STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE ADMINISTRATION,

Petitioner,

Case No. 14-0436

vs.

TALLAHASSEE FACILITY OPERATIONS, LLC, d/b/a CONSULATE HEALTH CARE OF TALLAHASSEE,

Respondent.
_____/

RECOMMENDED ORDER

On March 25, 2014, an administrative hearing in this case was held in Tallahassee, Florida, before Lawrence P. Stevenson, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: John E. Bradley, Esquire
Agency for Health Care Administration
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St. Petersburg, Florida 33701

For Respondent: George Huffman, Esquire
Consulate Health Care
5102 West Laurel Street, Suite 700
Tampa, Florida 33607

STATEMENT OF THE ISSUES

The issues in this case are: whether Respondent, Tallahassee Facility Operations, LLC, d/b/a Consulate Health

Care of Tallahassee ("Consulate"), committed a Class III deficiency at the time of a complaint survey conducted on July 2, 2013; whether Consulate committed two further Class III deficiencies at a revisit survey on August 12, 2013; and, if Consulate did commit the alleged Class III deficiencies found during the surveys on July 2 and August 12, 2013, whether the latter deficiencies constituted "uncorrected deficiencies" meriting the imposition of a $1,000 fine and the issuance of a conditional license to Consulate for the period August 13, 2013 through September 30, 2014.

PRELIMINARY STATEMENT

A two-count Administrative Complaint, dated November 6, 2013, was filed by Petitioner, Agency for Health Care Administration ("AHCA"), against Consulate, notifying Consulate that AHCA intended to impose an administrative fine in the amount of $1,000 and conditional licensure status beginning on August 13, 2013, based on one uncorrected Class III deficiency discovered during a revisit survey inspection conducted on August 12, 2013.

Consulate denied the allegations and timely requested a formal hearing. The matter was forwarded to the Division of Administrative Hearings ("DOAH") for hearing on January 27,

2014. The case was scheduled for hearing on March 25 and 26, 2014. The hearing was convened and completed on March 25, 2014.

At the hearing, AHCA presented the testimony of three AHCA employees: Susan Page, a registered nurse specialist surveyor accepted as an expert in nursing; Debra Ball, a registered nurse specialist accepted as an expert in nursing; and Patricia McIntire, a registered nurse consultant supervisor. AHCA's Exhibits 1 through 4, 6, 8, and 9 were accepted into evidence by stipulation of the parties. AHCA's Exhibits 5, 7, and 10 were accepted into evidence through witnesses at the hearing. Consulate presented the testimony of Barbara Stevens, its vice president of clinical services for the district, including the Tallahassee facility in question. Consulate's Exhibits 2 and 3 were admitted into evidence by stipulation of the parties.

A two-volume Transcript of the hearing was filed at DOAH on April 17, 2014. Respondent's request for an extension of the period within which to file Proposed Recommended Orders was granted by an Order dated April 24, 2014. The parties submitted their Proposed Recommended Orders on May 13, 2014, in compliance with the April 24, 2014, Order.

FINDINGS OF FACT

1. AHCA is the state agency charged with licensing of nursing homes in Florida under section 400.021(2), Florida Statutes, and the assignment of a licensure status pursuant to

section 400.23(7), Florida Statutes.[1/] AHCA is charged with evaluating nursing home facilities to determine their degree of compliance with established rules as a basis for making the required licensure assignment.

2. Pursuant to section 400.23(8), AHCA must classify deficiencies according to their nature and scope when the criteria established under section 400.23(2) are not met. The classification of the deficiencies determines whether the licensure status of a nursing home is "standard" or "conditional" and the amount of the administrative fine that may be imposed, if any.

3. During the survey of a facility, if violations of regulations are found, the violations are noted on the prescribed form and referred to as "Tags." A tag identifies the applicable regulatory standard that the surveyors believe has been violated, provides a summary of the violation, and sets forth specific factual allegations that the surveyors believe support the violation.

4. Consulate operates a 120-bed nursing home at 1650 Phillips Road in Tallahassee and is licensed as a skilled nursing facility.

