

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE)
ADMINISTRATION,)
)
Petitioner,)
)
vs.) Case No. 08-4582
)
SANDALWOOD NURSING CENTER,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held in this case via video teleconference between sites in Daytona Beach, and Tallahassee, Florida, on May 6, 2009, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Shaddrick Haston, Esquire
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Tallahassee, Florida 32308

For Respondent: John E. Terrel, Esquire
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STATEMENT OF THE ISSUES

Whether Respondent nursing home has committed a violation of Section 400.102 (1), Florida Statutes (2007), by an

intentional or negligent act materially affecting the health or safety of nursing home residents, so that Petitioner may impose a \$15,000, administrative fine, a "survey fee" of \$6,000, for surveys every six months for two years, and a conditional license for the period of April 24, 2008, through and including May 5, 2008, based on a cited Class I widespread deficiency.

PRELIMINARY STATEMENT

By an Administrative Complaint, dated July 28, 2008, Petitioner sought the aforementioned sanctions. Respondent timely requested a disputed-fact hearing, and the cause was referred to the Division of Administrative Hearings (DOAH) on or about September 18, 2008.

DOAH's file reflects all pleadings, notices, and orders intervening before final hearing on May 6, 2009, including but not limited to, an Amended Administrative Complaint filed October 24, 2008. Petitioner amended the Administrative Complaint to allege that Respondent had also violated Florida Administrative Code Rule 59A-4.1288, encompassing Federal Regulation 42 C.F.R. Section 483.70.

At hearing, Petitioner presented the oral testimony of Don Gray and had Exhibits P-2, P-3, and P-5, admitted in evidence. Respondent presented the oral testimony of Anthony Mongelluzzo, Lewis Hubbard, Richard Feldman, and Linda Walker. Respondent had Exhibits R-1, R-2, R-3, R-4, R-5, R-6, R-7, R-8, R-10, R-11,

R-12 (attached to Exhibit R-15), R-13, R-14, R-15, and P-6, admitted in evidence. Exhibit R-15 is the after-filed deposition of Nancy Marsh, complete with attachments.

A one-volume Transcript was filed on May 21, 2009.

The parties timely-filed their Proposed Recommended Orders on June 15, 2009.

FINDINGS OF FACT

1. Petitioner Agency for Health Care Administration (AHCA) is the State agency responsible for licensing and evaluating nursing homes under Chapter 400, Part II, Florida Statutes, and Section 408.802(13), Florida Statutes.

2. Respondent Sandalwood is a skilled nursing facility located in Daytona Beach, Florida. It is one of roughly 15 nursing facilities managed by Sterling Healthcare.

3. The dispute in this case arose from a survey conducted by AHCA at the Sandalwood facility on April 23, 2008.

4. Effective October 23, 2006, the Code of Federal Regulations, 42 C.F.R. Section 483.70(7), was amended to require installation of battery-operated single station smoke alarms, in accordance with the manufacturer's recommendation, in every nursing home resident's sleeping room and in common areas of all nursing homes, unless the facility were "fully sprinklered" or if the facility had system-based smoke detectors in residents' rooms and common areas. "Fully sprinklered" means sprinklers

installed throughout the facility, including in each resident's room.

5. On November 1, 2006, the United States Center for Medicare and Medicaid Services (CMS) issued a letter to State Survey Agency Directors, including AHCA, advising them of this new requirement. There was a phase-in period for this regulation based on the cost of implementing it.

6. It is AHCA's general practice to issue letters to nursing home facilities advising them of changes to laws that affect them. In this situation, AHCA issued a letter to nursing homes requiring that they become fully-sprinklered by December 31, 2010, but AHCA did not send out a letter advising nursing homes, including Respondent, that at least until the nursing home became fully sprinklered, smoke detectors were required in residents' rooms. There also may not have been any other readily accessible private publication notifying nursing homes in the relevant time frame.^{1/}

7. A telephone conference occurred on April 22, 2008, between Polly Weaver, AHCA's Bureau Chief for Field Operations; Skip Gregory, Chief Fire Marshal for AHCA; and all of AHCA's Field Office Managers, including Nancy Marsh, the Field Office Manager for AHCA's Area Four, which comprises seven counties, including Volusia, where Respondent is located.

