STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

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AHCA AGENCY CLERK
2009 OCT -1 P 1:18

STATE OF FLORIDA, AGENCY FOR
HEALTH CARE ADMINISTRATION,

Petitioner,

v.

SANDALWOOD NURSING CENTER,

Respondent.
_______________________________/

DOAH CASE NO. 08-4582
FRAES NOS. 2008007901
2008007903

RENDITION NO.: AHCA-09-938 -FOF-OLC

FINAL ORDER

This cause was referred to the Division of Administrative Hearings where the assigned Administrative Law Judge (ALJ), Ella Jane P. Davis, conducted a formal administrative hearing. At issue in this case is whether Respondent committed the violations alleged in the Amended Administrative Complaint and, if so, what penalty should be imposed. The Recommended Order dated August 5, 2009, is attached to this Final Order and incorporated herein by reference, except where noted infra.

RULING ON EXCEPTIONS

Petitioner filed exceptions to the Recommended Order, and Respondent filed a Response to Petitioner's exceptions.

In Exception 1, Petitioner took exception to the conclusion of law in Paragraph 79 of the Recommended Order, arguing that, contrary to the ALJ's conclusion, the lack of single station battery-operated smoke detectors in residents' rooms was a negligent act that materially affected the health or safety of residents of Respondent's facility. Petitioner's "negligence per se" argument is irrelevant because the ALJ's conclusion of law was based on her weighing the evidence presented in this case. The Agency cannot re-weigh that evidence to reach a different conclusion of law. See Heifetz v. Dep't of Bus. Reg., 475 So.2d 1277, 1281 (Fla. 1985) ("The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion."). Therefore, Exception 1 must be denied.

In Exception 2, Petitioner took exception to the conclusion of law in Paragraph 71 of the Recommended Order, wherein the ALJ concluded that "the evidence herein falls short of demonstrating that Respondent's inadvertent noncompliance was likely to cause serious injury, harm, impairment, or death." Petitioner argued that the ALJ's conclusion was erroneous based on the findings of fact in the Recommended Order. However, the findings of fact Petitioner cited in support of its argument are not in contradiction to the ALJ's conclusion. For example, in Paragraph 13 of the Recommended Order, the ALJ found that "Mr. Gray assessed a risk of harm that could possibly befall at least 53 Sandalwood residents…." (Emphasis added). There were no findings of fact that demonstrated the alleged violation was "likely to cause serious injury, harm, impairment, or death." The findings of fact demonstrate Respondent committed a possible Class II or Class III violation, but not the Class I violation that was alleged. Furthermore, the ALJ's conclusion of law was based on weighing evidence; the Agency cannot re-weigh that evidence to reach a different conclusion of law. See Heifetz. Therefore, Exception 2 is denied.

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In Exception 3, Petitioner took exception to the conclusion of law in the second sentence of Paragraph 75 of the Recommended Order, arguing that, pursuant to §400.19(4), Fla. Stat. (2007), the six month survey cycle is required for any facility cited for a Class I violation. However, the statute states that "[d]eficiencies related to physical plant do not require followup reviews after the agency has determined that correction of the deficiency has been accomplished and that the correction is of the nature that continued compliance can be reasonably expected." The ALJ concluded in the first sentence of Paragraph 75 of the Recommended Order that the violation at issue was related to the physical plant of the facility and had been corrected, and thus was not subject to a followup review. While the Agency does have substantive jurisdiction over the conclusion of law in the second sentence of Paragraph 75 of the Recommended Order, it could not substitute a conclusion of law as or more reasonable than that of the ALJ. Therefore, Exception 3 is denied.

In Exception 4, Petitioner took exception to the conclusions of law in Paragraph 78 of the Recommended Order, arguing that the statutes, not a subject matter index, mandate the range of penalties the Agency can seek to impose. In reaching this conclusion of law, the ALJ seemed to liken the Agency to professional licensing boards as evidenced by the cases she cited in support of her conclusion. However, professional licensing boards are allowed by statute to make rules that allow for a range of penalties for specific statutory violations along with a list of mitigating or aggravating factors that might increase or decrease a penalty. See, e.g., §455.2273, Fla. Stat., and §456.079, Fla. Stat. The statutes governing the regulation of facilities contain no such provisions and instead mandate the specific penalties that the Agency must impose for certain violations. The Agency must therefore look to the statutes, not a subject matter index, when determining a proposed penalty for a violation. Thus, the Agency finds that it has substantive jurisdiction over the conclusions of law in Paragraph 78 of the Recommended Order and that it could substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, Exception 4 is granted and Paragraph 78 of the Recommended Order is stricken in its entirety.

FINDINGS OF FACT

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

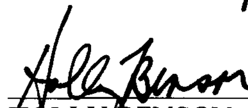
CONCLUSIONS OF LAW

The Agency adopts the conclusions of law set forth in the Recommended Order, except where noted supra. However, the conclusions of law in the Recommended Order regarding whether the Respondent committed the violations alleged in the Amended Administrative Complaint should be solely limited to the particular facts of this case and should not be given general applicability.

ORDER

Based upon the foregoing, the Amended Administrative Complaint issued by the Agency in this matter is hereby dismissed.

DONE and ORDERED this 30th day of September, 2009, in Tallahassee, Florida.



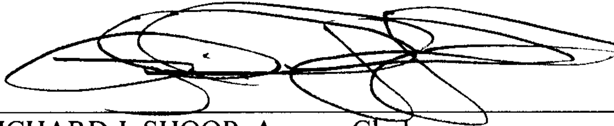
HOLLY BENSON, SECRETARY
AGENCY FOR HEALTH CARE ADMINISTRATION

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 1st day of October, 2009.



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