July 2, 2013, complaint survey

5. Having received complaints alleging Consulate's failure to follow physician-ordered plans of care for residents, AHCA

sent a survey team to conduct a survey of the facility on July 2, 2013.

6. Registered nurse specialist surveyor Susan Page was specifically directed to examine the facility's procedures regarding activities of daily living ("ADLs") and its practices in following physicians' plans of care.

7. Ms. Page reviewed the records of Resident 1, a male resident who had suffered a fractured pelvis in a fall at his home. He had been fitted with an external fixation device to stabilize the fracture and was admitted to Consulate for rehabilitative care. The external fixation device was anchored by metal pins that were inserted through the skin and into the bone. When the fixator was removed, a small wound remained at the pin site on Resident 1's hip.

8. Resident 1 had been discharged on June 27, 2013. Ms. Page's review was thus limited to the facility's records. She looked at the generalized history of the resident, the physician orders, the grievance log, the ADL treatment record, care plan, and the Minimum Data Set information on Resident 1.

9. Ms. Page discovered a written physician order dated June 1, 2013, that directed Consulate staff to clean the pin site with Betadine then wash off the Betadine and cover the wound with gauze twice a day for seven days, and afterwards to wash the wound with soap and cover it daily. The order directed a ten-day

course of Zyvox, an antibiotic. Finally, the physician order stated, "Make sure [patient] showers daily."

10. Ms. Page testified that she reviewed other physician orders that showed changes in pain medications and indicated that Resident 1 was having issues with loose stool or diarrhea. He was tested for the bacterium Claustridium difficile ("C. diff") in his stool.

11. Ms. Page reviewed Consulate's ADL Flow Record for Resident 1 and discovered that during the period from June 1 to June 27, the resident was given a shower on only seven days, despite the physician's order that he receive a daily shower. On four days during that period, Resident 1 received no form of body cleansing. On the remaining days, he was given bed baths.

12. Ms. Page and Debra Ball, a registered nurse specialist who was part of the survey team, each testified that a bed bath is not commensurate with a shower. A shower involves clean water running over the entire body, allowing the body to be cleansed with soap and rinsed with clean water. A bed bath involves a tub of soapy water and a tub of clean water. The resident remains in the bed and the staff person wipes the resident off as best she can. The resident is not immersed in clean water.

13. Ms. Page explained the significance of Consulate's failure to follow physician orders for Resident 1. The

resident's recent surgery provided a portal of entry for bacteria into the body, and the physician's orders were designed to work in combination to minimize the possibility of infection. The daily shower was an essential part of the physician's plan of care for Resident 1. A shower is invaluable in keeping low the bacteria count on the resident's skin. The shower was especially important in this situation because of the pin site location on Resident 1's hip and his noted problems with loose stools and possible C. diff infection.

14. Ms. Page, opining as an expert in nursing, testified that the failure to follow the physician order in this case potentially compromised Resident 1's ability to maintain or reach his highest practical mental, physical, or psychosocial well-being. Ms. Page specifically testified that due to the position of the wound site, the loose stools, and the fact that the portal of entry led directly to the bone, Resident 1 had a potential to contract cellulitis or osteomyelitis as a result of the deficiency. Ms. Page conceded the efficacy of cleansing with Betadine, but noted that the antibacterial cleansing was prescribed for only seven days and that the failure to give showers as prescribed occurred on consecutive days after the Betadine prescription had expired.

15. As a result of the failure to provide showers or to note in the record any reason for that failure, the facility was

cited for violating Florida Administrative Code rule 59A-4.107(5), which provides: "All physician orders shall be followed as prescribed, and if not followed, the reason shall be recorded on the resident's medical record during that shift."[2/] The deficiency tag correlating to this violation is Tag N054. Consulate was cited with a Class III deficiency for this violation.

16. Ms. Page testified that the decision to classify the July 2, 2013, deficiency as Class III was reached by a consensus of the four-person survey team, all registered nurses, and was based on the facts of the case and the statutory definition set forth in section 400.23(8)(c):

> A class III deficiency is a deficiency that the agency determines will result in no more than minimal physical, mental, or psychosocial discomfort to the resident or has the potential to compromise the resident's ability to maintain or reach his or her highest practical physical, mental, or psychosocial well-being, as defined by an accurate and comprehensive resident assessment, plan of care, and provision of services.