8. During that April 22, 2008, telephone conference, a decision was made to survey all nursing home facilities on a list of 26 nursing homes (out of a total of 670 such homes in the State) that were not yet fully sprinklered. The impetus for the telephone conference had been a fire at a nursing home outside Area Four and unrelated to Respondent Sandalwood. Ms. Marsh may not even have been aware of the smoke detector issue until shortly before April 22, 2008.

9. After the April 22, 2008, conference, Ms. Marsh telephoned Lewis Hubbard, the licensed nursing home administrator of Respondent Sandalwood. Ms. Marsh inquired as to whether Sandalwood had smoke detectors in each resident's room, and Mr. Hubbard candidly admitted there were not. Ms. Marsh did not indicate any urgency concerning her inquiry, did not mention anything about issuing a complaint against Sandalwood, and did not alert Mr. Hubbard that an emergency survey was about to occur.

10. Mr. Hubbard has been Respondent's administrator since March 2006. He first became licensed in 2004, and is an expert in nursing home administration.

11. On April 23, 2008, Ms. Marsh sent Don Gray, an AHCA Fire Protection Specialist from AHCA's Area Seven, to Respondent Sandalwood, which is in Area Four, to do a "pinpoint" survey to see if the facility had smoke detectors in residents' rooms.

Mr. Gray had never inspected Sandalwood. Nick Linardi is the AHCA surveyor who normally inspects Sandalwood.

12. On April 23, 2008, Mr. Gray inspected Sandalwood for a "fully-sprinklered" system and checked for smoke detectors in 30 residents' sleeping rooms. Informed that there were no smoke detectors in any of the residents' sleeping rooms, Mr. Gray did not inspect the remaining sleeping rooms.

13. At his request, Sandalwood provided Mr. Gray with a resident census and condition report that gave the surveyor a synopsis of the type of residents currently at the facility on the day of his inspection: 14 Medicare patients and 53 Medicaid patients, which meant the facility was subject to CMS regulations. At the time of the survey, seven patients were bedfast and would require special assistance from staff if an emergency situation occurred, such as a fire. Mr. Gray assessed a risk of harm that could possibly befall at least 53 Sandalwood residents who would need help in moving to a secure area if a fire broke out.

14. Respondent Sandalwood is a nursing home built in 1962, and composed basically of concrete. Its ceilings and the walls between residents' rooms are made of concrete. It is in the shape of a big "capital H". There are two nurses' stations on each wing, so that staff can view all the residents' rooms.

15. On the day of Mr. Gray's pinpoint survey, Respondent Sandalwood had six designated fire zones. There also were smoke detectors placed about every 15 feet throughout the hallways. This placed smoke detectors in close proximity to the door of each resident's room. Smoke detectors were also located in all the common areas (dining area, receptionist desk, etc.) Sandalwood utilizes a Def-Con fire detection system, so that if any smoke detector sounds, the alert goes immediately to the nearest nurses' station and simultaneously to the local fire department. This type of system is called a "core" smoke detection system.

16. On April 23, 2008, Respondent Sandalwood also had sprinklers located in the utility and linen closets.

17. On April 23, 2008, Respondent Sandalwood had plans in place to have the facility "fully-sprinklered" by the established deadline of December 31, 2010. That deadline has since been extended by CMS/AHCA to December 2013.

18. Mr. Gray normally completes handwritten notes during, or immediately after, his survey or whenever he "gets time." His notes for this case reflect an inspection for battery-operated smoke detectors in residents' rooms and a check for sprinkler heads.

