

STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

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STATE OF FLORIDA, AGENCY FOR
HEALTH CARE ADMINISTRATION,

Petitioner,

DOAH CASE NO. 05-3574
AHCA NO. 2005006916
RENDITION NO.

vs.

FIRST CARE ASSISTED LIVING
SERVICES d/b/a FIRST CARE ASSISTED
LIVING SERVICES, INC.,

Respondent.

FILED
2006 MAY 18 11:30
DIVISION OF HEAVY
ADMINISTRATIVE
HEARINGS

FINAL ORDER

This cause was referred to the Division of Administrative Hearings where the assigned Administrative Law Judge (ALJ), Michael M. Parrish, conducted a formal administrative hearing. At issue in this case is whether the Respondent committed the violations alleged in the Administrative Complaint, and, if so, what sanctions, if any, should be imposed. The Recommended Order of February 28, 2006, is attached to this Final Order and incorporated herein by reference, except where noted infra.

RULING ON EXCEPTIONS

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

The Petitioner took exception to Paragraph 10 of the Recommended Order, arguing that the ALJ erred in finding that “[o]n that date there was a written weight record for Resident A.L., but for reasons not explained in the record on this case, Mr. Martin did not see the record that day.” According to the Petitioner, that finding was not based on competent substantial evidence,

because the weight record did not exist on that date and could therefore not be shown to him. There is competent substantial evidence to support the existence of a written weight record for Resident A.L. See Petitioner's Exhibit 3. Further, the parties stipulated that "[t]he records provided by Respondent through discovery and those copied by the Respondent at the time of the survey are authentic records that are true and accurate." See Joint Pre-hearing Stipulation at Page 4. The ALJ noted that, in making his findings, he accepted the assertions of fact made in the parties' Joint Pre-Hearing Stipulation as true and accurate. See Endnote 2 of the Recommended Order. In doing so, the ALJ assumed, as the parties stipulated, that the written weight record for Resident A.L. was true and accurate. In making this assumption, the ALJ correctly found, because it was true and accurate, it must have been in existence on the date of the November 29, 2004 survey, since it contained an entry that pre-dated the November 29, 2004 survey. See Petitioner's Exhibit 3. Thus, the Agency cannot reject that portion of the ALJ's finding. See § 120.57(1)(I), Fla. Stat.; 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"). However, there is no competent substantial evidence to support the ALJ's finding that "for reasons not explained in the record on this case, Mr. Martin did not see the record that day." Rather, the record evidence shows that Mr. Martin asked the Respondent to show him that record, but the Respondent did not provide that record to Mr. Martin in response to his request. See Transcript, Page 48. Therefore, the Petitioner's exception to Paragraph 10 of the Recommended Order is granted in part, and Paragraph 10 of the Recommended Order is changed to state:

10. During the course of the survey on November 29, 2004, Mr. Martin reviewed the weight records at the Respondent's

facility. He did not see any weight records for Resident A.L. On that date there was a written weight record for Resident A.L., but the Respondent did not produce the weight record to Mr. Martin on that day. If there had been a written weight record for Resident A.L. in the resident's file on November 29, 2004, Mr. Martin would not have cited the Respondent's facility for insufficient weight records.

The Petitioner took exception to Paragraph 11 of the Recommended Order, arguing the ALJ's finding that "[t]here is no evidence that the quality of care of any resident was diminished or compromised by reason of the manner in which the weight records were prepared and kept." In support of this argument Petitioner points to the record testimony of Mr. Martin wherein he suggested that the Respondent's record keeping could be a potential threat to the physical health of any of the residents. See Transcript, Page 50. However, a "potential threat" is not the same as a resident's quality of care being "diminished or compromised." There was no record evidence that the quality of care of any resident of Respondent's facility was diminished or compromised by the manner in which the weight records were prepared and kept. The ALJ's finding was a reasonable inference based on the record evidence. Therefore, Petitioner's exception to Paragraph 11 of the Recommended Order is denied.

The Petitioner took exception to Paragraph 12 of the Recommended Order, arguing the finding was not based on competent substantial evidence. Petitioner argued that, contrary to the ALJ's finding, the health assessment for Patient A.L. was not in existence at the time of the November 29, 2004 survey. Again, the parties stipulated that "[t]he records provided by Respondent through discovery and those copied by the Respondent at the time of the survey are authentic records that are true and accurate." See Joint Pre-hearing Stipulation at Page 4. The ALJ noted that, in making his findings, he accepted the assertions of fact made in the parties' Joint Pre-Hearing Stipulation as true and accurate. See Endnote 2 of the Recommended Order.

In doing so, the ALJ assumed, as the parties stipulated, that the health assessment for Resident A.L. was true and accurate. In making this assumption, the ALJ correctly found, because it was true and accurate, it must have been in existence on the date of the November 29, 2004 survey, since the document pre-dated the November 29, 2004 survey. See Petitioner's Exhibit 4. Thus, the Agency cannot reject that portion of the ALJ's finding. See § 120.57(1)(I), Fla. Stat.; 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"). In regards to the ALJ's finding that "for reasons not explained on the record on this case that document could not be located during the course of the November 29, 2004 survey", there was competent substantial evidence to support that finding as well. See Transcript, Pages 51-54. Therefore, the Petitioner's exception to Paragraph 12 of the Recommended Order is denied.