17. Ms. Ball agreed that Consulate should be cited for violating rule 59A-4.107(5) and that the violation should be classified as Class III. Ms. Ball testified that in her experience it is not unusual for a physician to direct the manner in which the cleansing of a post-operative patient should occur. She noted that the pin site's portal of entry went into

the bone and that bone infections have high morbidity and mortality rates. Ms. Ball further noted the variety of infections that could occur in a case such as Resident 1's: osteomyelitis, enterococcus, candida, methicillin-resistant staphylococcus aureus ("MRSA"), and the most common one, staphylococcus. Some of these infections could be life threatening.

18. Ms. Ball, who was accepted as an expert in nursing, offered the opinion that the failure to follow the physician order for showers had the potential to cause a surgical site infection, which in turn had the potential to compromise Resident 1's ability to maintain or achieve his highest practical physical well-being. Ms. Ball testified that an infection is never the sort of "minor impact" contemplated by the statutory definition of a Class IV deficiency. Ms. Ball testified that each of the four registered nurses on the survey team agreed that the failure to follow physician orders had the potential to compromise Resident 1's health and that the violation should be classified as Class III.

19. Patricia McIntire is a registered nurse consultant supervisor for AHCA. Her duties include reviewing cited deficiencies and ensuring that the evidence cited by the survey teams meets the requirements of the applicable statutes and regulations. Ms. McIntire was the supervisor who reviewed the

July 2, 2013, survey file. She agreed that the cited deficiency should be classified as a Class III deficiency.

20. AHCA's citation gave Consulate until August 2, 2013, to correct the deficiencies noted in the survey.

August 12, 2013 revisit survey

21. Ms. Ball was sent to conduct a revisit survey of Consulate on August 12, 2013 in order to determine whether the previous deficiencies had been corrected. Ms. Ball was specifically looking for Consulate's compliance with physician orders and the correction of the federal citation related to ADLs.

22. Ms. Ball wanted to survey a sample of residents that would include both aspects of the corrections she sought. She knew that residents receiving pain medications would have physician orders for the medications. She therefore asked the facility to provide the records of residents who were receiving both pain medications and assistance with ADLs. Resident 1 and Resident 3 met those criteria.

23. Resident 1, who was not the same person as the Resident 1 cited in the July 2 survey, had a physician order dated July 26, 2013, to change her peripheral inserted central catheter ("PICC") dressing every seven days starting on August 1. When Ms. Ball checked the PICC dressing on Resident 1, she saw a notation on the dressing indicating that it had last been changed

on August 3, nine days prior to the revisit.

24. Ms. Ball testified as to her experience with PICC dressing changes as follows:

> I've done these dressing changes for years. A central line dressing change, we're not talking about a piece of gauze and a piece of tape. You actually use an adherent Tegaderm dressing. It's like Saran Wrap. Picture Saran Wrap and when you put it on something, it sticks. Picture Saran Wrap with a sticky surface, a sticky bottom. So you have this clear 4-by-4-inch, it's a standard size, a clear sticky dressing of Tegaderm.
>
> Within your dressing kits— because these dressings have kits that you have to buy. It's a very involved, long, tedious process to do a dressing change on a PICC. I've done several. When you do this dressing change, which isn't just changing the dressing, it includes a cleaning to disinfect and reduce the number of microorganisms on your skin and then some of them have like a little biofilm. It's a little patch that you put where the catheter's going into the vessel. And that biofilm is designed to kind of provide a barrier for seven days. I think that's probably one of the reasons it's done every seven days.
>
> So you've got this clear dressing, this 4-by-4-inch Saran-Wrap-appearing thing that has a sticky to it. And it's not easy to peel off. Well, when you change a dressing, within your kit, you also have this little label. It measures about maybe 1-by-2 inches. It says "date" and "initials." And what you do is when you change that dressing, within your kit, which has a lot of stuff in it, you take the little label after you've sealed it, and you put that other sticky label on top of that Saran Wrap type dressing.