19. A conference call was held later on April 23, 2008, among Ms. Weaver, Mr. Gregory, Jim Tinkin (AHCA Administrator

for Safety and Life Safety for Tallahassee), Brian Smith, Molly McKistry (sic), Bernard Hudson, Joel Libby, a Paul (last name unknown but as recalled by Mr. Gray) and Nick Linardi, the previously unavailable AHCA surveyor. They discussed Mr. Gray's findings that the facility was not "fully-sprinklered" and that there were no battery-operated smoke detectors in residents' rooms. Based on Mr. Gray's notes, a consensus was reached to charge the lack of sprinklers and lack of smoke detectors as a "K023 & F454, violation."

20. During the foregoing conference call, Mr. Gray was the first one to recommend a Class I violation, claiming that there was an issue of immediate jeopardy. However, this opinion, as he recollected it at final hearing, was based on his assessment that Sandalwood's situation "could possibly, potentially cause harm to a client or resident," or "could be fatal . . . harmful."

21. Mr. Gray gave examples of fires which had occurred in other facilities in his home Region in the prior month, none of which fires had started in residents' rooms, and one of which had occurred outside on a smoking patio to a resident in a wheelchair. It is difficult to see how smoke detectors in sleeping rooms would have prevented the foregoing situations. He was additionally concerned with arson attempts, sometimes by residents.

22. According to Mr. Gray's handwritten notes, before leaving the facility on April 23, 2008, he advised Respondent's administrator, Mr. Hubbard, that Mr. Hubbard would have to correct the smoke detector issue in the "next few days."

23. Mr. Hubbard wanted clarification concerning the codes regarding these issues. Apparently, Mr. Gray called the administrator on April 24, 2008, to confirm the need for smoke detectors in all the residents' rooms.

24. Early on April 24, 2008, Mr. Hubbard began searching nearby stores to locate smoke detectors. He purchased 10 smoke detectors meeting the Federal requirements. Identifying the facility's "high risk" rooms or rooms most susceptible to fire, Mr. Hubbard assisted in placing the smoke detectors in the rooms of residents who were smokers and residents who used oxygen, whether or not they were smokers.

25. Later on April 24, 2008, Linda Walker, another AHCA surveyor, appeared at Respondent facility. Ms. Walker is a Registered Nurse Specialist and does nursing surveys of nursing homes for AHCA.

26. If this had been a normal complaint survey or a periodic survey, Ms. Walker and Mr. Gray would have surveyed Sandalwood at the same time on the same date, and deferred to each other in their respective areas of control/expertise. In this instance, Ms. Walker's superiors had sent her to

Respondent's facility after Mr. Gray's survey, specifically to assess, from a nursing perspective, any danger to certain types of residents. Mr. Gray, in addition to being a Fire Specialist, is also a Licensed Practical Nurse, but he stated that he would defer to Ms. Walker on all nursing issues.

27. Among other things, Registered Nurse Walker was sent to the facility to check on the progress of the smoke detector installation and the status of resident smokers and those residents using oxygen. Ms. Walker did more than a "pinpoint" inspection involving just a few sprinkler heads, smoke detectors, and a patient census.

28. In this case, Registered Nurse Walker's survey amounted to a more thorough assessment of any jeopardy to the resident population in Respondent's facility than Mr. Gray's assessment.

29. Ms. Walker determined that when a resident is admitted to Sandalwood, she/he is assessed on whether she/he is, or is not, a smoker. An assessment form is filled out to determine if the resident is safe to smoke on his or her own. A care plan is also established concerning smoking for each resident who smokes.

30. To keep an ongoing assessment of each resident in regards to smoking, Sandalwood also utilizes quarterly assessments for each of their smokers.

31. Ms. Walker observed "No Smoking" signs on the doors of residents who used oxygen.

32. Ms. Walker also observed that the one smoker on the well-ventilated smoking porch was wearing a smoking apron. A smoking apron is a flame-resistant apron used for residents who may have difficulty holding a cigarette. It protects the designated resident if a cigarette, match, or lighter is dropped. Such a precaution would have eliminated one of Mr. Gray's examples of potential concern. (See Finding of Fact No. 21.) Ms. Walker also observed ashtrays and a fire extinguisher on the smoking porch.

