STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE ADMINISTRATION,	)	
Petitioner,	)	
vs.	)	Case No. 05-3574
FIRST CARE ASSISTED LIVING SERVICES, d/b/a FIRST CARE ASSISTED LIVING SERVICES, INC.,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes,[1] on December 12, 2005, by video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida, before Administrative Law Judge Michael M. Parrish of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Nelson E. Rodney, Esquire
Agency for Health Care Administration
8355 Northwest 53rd Street, 1st Floor
Miami, Florida 33166

For Respondent: Richard J. Geisert, Esquire
2423 Hollywood Boulevard, Suite A
Hollywood, Florida 33020

STATEMENT OF THE ISSUE

Whether Respondent committed the violations alleged in the Administrative Complaint, and, if so, what sanctions, if any, should be imposed.

PRELIMINARY STATEMENT

In or around May of 2003, the Agency for Health Care Administration (Agency), filed a three-count Administrative Complaint alleging that Respondent had committed three violations deemed by the Agency to constitute Class III deficiencies. The Administrative Complaint contained the following Claim for Relief:

> WHEREFORE, the Agency requests the Court to order the following relief:
>
> 1. Enter a judgment in favor of the Agency for Health Care Administration against First Care Assisted Living Services, Inc.[,] on Counts I, II, and III.
>
> 2. Assess an administrative fine of $1,500.00 against First Care Assisted Living Services, Inc.[,] on Counts I, II, and III for the violations cited above.
>
> 3. Assess costs related to the investigation and prosecution of this matter, if the Court finds costs applicable.
>
> 4. Grant such other relief as the Court deems is just and proper.

By petition filed by its attorney, Respondent timely requested an evidentiary hearing on the charges asserted in the Administrative Complaint. In due course, the matter was

referred to DOAH for the assignment of an Administrative Law Judge to conduct the hearing Respondent had requested.

At the final hearing in this case each party presented the testimony of one witness. The Agency also offered six exhibits (Agency Exhibits 2 through 7), all of which were received in evidence. The Respondent did not offer any exhibits. At the conclusion of the hearing, consistent with the requests of the parties, the parties were allowed until January 17, 2006, within which to file their proposed recommended orders. The transcript of the hearing was filed with DOAH on January 3, 2006. Thereafter, both parties filed timely Proposed Recommended Orders containing proposed findings of fact and conclusions of law. The parties' proposals have been carefully considered during the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the evidence adduced at the final hearing and the record as a whole, including the factual stipulations contained in the parties' Joint Prehearing Stipulation,[2] the following findings of fact are made:

Admitted facts

1. The Respondent operates a six-bed assisted living facility located at 12085 West Dixie Highway, Miami, Florida 33161, and is licensed by the State of Florida under Chapter 400, Part III.

2. The Agency conducted surveys at First Care on November 29, 2004, and on May 24, 2005, and identified three alleged repeat deficiencies that were described as three Class III deficiencies. An Administrative Complaint was filed on August 15, 2005.

3. The deficiencies alleged in the Administrative Complaint are: (1) that the facility failed to maintain an accurate record of admissions and discharges; (2) failed to have weight recorded for some residents; and (3) failed to properly complete the health assessment for some residents.

4. Because the deficiencies alleged in the Administrative Complaint are alleged to be Class III deficiencies, the Agency is seeking to impose a fine of $500.00 for each deficiency, for a total fine of $1,500.00.

5. The Respondent timely requested an evidentiary hearing pursuant to Section 120.57(1), Florida Statutes.

6. The records provided by the Respondent through discovery and those copied by the Respondent at the time of the survey are authentic records that are true and correct.

Additional findings about Count I

7. Alfonso Martin, a Health Care Evaluator for the Agency, conducted a survey inspection of the Respondent's facility on November 29, 2004. There had been prior inspections of the Respondent's facility. None of the prior inspections had

revealed any violations that resulted in any Agency action against the facility.