> Well, picture taking a piece of adhesive tape off a piece of Saran Wrap. I challenge you. It can't be done. It's going to tear it. So there would be no reason for that dressing to still bear that date of August the 3rd if it had been changed since then.

25. Ms. Ball testified that it is a basic standard-of-care, established by the Centers for Disease Control ("CDC") and many other entities, that PICC-line dressings should be changed every seven days. Ms. Ball testified that the primary risk associated with failure to change PICC dressings as directed is CLABSI, which is the CDC's acronym for a central line associated blood infection. She stated that 250 deaths a day are associated with central line associated blood infections. Ms. Ball testified that the potential harm is so great that the CDC has developed initiatives for surgical site infections and central line associated blood infections.

26. Ms. Ball saw the date of August 9 scribbled on a white label stuck to the dressing but she disregarded it because it was not on the label provided in the PICC dressing kit. She spoke to Consulate's unit manager, who stated that the note on the white label had been made by a Licensed Practical Nurse ("LPN"). The unit manager confirmed that LPNs do not perform PICC dressing changes but nonetheless told Ms. Ball that the dressing must have been changed on August 9. However, the nurse's notes and other

medical records indicated no dates other than August 3 for a PICC-dressing change for Resident 1.

27. Ms. Ball asked Resident 1 when the PICC dressing was last changed but the Resident could not say.

28. Consulate's medication log confirmed that the dressing had not been changed since August 3. Ms. Ball testified that she looked at the medication record, nurse's notes, and treatment record and could not find any evidence in any record kept by the facility that the PICC dressing had been changed since August 3. Ms. Ball was also unable to find any evidence that the PICC dressing had been changed from July 26 to August 3, 2013.

29. Ms. Ball concluded that the PICC dressing for Resident 1 had not been changed from August 3 to the date of the revisit survey, August 12, 2013, a period of more than seven days. Ms. Ball also concluded that the PICC dressing had not been changed from July 26 to August 3, 2013, also a period of more than seven days. Consulate's records gave no reason why the physician order to change the dressing every seven days had not been followed.

30. The physician order required a PICC-dressing change on August 1, 2013. Ms. Ball found no documentation of a PICC-dressing change for Resident 1 on August 1, 2013.

31. After she encountered problems with Resident 1's

treatment, Ms. Ball reviewed the record of Resident 3, who had a physician order dated July 23, 2013, to change her PICC dressing every seven days. Ms. Ball could find no documentation showing that a dressing change occurred from July 23 to August 2, 2013, a period of more than seven days. The facility's records also gave no indication as to why the dressing change had not occurred.

32. AHCA's July 2, 2013, notice of deficiency required Consulate to complete all corrections by August 2, 2013. The failures to perform PICC-dressing changes for Residents 1 and 3 occurred on or after August 2, the date by which all corrections were to be completed.

33. On August 12, 2013, Consulate was cited with an uncorrected deficiency for again violating rule 59A-4.107(5), by failing to follow physician orders or to document reasons why the orders were not followed.

34. Ms. Ball testified as to the similarities between the deficient practices found in the July 2 survey and the August 12 revisit survey. In both cases, Residents had orders for specific types of treatment. Both cases involved residents with impaired skin integrity that substantially increased the risk of infection. In both cases, the facility failed to show it was following physician orders.

35. Ms. Ball testified that the July 2 deficiency involved the potential for infection to the bone, a "very complex, very

devastating" type of infection. She noted that the August 12 deficiencies involved central lines going directly to the residents' hearts. She stated, "They both have potential for serious harm or a potential to keep you from getting well or increasing your stay or possibly killing you. Ultimately, you could die from either one."

36. Ms. Ball testified that in her opinion, Consulate's failure to follow physician orders for Residents 1 and 3 potentially compromised their ability to maintain or reach their highest practical, mental, or psychological well-being. Ms. Ball testified that AHCA does not assign a specific classification for all deficiencies related to failure to follow physician orders. Each deficiency is assigned a classification based on an application of the statutory definitions to the facts of the specific case under consideration. In this case, Ms. Ball had no doubt that Consulate's failure to follow physician orders constituted a Class III deficiency.

