STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Petitioner,

v.

SA-PG SUN CITY CENTER, LLC d/b/a PALM GARDEN OF SUN CITY,

Respondent.
_____/

DOAH CASE NO. 10-4740
AHCA NOS. 2010005395
2010005396
RENDITION NO.: AHCA-11-0086 -FOF-OLC

FINAL ORDER

This cause was referred to the Division of Administrative Hearings where the assigned Administrative Law Judge (ALJ), R. Bruce McKibben, conducted a formal administrative hearing. At issue in this case is whether Respondent committed the violations alleged in the Administrative Complaint and, if so, what penalty should be imposed. The Recommended Order dated December 21, 2010, 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.

In determining how to rule on the exceptions and whether to adopt the ALJ's Recommended Order in whole or in part, the Agency for Health Care Administration ("Agency" or "AHCA") must follow section 120.57(1)(*l*), Florida Statutes, which provides in pertinent part:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state

> with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. . . .

§ 120.57(1)(*l*), Fla. Stat. Additionally, "[t]he final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." § 120.57(1)(k), Fla. Stat.

In accordance with these legal standards, the Agency makes the following rulings:

In Exception 1, Petitioner takes exception to the ALJ's conclusion of law in Endnote 6 of the Recommended Order, wherein the ALJ concluded that "[w]hile it may be argued that the imposition of a Conditional licensure rating may require a preponderance of the evidence standard, inasmuch as the elements to prove each allegation in the Administrative Complaint are the same, the higher standard of proof will apply." Petitioner argued this conclusion of law is contrary to applicable law.

"[P]arties are held to varying standards of proof at the fact-finding stage in administrative proceedings depending on the nature of the proceedings and the matter at stake. Bowling v. Dep't of Ins., 394 So.2d 165, 171 (Fla. 1st DCA 1981). For instance, in Ferris v. Turlington, 510 So.2d 292 (Fla.1987), we concluded that '[i]n a case where the proceedings implicate the loss of livelihood, an elevated standard is necessary to protect the rights and interests of the accused.' Id. at 295. Consequently, we held that the clear and convincing evidence standard

applied in proceedings involving the revocation of a professional license. Id." Dep't of Banking & Finance v. Osborne, Stern & Co., 670 So. 2d at 933 (Fla. 1996). Thus, when the revocation of a license or the imposition of a fine is at issue, the burden of proving the allegations by clear and convincing evidence is placed on the Agency. However, 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" because no loss of livelihood is at stake. See 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); Parthenon Healthcare of Blountstown v. AHCA, 25 FALR 2328 (AHCA 2003); Edgewater at Waterman Village v. AHCA, 25 FALR 3923 (AHCA 2003); and AHCA v. Harbour Health Center, et al., 25 FALR 1937 (AHCA 2003). The Agency finds that it has substantive jurisdiction over the conclusion of law in Endnote 6 of the Recommended Order since the Agency is charged with the regulation of facilities and the imposition of penalties against facilities that violate such laws; and that it could substitute a conclusion of law that is as or more reasonable than that of the ALJ. Therefore, to the extent that the ALJ in this case sought to impose the higher standard of proof in regards to the imposition of a conditional license, Exception 1 is granted and Endnote 6 of the Recommended Order is stricken in its entirety. However, regardless of which burden of proof was applied, the Agency did not prove the violations alleged in the Administrative Complaint, so the imposition of a conditional license is not warranted in this matter.

In Exception 2, Petitioner takes exception to Endnote 7 of the Recommended Order, wherein the ALJ concludes that "[a]ctual harm is not technically an element of the Class II (State) deficiency, but inasmuch as the senior nurse on the survey team used the term in describing the alleged deficiencies, it is addressed herein." Petitioner argues that the ALJ's conclusion of law is

contrary to applicable law. In actuality, Exception 2 is directed towards the ALJ's conclusions of law in Paragraphs 26 and 27 of the Recommended Order, and shall therefore be addressed accordingly. It appears that the ALJ's conclusions of law in Paragraphs 26 and 27 of the Recommended Order stem from the testimony of Sandra Santiago in Transcript, Volume I, Page 117, wherein the following exchange took place:

> Q. And the distinction between those [Class II and Class III violations] in the surveyor's mind is a II is one where actual harm has occurred, correct?
>
> A. Correct.
>
> Q. And the one where there is only a potential for harm is a III, correct?
>
> A. Correct.

This testimony conflicts with the plain language of § 400.23(8)(b), Fla. Stat., which states that "[a] class II deficiency is a deficiency that the agency determines has compromised the resident's ability to maintain or reach his or her highest practical physical, mental, and psychological well-being, as defined by an accurate and comprehensive resident assessment, plan of care, and provision of services." The Florida Supreme Court has held that "legislative intent must be determined primarily from the language of the statute." Miele v. Prudential-Bache Securities, Inc., 656 So.2d 470 (Fla. 1995) citing City of Tampa v. Thatcher Glass Corp., 445 So.2d 578, 579 (Fla.1984). Thus, because the plain language of § 400.23(8)(b), Fla. Stat., does not mention "actual harm," it, and not Ms. Santiago's testimony, must be used to determine whether a Class II violation occurred in these proceedings. The Agency finds that it has substantive jurisdiction over the conclusions of law in Paragraphs 26 and 27 of the Recommended Order and Endnote 7 of the Recommended Order since it is charged with implementing § 400.23(8)(b), Fla. Stat., and

that it could substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, Exception 2 is granted. The Agency modifies Paragraph 26 of the Recommended Order to state:

> 26. There is no competent and substantial evidence that the actions of the Facility compromised either resident's ability to maintain their highest practicable physical, mental or psychological well-being.

The Agency strikes Paragraph 27 and Endnote 7 of the Recommended Order 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.

ORDER

Based upon the foregoing, the Agency hereby dismisses the Administrative Complaint that was issued in this matter. The parties shall govern themselves accordingly.

DONE and ORDERED this 1 day of January, 2011, in Tallahassee, Florida.

ELIZABETH DUDEK, INTERIM 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 2nd day of February, 2011.

RICHARD J. SHOOP, Agency Clerk
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