33. Ms. Walker interviewed various residents concerning Sandalwood's smoking policy and procedures, and all reflected an understanding of the policies and procedures. Two residents were identified as those with oxygen orders. One of these residents was interviewed and understood the need not to smoke around oxygen, even though she no longer used oxygen. The other resident could only smoke with supervision of staff.

34. One resident, who was observed by Ms. Walker, had been identified by the nursing staff as being unsafe to smoke when alone, needing supervision, and needing to wear a smoking apron. That resident's cigarettes and lighter were kept at the nursing station, except when actually in use. Ms. Walker noted that particular resident's file contained the resident's assessment

and care plan, and quarterly reviews of the resident's care plan.

35. Ms. Walker further noted that Respondent's smoking assessments and care plans were proper. She concluded that Respondent's quarterly assessments of smokers which are used by some, but not all, nursing homes, were complete for all smokers at Respondent's facility. There is evidence herein that the nursing home fire which started this chain of events (see Finding of Fact No. 8) did not have adequate care plans.

36. Respondent's staff was also interviewed by Ms. Walker. They expressed an understanding of the facility's smoking policy and procedures, including the rule that smokers could not smoke in their rooms.

37. During Ms. Walker's survey on April 24, 2008, Sandalwood's maintenance director and Mr. Hubbard were already placing smoke detectors in 10 residents' rooms. Mr. Hubbard had purchased as many of the appropriate smoke detectors as he could, and these detectors were being placed in the rooms of the nine residents who used oxygen and/or who smoked. After placing those nine smoke detectors, the tenth smoke detector was placed in a randomly selected room.

38. Ms. Walker completed a three-page handwritten note about her survey on April 24, 2008, and followed-up with a typed report of the same date.

39. Ms. Walker returned to Sandalwood on April 25, 2008. By that time, Mr. Hubbard had purchased enough smoke detectors for the remaining residents' rooms, and Ms. Walker determined that a compliant smoke detector had, in fact, been placed in every resident's room by April 25, 2008.

40. The smoke detectors had been placed out of reach of the residents and were affixed with heavy-duty "two-way" tape, mostly to ceilings, but occasionally to walls. It would be extremely difficult to remove the smoke detectors from the concrete walls.

41. Affixing the smoke detectors to the ceilings and walls arguably constituted a change to the physical facility.

42. On April 28, 2008, Mr. Hubbard prepared a "Plan of Correction," indicating that all smoke detectors had already been installed in all residents' rooms on April 25, 2008. He forwarded this "Plan of Correction" to Petitioner AHCA.

43. On May 5, 2008, AHCA sent Mr. Hubbard a 2567 survey form. He added his foregoing Plan of Correction (see, supra.) to this form, signed it, and sent it back to AHCA the same day. However, as noted previously, the corrections had already been made as of April 25, 2008, even though AHCA did not issue its survey form mandating the corrections until May 5, 2008.

44. According to Ms. Marsh, the single station battery-operated smoke detectors located in residents' rooms in nursing

homes only need to be checked annually by AHCA surveyors in order to comply with the applicable rules and regulations.

45. Ms. Marsh testified that in the future, surveyors would only check on a yearly basis to determine if nursing home facilities met the requirement concerning smoke detectors. Presumably, this would be to check on the timely replacement of batteries, because the smoke detector batteries last approximately one year. Mr. Hubbard testified that his Plan of Correction called for Sandalwood staff to check each battery monthly.

46. Anthony Mongelluzzo has been Daytona Beach's Fire Inspector for 20 years, 15 years of which have involved inspecting 150 nursing homes. He is an expert in Fire Safety Inspections. He has inspected the Sandalwood facility on an annual basis and is familiar with its physical plant.

47. Mr. Mongelluzzo had completed his most recent annual inspection of Respondent in March 2008, the month preceding the material time frame of AHCA's pinpoint survey.