37. Ms. McIntyre testified that she reviewed the facts related to the August 12, 2013, revisit survey. She agreed that Consulate failed to follow physician orders in accordance with rule 59A-4.107(5), that Consulate's failures to follow physician orders were properly classified as Class III deficiencies, and that they constituted an uncorrected deficiency from the July 2, 2013, complaint survey.

The plan of correction

38. Section 400.23(8)(c) provides in part: "A citation for a class III deficiency must specify the time within which the deficiency is required to be corrected. If a class III deficiency is corrected within the time specified, a civil penalty may not be imposed." Section 408.811(4) provides that a deficiency must be corrected within 30 calendar days after the provider is notified of inspection results unless an alternative timeframe is required or approved by the agency. Section 408.811(5) provides: "The agency may require an applicant or licensee to submit a plan of correction for deficiencies. If required, the plan of correction must be filed with the agency within 10 calendar days after notification unless an alternative timeframe is required."

39. After the July 2, 2013, complaint survey, AHCA sent to Consulate a letter dated July 12, 2013, stating that "Deficiencies must be corrected no later than August 2, 2013," and requiring Consulate to file a plan of correction within ten days. The letter provided that the plan must contain the following:

> * What corrective action(s) will be accomplished for those residents found to have been affected by the deficient practice;
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> * How you will identify other residents having potential to be affected by the same

deficient practice and what corrective action will be taken;

* What measures will be put into place or what systematic changes you will make to ensure that the deficient practice does not recur; and,

* How the corrective action(s) will be monitored to ensure the deficient practice will not recur, i.e., what quality assurance program will be put into place.

40. On July 21, 2013, Consulate submitted a plan of correction that provided as follows as pertains to Tag N054, failure to follow physician orders:

* Resident #1 has been discharged from the facility on 6/27/2013.

* An audit has been conducted for current residents shower preferences and an audit has been conducted of current resident ADL sheets.

* Re-inservice staff on giving showers per shower schedule. Shower sheets will be reviewed 5 times weekly in the clinical meeting for completion. [CNAs] will complete shower sheets daily and the nurse will verify that a shower has been given.

* Findings will be reviewed at the monthly QA/PI committee meeting to ensure substantial compliance.

41. On July 24, 2013, AHCA sent a fax to Consulate stating that its plan of correction had been approved on June 18, 2003.

42. Barbara Stevens, Consulate's vice president of clinical services, testified that Consulate completed the

corrective work proposed in the plan of correction on or before August 2, 2013.

43. Consulate contends that AHCA's approval of its plan of correction, without requiring additional conditions or actions, effectively preempts AHCA from finding that the August 12 deficiencies are uncorrected deficiencies from the July 2 survey. AHCA accepted the proposed plan, Consulate performed the plan, and no deficiencies involving showers or other ADLs were a part of the August 12 deficiency findings. In other words, the failure to follow physician orders deficiencies found in the August 12 survey should not be considered "uncorrected" because they were unlike the failure to follow physician orders deficiency found in the July 2 survey.

44. Ms. Ball testified that when AHCA conducts a revisit survey, it is not looking for compliance with a facility's plan of correction; it is looking for compliance with statutes and regulations. She noted that Tag N054 specifically addresses failure to follow physician orders, not failure to shower a resident. Consulate's plan entirely neglected to address what it intended to do going forward to assure that physician orders would be followed. She noted that virtually the same plan of correction was submitted for Tag F312, the federal ADL violation, and further noted that it should have been obvious that different actions would be required to correct a failure to

provide ADLs and to correct a failure to follow physician orders.

45. Ms. Ball testified that AHCA cannot lead a facility by the nose and tell it how to come into compliance. The facility is expected to know and follow the statutes and rules and to understand what it needs to do to come into compliance. She conceded that nothing in the plan of correction would have prevented the subsequent PICC-dressing violations, but opined that this was a flaw in the plan, not with AHCA's determination that the PICC-dressing issue constituted an uncorrected deficiency. Consulate "missed the boat" by failing to address physician orders in its plan and paid the price during the August 12 revisit survey.