8. The Respondent's admission and discharge log ("A&D log") shows that Resident R.M. was taken from the Respondent's facility by his guardian to live with his fiancée. The A&D log shows that Resident D.K. left the Respondent's facility and went to the local VA Hospital. The A&D log shows that Resident P.H. went first to the VA Medical Center and then to North Shore Hospital. The A&D log does not contain any information as to where Resident G.D. went, because that resident left the Respondent's facility in a taxi without telling anyone where he was going. The A&D log shows that Resident J.W. was discharged or transferred "to his family." Actually, Resident J.W. did not have any family, but he had friends who treated him like family. Those friends had brought Resident J.W. to the Respondent's facility and those same friends had arranged for J.W. to be taken to a hospice facility by Vitas Medical Center. The A&D log does not contain any information as to where Resident J.N. went, because, after receiving an eviction notice, that resident left the Respondent's facility in a taxi without telling anyone where he was going.

9. Mr. Martin conducted another survey inspection of the Respondent's facility on May 24, 2005. During this inspection Mr. Martin noted that, with regard to Resident R.M., the A&D log

showed "taken by guardian" as the place to which R.M. was discharged. The A&D log also showed "other facility" as the place to which Resident J.B. was discharged. Resident J.B. was taken from the Respondent's facility by a State Ombudsman. The State Ombudsman did not tell anyone at the Respondent's facility where J.B. was being taken. At all times, the Administrator of the Respondent's facility did the best she could to maintain appropriate records with the sometimes incomplete information she received from the Residents.

Findings about Count II

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 for reasons not explained on the record in this case, Mr. Martin did not see the record that day. If Mr. Martin had seen the weight record for Resident A.L. on November 29, 2004, he would not have cited the Respondent's facility for insufficient weight records.

11. During the course of the survey on May 24, 2005, Mr. Martin again reviewed the weight records at the Respondent's facility. The records for Resident J.B. show he was admitted on January 13, 2005, and that his weight was recorded on February 21, 2005. The records for Resident P.H. show he was

admitted on November 1, 2004, but his weight was not recorded until February 21, 2005. The records for Resident R.H. show that he was admitted on May 1, 2005, but his weight was not recorded until June 8, 2005. There 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.

Findings about Count III

12. During the course of the survey on November 29, 2004, Mr. Martin reviewed Health Assessments for residents at the Respondent's facility. He did not see any Health Assessments for Residents J.W. or A.L. On that date there was a written Health Assessment document for Resident A.L., but for reasons not explained on the record in this case that document could not be located during the course of the November 29, 2004, survey.

13. During the course of the survey on May 24, 2005, Mr. Martin again looked at the Health Assessments. The survey report states that Health Assessments for Residents 2, 3, and 4 were not completed. Mr. Martin testified about the Health Assessment documentation of Resident R.H. In the survey report for the May 24, 2005, survey, Resident R.H. was identified as being either Resident 5 or Resident 11. Health Assessments are not prepared by employees of the Respondent facility. They are prepared by third parties; usually medical doctors or health

care professionals working under the supervision of medical doctors, such as physician assistants or advanced registered nurse practitioners.

CONCLUSIONS OF LAW

14. DOAH has jurisdiction over the subject matter of this proceeding and of the parties hereto pursuant to Chapter 120, Florida Statutes.

15. Before imposing any sanction on a noncompliant licensee, the Agency must give the licensee reasonable written notice of the charges and an adequate opportunity to request an administrative hearing pursuant to Chapter 120, Florida Statutes. See Florida League of Cities v. Administration Commission, 586 So. 2d 397, 413 (Fla. 1st DCA 1991)("Until proceedings are had satisfying [S]ection 120.57, or an opportunity for them is clearly offered and waived, there can be no agency action affecting the substantial interests of a person.").

16. Where "there is a disputed issue of material fact which formed the basis for the proposed final action [to impose the sanction]," the licensee is entitled to an evidentiary hearing held in accordance with Sections 120.569 and 120.57(1), Florida Statutes. Florida Sugar Cane League v. South Florida Water Management District, 617 So. 2d 1065, 1066 (Fla. 4th DCA 1993).