48. Mr. Mongelluzzo's March 2008, inspection noted that there were only two corrections that Sandalwood needed to make. Both corrections involved an extension cord deficiency and the use of multi-plug power strips. Both issues were subsequently corrected, and Mr. Mongelluzzo sent a letter acknowledging that fact to Mr. Hubbard.

49. Mr. Mongelluzzo also had reviewed the Fire Safety Plan that Sandalwood had submitted to the City of Daytona Beach for the year 2008. As a result, he had issued an April 15, 2008, letter, approving Sandalwood's 2008 Fire Safety Plan. This approval occurred approximately nine days before AHCA targeted Sandalwood and sent in AHCA surveyors, Mr. Gray and Ms. Walker.

50. The Fire Safety Plan submitted by Sandalwood to the City of Daytona Beach sets forth the facility's procedures in the event of a fire, such as closing doors, evacuation of all occupants of the facility, and where the residents and staff are to rendezvous outside of the facility in order for there to be a meaningful headcount. It is specific, where Mr. Gray's assessment of evacuation situations was more general or an estimate. (See, supra.)

51. In issuing the City of Daytona Beach's approval letter for Sandalwood's Fire Safety Plan, Mr. Mongelluzzo did not imply that the facility was not required to follow federal laws. Mr. Mongelluzzo is not familiar with 42 C.F.R. Section 483.70. The City of Daytona Beach's Plan approval letter only approved Sandalwood's procedures, staff, and the staff's assigned responsibilities in case of a fire, in connection with the Life Safety Code, National Fire Protection Association (NFPA) 101, which standard is utilized by municipalities across the State of Florida and which standard has been adopted by the City of

Daytona Beach. The Life Safety Code NFPA-101 is the Code that Mr. Mongelluzzo relies upon when inspecting nursing home facilities.

52. The Life Safety Code NFPA-101, addresses construction, protection, and occupancy features necessary to minimize danger to life from the effects of fire, including smoke, heat, and toxic gases created by fire. The Life Safety Code also addresses features and systems, building services, operating features, maintenance activities, and other provisions in recognition of the fact that to achieve an acceptable degree of Life Safety depends on additional safeguards providing adequate facility egress, time for that egress, and protection for people exposed to a fire.

53. However, 42 C.F.R. Section 483.70(a), states that facilities must meet the applicable provisions in the 2000 Edition of the Life Safety Code of the National Fire Protection Association. Florida Administrative Code Rule 59A-4.130, also states that a licensee must comply with the Life Safety Code requirements and Building Code standards applicable at the time of departmental approval of the facility's Third-Stage construction documents. The Life Safety Code NFPA-101 does not require smoke detectors in residents' rooms when a facility has a core smoke detection system, like the one utilized by Sandalwood. (See Finding of Fact No. 15.)

54. Sandalwood also had been surveyed in standard rotation by Respondent AHCA on a regular basis over the years, the most recent survey having occurred on April 10, 2007, approximately a year before the survey in the instant case. AHCA issued a survey report thereafter which was signed by the Administrator, Mr. Hubbard, in May 2007.

55. AHCA's survey on April 10, 2007, had not identified as a deficiency the lack of smoke detectors in residents' rooms. There is no competent evidence that the AHCA surveyors at that time even looked for them, even though the CMS requirement therefor would have applied at that time.

56. Respondent AHCA also makes quarterly monitoring reports on nursing home facilities. These are confidential reports for the facility to use for purposes of correcting any issues identified by the monitor. The monitor has the same or better qualifications than a typical nursing home surveyor. Monitor reports contain a disclaimer that the report is not to be construed as evidence of compliance or noncompliance with applicable sections of Florida Statutes, the Florida Administrative Code, or the Code of Federal Regulations. However, the quarterly monitoring reports are designed to advise the facility of any perceived issue and to advise of any unusual, out of character, or problematic issues.