The Petitioner took exception to Paragraph 20 of the Recommended Order, arguing the ALJ erred in concluding that "[t]here is no evidence in this case that '[t]here were new residents not listed in the log and discharged residents not properly listed as discharge[d].' Accordingly, the factual basis for Count I has not been proven and Count I should be dismissed." The Petitioner argued the ALJ took an extremely narrow view of the Administrative Complaint that ~~each and every sentence therein must be proven to prove a deficiency.~~ Rule 58A-5.024(1)(b), Florida Administrative Code, requires a facility to maintain

(b) An up-to-date admission and discharge log listing the names of all residents and each resident's:

1. Date of admission, the place from which the resident was admitted, and if applicable, a notation the resident was admitted with a stage 2 pressure sore; and
2. Date of discharge, the reason for discharge, and the identification of the facility to which the resident is discharged or home address, or if the person is deceased, the date of death.

Readmission of a resident to the facility after discharge requires a new entry. Discharge of a resident is not required if the facility is holding a bed for a resident who is out of the facility but intends to return pursuant to Rule 58A-5.025, F.A.C.

A review of the rule indicates that there is more than one way that the rule could be violated. The Petitioner only alleged one particular way in which the Respondent violated the rule, and there was no competent substantial evidence to support the Petitioner's allegation. As the ALJ noted in Endnote 4 of the Recommended Order, the record evidence indicated other deficiencies in the Respondent's Admission and Discharge Log, but the Petitioner did not allege these deficiencies in the Administrative Complaint. "Predicating disciplinary action against a licensee on conduct never alleged in an administrative complaint or some comparable pleading violates the Administrative Procedure Act. To countenance such a procedure would render nugatory the right to a formal administrative proceeding to contest the allegations of an administrative complaint." Cottrill v. Department of Insurance, 685 So.2d 1371 (Fla. 1st DCA 1996). Therefore, Petitioner's exception to Paragraph 20 of the Recommended Order is denied.

The Petitioner took exception to Paragraph 21 of the Recommended Order, arguing the ALJ erred in concluding that the Agency failed to prove Count II of the Administrative Complaint. In the Administrative Complaint, the Agency alleged the Respondent violated Rule 58A-5.024(3)(f), Florida Administrative Code, in that a records review by an Agency surveyor revealed that Resident #5 did not have semi-annual weight recorded in the resident's file. Rule 58A-5.024(3)(f), Florida Administrative Code states that resident records shall be maintained on the premises and include "[a] weight record which is initiated on admission. Information may be taken from the resident's health assessment. Residents receiving assistance with the activities of daily living shall have their weight recorded semi-annually." The record evidence revealed that there were no weight records for Resident A.L. in the resident's file during the November 29,

2004 Agency survey and the May 24, 2005 survey. See Transcript, Pages 47-48; and Petitioner's Exhibit 6. However, the record evidence did indicate the weight records existed and that Resident #5's weight was recorded on a semi-annual basis. Thus, the ALJ was correct in concluding that the Agency failed to prove the violation alleged in Count II of the Administrative Complaint. As for Petitioner's arguments about the weights of other residents not being recorded upon admission, that issue was not alleged in the Administrative Complaint and cannot be a basis for finding that Respondent violated Rule 58A-5.024(3)(f), Florida Administrative Code. See the ruling on Petitioner's exception to Paragraph 20 of the Recommended Order supra. Therefore, Petitioner's exception to Paragraph 21 of the Recommended Order is denied.

The Petitioner took exception to Paragraph 22 of the Recommended Order, arguing that, contrary to the ALJ's conclusion, the Agency did prove the allegations in Count III of the Administrative Complaint. In Count III of the Administrative Complaint, the Agency alleged the Respondent violated Rule 58A-5.0181(2)(a), Florida Administrative Code, by not having completed health assessments for Residents #2, #3 and #4. During the May 24, 2005 survey, the Agency did not find health assessments for Residents #2, #3 and #4. See Transcript, Page 56; and Petitioner's Exhibit 6. However, the Agency could not identify who Resident #4 was. See Transcript, Page 62. Further, the health assessments for Residents #3 and #4 as identified on the ~~Agency's Resident/Participant Sample Roster (See Petitioner's Exhibit 6 at Page 65)~~ were in existence at the time of the May 24, 2005 survey. See Petitioner's Exhibit 4. There was no record evidence concerning the presence or absence of Resident #2's health assessment. Therefore, the ALJ properly concluded that the Petitioner did not prove Count III of the Administrative Complaint. Therefore, the Petitioner's exception to Paragraph 22 of the Recommended Order is denied.

FINDINGS OF FACT

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


CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing, the Administrative Complaint is dismissed and this case is now closed.

DONE and ORDERED this 15 day of May, 2006, 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 17th day of May, 2006.



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