17. At the hearing, the Agency bears the burden of proving that the alleged deficiencies occurred and that they were of such nature and scope to warrant the sanction(s) the Agency proposes to take. When the Agency seeks to impose an administrative fine, its proof must be clear and convincing. See Department of Banking and Finance, Division of Securities and Investor Protection v Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996)("[A]n administrative fine deprives the person fined of substantial rights in property. Administrative fines . . . are generally punitive in nature. . . . Because the imposition of administrative fines . . . [is] penal in nature and implicate[s] significant property rights, the extension of the clear and convincing evidence standard to justify the imposition of such a fine is warranted."). Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). It is an "intermediate standard." Id. For proof to be considered "'clear and convincing' . . . the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or

conviction, without hesitancy, as to the truth of the allegations sought to be established." In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). "Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Electric Corporation, Inc. v. Shuler Bros., Inc., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

18. In determining whether the Agency has met its burden of proof, it is necessary to evaluate the Agency's evidentiary presentation in light of the specific allegations made in the charging instrument. Due process prohibits an agency from taking penal action against a licensee based on matters not specifically alleged in the charging instrument, unless those matters have been tried by consent. See Shore Village Property Owners' Association, Inc. v. Department of Environmental Protection, 824 So. 2d 208, 210 (Fla. 4th DCA 2002); Hamilton v. Department of Business and Professional Regulation, 764 So. 2d 778 (Fla. 1st DCA 2000); Lusskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999); Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); and Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

19. Section 400.419, Florida Statutes, includes the following language:

> 1) The agency shall impose an administrative fine in the manner provided in chapter 120 for any of the actions or violations as set forth within this section by an assisted living facility, for the actions of any person subject to level 2 background screening under s. 400.4174, for the actions of any facility employee, or for an intentional or negligent act seriously affecting the health, safety, or welfare of a resident of the facility.
>
> (2) Each violation of this part and adopted rules shall be classified according to the nature of the violation and the gravity of its probable effect on facility residents. The agency shall indicate the classification on the written notice of the violation as follows:
>
> * * *
>
> (c) Class "III" violations are those conditions or occurrences related to the operation and maintenance of a facility or to the personal care of residents which the agency determines indirectly or potentially threaten the physical or emotional health, safety, or security of facility residents, other than class I or class II violations. The agency shall impose an administrative fine for a cited class III violation in an amount not less than $500 and not exceeding $1,000 for each violation. A citation for a class III violation must specify the time within which the violation is required to be corrected. If a class III violation is corrected within the time specified, no fine may be imposed, unless it is a repeated offense.
>
> (d) Class "IV" violations are those conditions or occurrences related to the operation and maintenance of a building or to

required reports, forms, or documents that do not have the potential of negatively affecting residents. These violations are of a type that the agency determines do not threaten the health, safety, or security of residents of the facility. The agency shall impose an administrative fine for a cited class IV violation in an amount not less than $100 and not exceeding $200 for each violation. A citation for a class IV violation must specify the time within which the violation is required to be corrected. If a class IV violation is corrected within the time specified, no fine shall be imposed. Any class IV violation that is corrected during the time an agency survey is being conducted will be identified as an agency finding and not as a violation.

(3) In determining if a penalty is to be imposed and in fixing the amount of the fine, the agency shall consider the following factors:

(a) The gravity of the violation, including the probability that death or serious physical or emotional harm to a resident will result or has resulted, the severity of the action or potential harm, and the extent to which the provisions of the applicable laws or rules were violated.

(b) Actions taken by the owner or administrator to correct violations.

(c) Any previous violations.

(d) The financial benefit to the facility of committing or continuing the violation.

(e) The licensed capacity of the facility.

* * *

(11) The agency, as an alternative to or in conjunction with an administrative action against a facility for violations of this part and adopted rules, shall make a reasonable attempt to discuss each violation and recommended corrective action with the owner or administrator of the facility, prior to written notification. The agency, instead

> of fixing a period within which the facility shall enter into compliance with standards, may request a plan of corrective action from the facility which demonstrates a good faith effort to remedy each violation by a specific date, subject to the approval of the agency.

20. The essence of the allegations that comprise Count I of the Administrative Complaint is that, during the course of the facility survey on May 24, 2005, "the admission and discharge log was not accurate. There were new residents not listed in the log and discharged residents not properly listed as discharge[d]." It was also alleged that this was a repeat deficiency from the survey on November 29, 2004, without allegation of any specific details of the November 29, 2004, survey.[3] There 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 proved and Count I should be dismissed.[4]

21. The essence of the allegations that comprise Count II of the Administrative Complaint is that, during the course of the facility survey on May 24, 2005, "the resident's file for resident #5 lacked semi-annual weight recorded," and the administrator was unaware of this short-coming in the file of Resident number 5. It was also alleged that this was a repeat deficiency from a survey on November 29, 2004, without

allegation of any specific details of the November 29, 2004, survey. The evidence in this case establishes that semi-annual weight was recorded in the file of Resident number 5. Accordingly, the factual basis for Count II has not been proved and Count II should be dismissed.

