

6-29-05

STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

2005 AUG 22 A @ 30

STATE OF FLORIDA, AGENCY FOR
HEALTH CARE ADMINISTRATION,

Petitioner,

AP

DOAH CASE NO. 05-0121
AHCA NOS. 2004010835
2004010620

Dmk
closed

vs.

LAKELAND MANOR HEALTH CARE
ASSOCIATES, LLC d/b/a WEDGEWOOD
HEALTHCARE CENTER,

RENDITION NO.: AHCA-05-457-FOF-OLC

Respondent.

2005 10 23 P 26
L. J. ...

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 June 29, 2005, is attached to this Final Order and incorporated herein by reference except as noted infra.

RULING ON EXCEPTIONS

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

Petitioner excepted to Paragraph 46 of the Recommended Order, stating the ALJ incorrectly asserted that a "Class II deficiency cannot be the basis for a fine or a 'conditional' license, unless it is not timely corrected by the nursing home." Petitioner's statement is correct. See Sections 400.23(7)(b) and 400.23(8)(c), Florida Statutes (2004). Therefore, Petitioner's exception is granted and the fifth sentence of Paragraph 46 of the Recommended Order is changed to state

A Class III deficiency cannot be the basis for a fine or a “conditional” license, unless it is not timely corrected by the nursing home.

Petitioner excepted to the ALJ’s recommendation on Pages 20 and 21 of the Recommended Order that the cited deficiency be deleted from the survey report dated October 24, 2004 and all other records maintained by the Agency. As has been previously stated in prior Agency final orders, The Agency has no statutory or rule authority to make such changes. See, e.g., Agency for Health Care Administration v. Oak Terrace Specialty Care Center, 25 FALR 1859, 1860 (AHCA 2003). Therefore, Petitioner’s exception is granted and the Agency declines to follow the ALJ’s recommendation concerning alteration or deletions to the survey report dated October 24, 2004 and all other records maintained by the Agency.

Additionally, the Agency, *sua sponte*, excepts to the conclusion of law in Paragraphs 36 and 37 of the Recommended Order. The standard of clear and convincing evidence is used when the Agency seeks to impose administrative fines; and the standard of preponderance of the evidence is used when the Agency seeks to alter the licensure status of a facility from “standard” to “conditional”. Section 120.57(1)(j), Florida Statutes, provides that “[f]indings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute, and shall be based exclusively on the evidence of record and on matters officially recognized.” As concluded in a recommended order adopted by AHCA on October 28, 1998, license reduction cases are not licensure disciplinary proceedings. Spanish Gardens Nursing & Convalescent Center v. AHCA, 21 FALR 132 (AHCA 1998). Instead, because they are regulatory in nature, the preponderance of the evidence standard applies. See Heritage Health Care and Rehabilitation Center v. AHCA, 22 FALR 2171 (granting agency counsel’s exception and ruling that downgrading a nursing home’s licensure

rating is not penal in nature); Washington Manor Nursing and Rehabilitation Center, 24 FALR 507 (concluding that rating a nursing home as conditional is a regulatory measure, not a penal sanction). Moreover, many administrative decisions have cited the statute to support a conclusion that the preponderance of the evidence standard applies to license reduction cases. Capital Health Care Center v. AHCA, 23 FALR 2713 (AHCA 2001); Life Care Center of Port Saint Lucie, 24 FALR 4518 (AHCA 2002); 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). Therefore, to the extent that the ALJ in this case argued that there should be a different standard of proof for conditional licensure cases, the exception to Paragraphs 36 and 37 is granted and both Paragraph 36 and Paragraph 37 of the Recommended Order, along with Footnote 1, are stricken in their entirety.

FINDINGS OF FACT

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

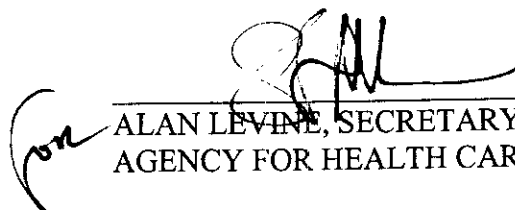
CONCLUSIONS OF LAW

The Agency adopts the conclusions of law set forth in the Recommended Order, except where noted supra.

IT IS THEREFORE ADJUDGED THAT:

Respondent's licensure status for the time period of October 29, 2004 to December 7, 2004 shall be changed from "conditional" to "standard"; the Amended Administrative Complaint issued in this case is dismissed; and this case is now closed.

DONE and ORDERED this 12 day of August, 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 12 day of August, 2005.



RICHARD J. SHOOP, Agency Clerk
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