Resident BC and Resident No. 1 is Resident HF.

22. Also, as to Tag F-281, pertinent hereto, Resident RP was administered Thera M, a multiple vitamin with minerals, when her prescription was for Theragram, a vitamin only. On the survey, Resident No. 19 is Resident RP.

23. Further, as to Tag F-281, pertinent hereto, Sunrise was cited for failure to follow physicians' orders.

24. As to Tag F-332, the same method for the calculation of percentage errors was used. Six medication errors were observed. Fifty medication opportunities were observed, which

included the additional opportunities observed. The percentage of medication errors was 12 percent.

25. AHCA required Sunrise to correct the deficiencies cited by June 22, 2003.

26. The evidence presented was insufficient to show that an individual Resident experienced discomfort due to the medication errors. However, the medication errors had the potential to cause the Residents to experience discomfort.

27. The evidence presented was insufficient to show that the medication errors jeopardized an individual Resident's health and safety. Nevertheless, the medication errors had the potential to jeopardize the health and safety of the Residents.

28. By certified letter dated May 30, 2003, AHCA notified Sunrise, among other things, that, based on the survey conducted on May 22, 2003, Sunrise was not in substantial compliance due to Tag F-281 and Tag F-332 being found; that the investigative survey was still ongoing; and that the recommendation would be made to impose the same remedies recommended in the letter dated April 25, 2003.

29. By letter dated July 23, 2003, AHCA notified Sunrise, among other things, that, as a result of a second follow-up visit completed on July 14, 2003, Sunrise was in substantial compliance as of July 15, 2003.



30. Sunrise was issued a conditional license by AHCA effective May 22, 2003 and expiring September 30, 2003.

31. At the expiration of the conditional license, Sunrise was issued a standard license.

CONCLUSIONS OF LAW

32. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2003).

33. AHCA has authority over Sunrise pursuant to Chapter 400, Part II, Florida Statutes (2002) and Florida Administrative Code Chapter 59A-4.

34. Sunrise, as a nursing home, must also be in compliance with Title 42, Chapter 483, Code of Federal Regulations.

35. Section 400.23, Florida Statutes (2002), provides in pertinent part:

(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.

(a) A standard licensure status means that a facility has no class I or class II deficiencies and has corrected all class III deficiencies within the time established by the agency.

(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 follow-up survey, a standard licensure status may be assigned.

(c) In evaluating the overall quality of care and services and determining whether the facility will receive a conditional or standard license, the agency shall consider the needs and limitations of residents in the facility and the results of interviews and surveys of a representative sampling of residents, families of residents, ombudsman council members in the planning and service area in which the facility is located, guardians of residents, and staff of the nursing home facility.

\* \* \*

(f) The agency shall adopt rules that:

1. Establish uniform procedures for the evaluation of facilities.
2. Provide criteria in the areas referenced in paragraph (c).
3. Address other areas necessary for carrying out the intent of this section.

(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.

\* \* \*

(9) Civil penalties paid by any licensee under subsection (8) shall be deposited in the Health Care Trust Fund and expended as provided in s. 400.063.

36. Florida Administrative Code Rule 59A-4.112, "Pharmacy Services," provides in pertinent part:

(1) The facility shall adopt procedures that assure the accurate acquiring, receiving, dispensing, and administering of all drugs and biologicals, to meet the needs of each resident.

37. Florida Administrative Code Rule 59A-4.107, "Physician Services," provides in pertinent part:

(5) All physician orders shall be followed as prescribed, and if not followed, the reason shall be recorded on the resident's medical record during that shift.

38. Florida Administrative Code Rule 59A-1288, "Exception," provides in pertinent part:

Nursing homes that participate in Title XVIII or XIX must follow certification rules and regulations found in 42 C.F.R. 483, Requirements for Long Term Care Facilities, September 26, 1991, which is incorporated by reference. Non-certified facilities must follow the contents of this rule and the

standards contained in the Conditions of Participation found in 42 C.F.R. 483, Requirements for Long Term Care Facilities, September 26, 1991, which is incorporated by reference with respect to social services, dental services, infection control, dietary and the therapies.