57. Sandalwood had received AHCA monitoring reports for May 17, 2007, October 15, 2007, January 22, 2008, and May 5, 2008. There was no mention of the need for smoke detectors in residents' rooms in any of the AHCA reports prior to the May 5, 2008, report, which post-dated the survey at issue herein. In the May 5, 2008, report, the notation was included under the heading "Safety Issues."

58. CMS compiles what is termed a "Special Focus Facility" list that identifies facilities that it believes need to be monitored closely. Sandalwood is not on this list.

59. Two unrelated facilities are on this list. AHCA has filed administrative complaints against each of those facilities. The allegations in those cases appear to be more severe than in the instant case.

60. Ms. Marsh completed a "Request for Sanctions" (RFS) form in which she recommended a Class I penalty for Sandalwood.

61. Section 120.53, Florida Statutes, requires that agencies compile a list of prior final orders in a subject matter index, so as to ensure uniformity and fairness in assessing penalties in cases before each respective Agency. The Subject Matter Index is supposed to be used as administrative precedent and should be made public.

62. Ms. Marsh did not know what a Subject Matter Index is, or rely on a Subject Matter Index in assessing the penalty in

this case. Instead, she relied on prior RFSs, which are not public documents. She testified that the Agency's recommendation for sanctions takes into account the class and severity of a deficiency which is established through Agency procedure, protocol, and guidelines. She described parameters related to Class I, Class II, and Class III, deficiencies, as set out in the Florida Statutes. From her viewpoint, Sandalwood either had two Class I deficiencies or a single Class I deficiency in a specified timeframe, when consideration is given to the prior history of the facility. In light of Sandalwood's excellent survey history, the foregoing viewpoint was not fully explained.

63. Despite AHCA's sudden cessation of prior notification of changes in the law, Ms. Marsh brooks no excuse for a facility administrator not knowing his facility must be in compliance with State laws. She considered Sandalwood's history of not having been previously cited for the absence of smoke detectors by an AHCA survey as of minimal importance.

CONCLUSIONS OF LAW

64. The Division of Administrative Hearings has jurisdiction of the parties and subject matter of this cause, pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2008).

65. In its Amended Administrative Complaint, AHCA alleged that Respondent violated Section 400.102(1), Florida Statutes (2007), by committing an intentional or negligent act materially affecting the health or safety of residents of the facility in such a way that Respondent failed to maintain construction, protection, and occupancy features necessary to minimize dangers to life from smoke, fumes, or panic, should a fire or similar emergency occur. AHCA further alleged that this violation is a widespread Class I deficiency. AHCA seeks to impose a fine of \$15,000, conditional licensure status from April 24, 2008, until May 5, 2008, requiring a six month survey cycle for a period of two years, and to assess a \$6,000 "survey fee." The prayer for relief further requests attorney's fees and costs.

66. Section 400.102 (1), Florida Statutes, provides:

400.102 Action by agency against licensee; grounds. - In addition to the grounds listed in part II of chapter 408, any of the following conditions shall be grounds for action by the agency against a licensee:

(1) An intentional or negligent act materially affecting the health or safety of residents of the facility;

67. Section 400.19, Florida Statutes, provides, in pertinent part, as follows:

(3) The agency shall every 15 months conduct at least one unannounced inspection to determine compliance by the licensee with statutes, and with rules promulgated under

the provisions of those statutes, governing minimum standards of construction, quality and adequacy of care, and rights of residents. The survey shall be conducted every 6 months for the next 2-year period if the facility has been cited for a class I deficiency, has been cited for two or more class II deficiencies arising from separate surveys or investigations within a 60-day period, or has had three or more substantiated complaints within a 6-month period, each resulting in at least one class I or class II deficiency. In addition to any other fees or fines in this part, the agency shall assess a fine for each facility that is subject to the 6-month survey cycle. The fine for the 2-year period shall be \$6,000, one-half to be paid at the completion of each survey. The agency may adjust this fine by the change in the Consumer Price Index, based on the 12 months immediately preceding the increase, to cover the cost of the additional surveys. The agency shall verify through subsequent inspection that any deficiency identified during inspection is corrected. However, the agency may verify the correction of a class III or class IV deficiency unrelated to resident rights or resident care without re-inspecting the facility if adequate written documentation has been received from the facility, which provides assurance that the deficiency has been corrected . . .