22. The essence of the allegations that comprise Count III of the Administrative Complaint is that, during the course of the facility survey on May 24, 2005, "3 of 5 Health Assessments lacked a date of completion," that "for resident[s] #2, #3, and #4, the health assessments were not completed," and that the administrator "was aware that the health assessments were not completed." It was also alleged that this was a repeat deficiency from a survey on November 29, 2004, without allegation of any specific details of the November 29, 2004, survey. The gravamen of the charge in Count III concerns the status of the health assessment documents for the residents identified as Residents #2, #3, and #4. There is no evidence about the status of the health assessment documents for the residents identified as Residents #2, #3, and #4. Accordingly, the factual basis for Count III has not been proved and Count III should be dismissed.

RECOMMENDATION

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

RECOMMENDED that the Agency issue a final order dismissing the instant Administrative Complaint in its entirety.

DONE AND ENTERED this 28th day of February, 2006, in Tallahassee, Leon County, Florida.

MICHAEL M. PARRISH
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of February, 2006.

ENDNOTES

1/ Unless otherwise indicated, all references to the Florida Statutes are to the current version of the Florida Statutes. The relevant portions of the Florida Statutes were the same at the time of the events in this case as they are now.

2/ The undersigned has accepted these assertions of fact made in the parties' Joint Prehearing Stipulation as true and accurate. See Gunn Plumbing, Inc. v. The Dania Bank, 252 So. 2d 1, 4 (Fla. 1971)("A stipulation properly entered into and relating to a matter upon which it is appropriate to stipulate is binding upon the parties and the Court."); Johnson v. Johnson, 663 So. 2d 663, 665 (Fla. 2d DCA 1995)("[T]o foster the legal policy of encouraging stipulations to minimize litigation and expedite resolution of disputes, the law provides that '(s)uch stipulations should be enforced if entered into with good faith and not obtained by fraud, misrepresentation, or

mistake, and not against public policy.'"); EGYB, Inc. v. First Union National Bank of Florida, 630 So. 2d 1216, 1217 (Fla. 5th DCA 1994)("Unless grounds for recission or withdrawal are shown, the trial court is bound to strictly enforce the agreement between the parties."); and Robertson v. Robertson, 106 So. 2d 590, 593 (Fla. 2d DCA 1958)("It is undisputed that a court must accept as true facts which are undisputed . . . .").

3/ In view of the disposition of Counts I, II, and III on other grounds, it is not necessary to discuss whether the allegations regarding repeat deficiencies without mention of specific prior facts sufficiently puts the Respondent on notice of what must be defended against.

4/ There was evidence at the hearing to the effect that there were other deficiencies in the Respondent's A&D log, but those other deficiencies were not charged in the Administrative Complaint. Having not been charged, any such other deficiencies cannot be the basis for imposing any penalty on the Respondent. The record in this case also contains some evidence about other deficiencies similar to the ones charged in Counts II and III which were not charged in the Administrative Complaint. No uncharged deficiency can be the basis for imposing a penalty on the Respondent.

COPIES FURNISHED:

Nelson Rodney, Esquire
Agency for Health Care Administration
8355 Northwest 53rd Street
Miami, Florida 33166

Richard J. Geisert, Esquire
2423 Hollywood Boulevard, Suite A
Hollywood, Florida 33020

Richard Shoop, Agency Clerk
Agency for Health Care Administration
2727 Mahan Drive, Mail Station 3
Tallahassee, Florida 32308

Christa Calamas, General Counsel
Agency for Health Care Administration
Fort Knox Building, Suite 3431
2727 Mahan Drive
Tallahassee, Florida 32308

Alan Levine, Secretary
Agency for Health Care Administration
Fort Knox Building, Suite 3116
2727 Mahan Drive
Tallahassee, Florida 32308

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.