39. Sunrise is required to follow 42 CFR 483, "Quality of Care," which provides in pertinent part:

- (m) Medication Errors--The facility must ensure that--
  - (1) It is free of medication error rates of five percent or greater; and
  - (2) Residents are free of any significant medication errors.

40. AHCA has the burden of proof to show that Sunrise committed the offense in the Administrative Complaint. To impose a fine, AHCA's standard of proof is to show by clear and convincing evidence that Sunrise committed a Class III deficiency that was not corrected within the prescribed time period. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996). To impose a conditional license, AHCA's standard of proof is to show by a preponderance of the evidence that a basis exists to impose the conditional license. Florida Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

41. For the survey completed on April 17, 2003, the evidence shows, pursuant to both standards of proof, that the

deficiencies cited were that Sunrise had medication errors of five percent or greater and that it had significant medication errors. The evidence fails to show, pursuant to both standards of proof, that Sunrise was cited for a deficiency of failure to ensure that physicians' orders were followed even though the incidents noted in the survey described circumstances of Sunrise's staff not following physicians' orders.

42. Moreover, AHCA demonstrated, pursuant to both standards of proof, that the medication errors were five percent or greater as to Tag T-332; that the medication errors were significant medication errors regarding Tag F-333; and that the deficiencies were Class III deficiencies as to both Tag F-332 and Tag F-333.

43. As to the re-survey conducted on May 22, 2003, the evidence shows, pursuant to both standards of proof, that medication errors were five percent or greater regarding Tag F-332; that the medication errors were significant medication errors; that the deficiency was a Class III deficiency; and that Sunrise failed to correct the deficiency within the prescribed time period. The evidence demonstrated that, at the time of the re-survey, Sunrise was not in substantial compliance with established criteria.

44. The undersigned is not persuaded by Sunrise's argument that the surveyor who observed the medical error should observe

an additional 20 to 25 opportunities.<sup>3</sup> The additional 20 to 25 opportunities need not be observed by the same surveyor who observed the medication error.

45. The evidence failed to demonstrate, pursuant to either standard of proof, that Sunrise failed to correct any other Class III deficiency within the prescribed time period.

46. AHCA demonstrated by clear and convincing evidence that a Class III deficiency occurred and that Sunrise failed to correct the Class III deficiency within the prescribed time period. AHCA further demonstrated by clear and convincing evidence that, pursuant to Section 400.23(8)(c), Florida Statutes (2002), a fine of \$1,000 should be imposed upon Sunrise.

47. AHCA demonstrated by a preponderance of the evidence that a Class III deficiency occurred and was not corrected by Sunrise within the prescribed time period and that Sunrise was, therefore, not in substantial compliance at the time of the survey with established federal and state criteria. AHCA further demonstrated by a preponderance of the evidence, pursuant to Section 400.23(7)(b), Florida Statutes (2002), that Sunrise should receive a conditional license.

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:

1. Upholding the issuance of a conditional license to Richmond Health Care, Inc., d/b/a Sunrise Health & Rehabilitation Center.

2. Imposing a fine of \$1,000 upon Richmond Health Care, Inc., d/b/a Sunrise Health & Rehabilitation Center.

DONE AND ENTERED this 17th day of May 2004, in Tallahassee, Leon County, Florida.

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ERROL H. POWELL  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 17th day of May, 2004.



ENDNOTES

1/ The Administrative Complaint did not reflect when it was filed.

2/ AHCA's certified letter, dated April 25, 2003, to Sunrise regarding the Standard survey conducted April 19 through 17, 2003.

3/ Sunrise included a document attached to its Proposed Recommended Order, which was not admitted into evidence at the hearing, and included argument based upon this document in its Proposed Recommended Order. Neither the document nor Sunrise's argument based upon this document was considered.

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.