68. Section 400.23, Florida Statutes, reads, in pertinent part, as follows:

Section 400.23 Rules; evaluation and deficiencies; licensure status. -

(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. In addition to license categories authorized under part II of chapter 408, the agency shall assign a licensure status of standard or conditional to each nursing home.

* * *

(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.

* * *

(8) The agency shall adopt rules pursuant to this part and part II of chapter 408 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:

(a) A class I deficiency is a deficiency that the agency determines presents a situation in which immediate corrective action is necessary because the facility's noncompliance has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident receiving care in a facility. The condition or practice constituting a class I violation shall be abated or eliminated immediately, unless a fixed period of time, as determined by the agency, is required for correction. A class I deficiency is subject to a civil penalty of \$10,000 for an isolated deficiency, \$12,500 for a patterned deficiency, and \$15,000 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 licensure inspection or any inspection or complaint investigation since the last licensure inspection. A fine must be levied notwithstanding the correction of the deficiency.

69. Florida Administrative Code Rule 59A-4.1288 Exception, states as follows,

Nursing homes that participate in Title XVIII or XIX must follow certification rules and regulations found in 42 CFR 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 CFR 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.

70. The applicable C.F.R. regulation amendment imposed via Florida law required, at the time of the survey(s), that nursing

homes be "fully sprinklered" by December 31, 2010. That date has now been pushed back to 2013. Sandalwood had plans and financing in place to meet that deadline. All indications are that if an earlier deadline had been set, Sandalwood would have targeted its sprinkler upgrade for that earlier date. The regulations also require that any facility not "fully sprinklered" have smoke detectors in place in all residents' rooms. Apparently, AHCA saw fit to do nothing to publicize this second CMS requirement and further saw fit to not enforce it, via any of its surveys or monitorings until April 2008. While Sandalwood cannot escape having the duty to know and follow applicable laws, "ignorance of the law being no excuse," it is clear that AHCA has done nothing to encourage compliance or to fulfill its legislative mandate and administrative purpose to protect nursing home residents in this regard. Ms. Marsh's late awareness that smoke detectors were a federal issue and the Agency's inaction in this regard from 2006, through mid-2008, raises the question, "Can the Agency really believe that the absence of smoke detectors constitutes any significant threat to residents?"

71. A Class I violation requires proof that noncompliance has "caused, or is likely to cause, serious injury, harm, impairment, or death" to a resident receiving care in a facility. At the very most, AHCA produced Mr. Gray, who

testified that the lack of smoke detectors in residents' rooms "could possibly potentially cause harm." The situation herein is not precisely a case of "selective enforcement," and there is no estoppel against the State by a theory of "failure of the State to enforce." However, the evidence herein falls short of demonstrating that Respondent's inadvertent noncompliance was likely to cause serious injury, harm, impairment, or death.

72. Mr. Gray did not inspect the facility in the thorough way that Ms. Walker did on her visits of April 24-25, 2008. His inspection of Sandalwood did not check for smoking plans, quarterly appraisals, or the facility procedure of using a smoking apron for residents who had trouble holding cigarettes. Ms. Walker checked for these fire safety protocols and was satisfied with Sandalwood's policies and procedures. Mr. Gray presented a "parade of imaginary horrors" that the evidence as a whole shows are inapplicable to this case, and even he stated he would defer to Ms. Walker on nursing issues.

