E.26.05 AT

STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

2005 OCT 12 A 10:13

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Petitioner,

v.

MANOR CARE OF SARASOTA, INC. d/b/a MANOR CARE NURSING CENTER,

Respondent.
_____/

LPS Closed

DOAH CASE NO. 04-4633
AHCA FRAES NOS. 2004008600
2004008195
AHCA RENDITION NO.

FILED
05 OCT 13 PM 1:49
DIVISION OF ADMINISTRATIVE HEARINGS

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 August 26, 2005, is attached to this Final Order and incorporated herein by reference.

RULING ON EXCEPTIONS

The Agency filed exceptions to which the Respondent filed a response. The Respondent did not file any exceptions.

The Agency took exception to the first paragraph of the Recommended Order, stating it erroneously noted the hearing was held in Lakeland, Florida, when, in fact, it was actually held in Sarasota, Florida. The Agency will treat the exception as a notice of scrivener's error and note that the first paragraph of the Recommended Order should be corrected to reflect that the hearing was held in Sarasota, Florida.

The Agency took exception to the conclusion of law in Paragraph 45 of the Recommended Order and Endnote 3 of the Recommended Order to the extent that they inferred

that the burden of proof for the imposition of a conditional license may be higher than a preponderance of the evidence. The change in licensure status from "standard" to "conditional" is not the same as discipline against a license. See Spanish Gardens Nursing & Convalescent Center v. AHCA, 21 FALR 132 (AHCA 1998). Such a proceeding is regulatory in nature and thus subject to a lower burden of proof. See Heritage Health Care and Rehabilitation Center v. AHCA, 22 FALR 2171 (AHCA 2000) (granting agency counsel's exception and ruling that downgrading a nursing home's licensure rating is not penal in nature); and State of Florida, Agency for Health Care Administration v. Washington Manor Nursing and Rehabilitation Center (Beverly Enterprises Florida, Inc.), 24 FALR 507 (AHCA 2002) (concluding that rating a nursing home as conditional is a regulatory measure, not a penal sanction). Moreover, prior administrative decisions have cited Section 120.57(1)(j), Florida Statutes, for the proposition that the preponderance of the evidence standard applies to license reduction cases. See, e.g, Capital Health Care Center v. AHCA, 23 FALR 2713 (AHCA 2001); and Life Care Center of Port Saint Lucie, 24 FALR 4518 (AHCA 2002). However, in this instance, contrary to the Agency's assertions, the ALJ did not imply that the burden of proof for the imposition of a conditional license might be higher than a preponderance of the evidence. Rather, in Endnote 3, the ALJ merely presented both sides of the argument without reaching a conclusion in either party's favor. Therefore, the Agency's exception to Paragraph 45 and Endnote 3 of the Recommended Order is denied.

The Agency took exception to the findings of fact in Paragraphs 25, 26 and 36, and Endnote 2 of the Recommended Order, arguing the ALJ failed to include additional findings in those paragraphs that, according to the Agency, would have demonstrated the alleged deficiency was a Class II deficiency. However, the Agency can only reject or modify findings of fact if

they are not supported by competent substantial evidence. See generally Section 120.57(1)(*l*), Fla. Stat. (providing in pertinent part that "[t]he agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record . . . that the findings of fact were not based upon competent substantial evidence"); Heifetz v. Department of Bus. Regulation, 475 So.2d 1277, 1281 (Fla. 1985) (holding that an agency "may not reject the hearing officer's finding [of fact] unless there is no competent, substantial evidence from which the finding could reasonably be inferred"). The Agency made no showing that the findings of fact in these paragraphs were not based on competent substantial evidence. Therefore, the Agency's exception to the findings of fact in Paragraphs 25, 26 and 36, and Endnote 2 of the Recommended Order is denied.

FINDINGS OF FACT

The Agency adopts the findings of fact set forth in the Recommended Order.

CONCLUSIONS OF LAW

The Agency adopts the conclusions of law set forth in the Recommended Order.

IT IS THEREFORE ADJUDGED THAT:

The Administrative Complaint issued in this case is hereby dismissed and this case is now closed.

DONE and ORDERED in this 1 day of October, 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. or interoffice mail to the persons named below on this 12th day of October, 2005.

RICHARD J. SHOOP, Agency Clerk
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