73. The City of Daytona Beach recently had relied upon Life Safety Code NFPA 101, in assessing the safety of the facility. Prior to the current issues arising and before any corrections were made, the City's fire inspector had properly assessed the construction, protection, and occupancy features of the facility necessary to minimize dangers to life from the effects of fire, including smoke, heat, and toxic gases created

by fire. The City's thorough review of the facility is more persuasive than Mr. Gray's testimony concerning his cursory review, or Mr. Gray's and Ms. Marsh's testimony concerning comparisons based on fires and facilities not proven to be comparable. (See Findings of Fact 8, 21, 28, 35, and 59.)

74. Respondent also promptly solved any perceived deficiency before AHCA's mandatory correction date of April 28, 2008. What amounts to a 36-hour solution is very impressive, but if one looks at Mr. Gray's and Ms. Walker's inspections as constituting a single survey, then the facility alleviated any perceived problems by April 25, 2008, before the whole survey was even completed. The nursing home administrator issued his own "Plan of Correction" on April 28, 2008, demonstrating that the placement of the smoke detectors had occurred previously on April 25, 2008, long before AHCA even issued its 2567 survey form on May 5, 2008.

75. Moreover, the placement of the single station battery-operated smoke detectors arguably constitutes a correction that relates to the physical plant or physical structure of the facility. Deficiencies related to the physical plant do not require follow-up reviews after the Agency has determined that correction of the deficiency has been accomplished, and that the corrections are of a nature that continued compliance can be reasonably expected. See § 400.19(4), Fla. Stat.

76. It is also problematic that AHCA seeks a conditional licensure from April 24, 2008, until May 5, 2008, when Sandalwood corrected any alleged deficiency on April 25, 2008, and created its own plan of correction, which plan of correction it first forwarded to AHCA on April 28, 2008. AHCA delayed on following up on this matter until May 5, 2008, but there is no need for a conditional license in this case.

77. To require a survey every six months for two years, and assess Respondent the cost of \$6,000, associated therewith, is excessive, if all the Agency is going to be searching for is dead batteries, when batteries for the smoke detectors last up to a year.

78. Implicit in Section 120.53, Florida Statutes' requirement for an Agency to have a subject matter index is the concept that agency surveyors will utilize the subject matter index for the setting of penalties. See generally Gessler v. Dept. of Business and Professional Regulation, 627 So. 2d 501 (Fla. 4th DCA 1993); Caserta v. Dept. of Business and Professional Regulation, 686 So. 2d 651 (Fla. 5th DCA 1996), and Plante v. Dept. of Business and Professional Regulation, 716 So. 2d 790 (Fla. 4th DCA 1998). Apparently, the subject matter index was also not used for the setting of penalty.

79. Upon the evidence as a whole, it is concluded that the lack of single station battery-operated smoke detectors in

residents' rooms under the limited circumstances of this case was not an intentional or negligent act by Respondent which materially affected the health or safety of residents of Sandalwood.

RECOMMENDATION

Upon the foregoing Findings of Fact and Conclusions of Law it is RECOMMENDED:

That the Agency for Health Care Administration enter a Final Order finding Respondent not guilty of the charges contained in the Amended Administrative Complaint, and dismissing the Amended Administrative Complaint.

DONE AND ENTERED this 5th day of August, 2009, in
Tallahassee, Leon County, Florida.



ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of August, 2009.

ENDNOTE

1/ The Florida Health Care Association (FHCA) is an association in Florida that issues newsletters to individuals and facilities, such as nursing homes. FHCA issues its newsletters to its members. Its December 2008, newsletter was admitted in evidence, but there was no demonstration that this newsletter, which was published considerably after the material time frame of this case, warned its readers of obligations under the CMS/AHCA provisions applicable to this case. No statute, rule, or regulation requires nursing homes or their administrators to be members of FHCA. The FHCA newsletter is an advisory bulletin that also contains various advertisements and notifies members of upcoming events. The FHCA newsletter is not an AHCA publication. Respondent's administrator, Mr. Hubbard, testified that he pays attention to the advisory letters from AHCA about changes in the law, as opposed to reading this newsletter, issued by a voluntary member organization.

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.