46. Ms. McIntire testified that Consulate's plan of correction touched on some of the subjects of its July 2 deficiencies, namely ADLs, but that AHCA expects the facility to correct everything cited in the notice of deficiency. AHCA expected Consulate to look holistically at all physician orders, not merely those related to ADLs. Ms. McIntire testified that when a facility is cited under the physician order tag, the facility will typically look at its entire resident population and establish a mechanism for determining whether staff is following physician orders. The facility is expected to implement whatever corrective actions are necessary to bring it

back into compliance, not just for the few residents sampled in the survey but for all of them. It is up to the facility to decide what tool or mechanism it will use to correct the deficient practice.

47. Ms. McIntire testified that AHCA cannot reject a plan of correction on the assumption that the facility did not intend to address physician orders. She stated that AHCA accepted Consulate's plan because it did address some of the deficient practices that were identified, but that Consulate was nevertheless expected to correct every area in which it was found out of compliance.

48. Ms. McIntire stated that following the plan of correction does not bring the facility into compliance because AHCA surveys for compliance with the regulations, not the plan of correction. Ms. McIntire stated that Consulate's plan of correction included nothing that would have prevented the deficiency found on August 12 under Tag N054, but that the plan did correct Tag F312.

49. Ms. McIntire testified that the plan of correction is a "jumping off point" for AHCA. The agency wants to see how comprehensively the facility is looking at deficient practices. AHCA proceeds on a good faith assumption that the facility is going to look at all of its residents who could have been

affected by the deficient practice and make the proper corrections.

Substantial compliance

50. Consulate contended that it should not have been required to file a plan of correction at all because AHCA erred in finding the July 2, Tag N054, deficiency a Class III deficiency. Consulate argues that the deficiency should have been classified as Class IV because it had merely "the potential for causing no more than a minor negative impact on the resident." Section 400.23(8)(d) provides that no plan of correction is required for an isolated Class IV deficiency. If the July 2 deficiency was Class IV, then the August 12 deficiencies cannot be considered "uncorrected."

51. Consulate's argument rests essentially on the proposition that it substantially complied with the June 1, 2013, physician order for Resident 1. The pin site was cleaned with Betadine as prescribed. The wound was cleaned and gauzed as prescribed. The antibiotic was administered. The resident received a bath or shower on all but four days during the period from June 1 to June 27, and on some days he was washed more than once. Consulate argues that AHCA failed to establish how a failure to give Resident 1 a bath and/or shower on four days during the month of June presented a potential for physical, mental, or psychosocial discomfort to the resident or the

potential to compromise the resident's ability to maintain or reach his highest practical physical, mental, or psychosocial well-being.[3/]

52. Consulate's argument is at odds with the evidence. The testimony of AHCA's witnesses established the potential physical, mental, or psychosocial discomfort to the resident or the potential to compromise the resident's ability to maintain or reach his highest practical physical, mental, or psychosocial well-being. The potential for infection was real, and the physician's orders were fashioned to maximize Resident 1's protection from any potential infection.

53. Further, the deficiency for which Consulate was cited was not one with which it could "substantially" comply. Either the physician orders are followed or they are not. Ms. Page testified that facility staff may not pick and choose which physician orders to follow. The physician did not just pull the order out of the air and instruct Consulate to give the resident a daily shower.[4/] It was a prescribed treatment, a preventive measure. Ms. Page observed that all of the prescribed measures were intended to work together to prevent infection.

54. Ms. Ball stated that the order "was obviously infection control related. And he wouldn't have written an order if he didn't want it done. That's why physicians write

orders. If they write an order, they expect you to do that, hence, the word 'order.'"

Summary findings

55. Based on the foregoing, it is found that AHCA properly cited Consulate on July 2, 2013 under Tag N054 for violating rule 59A-4.107(5) and properly classified the violation as Class III.

56. Based on the foregoing, it is found that AHCA properly cited Consulate on August 12, 2013 under Tag N054 for two violations of rule 59A-4.107(5) and properly classified the violations as Class III. Further, it is found that AHCA properly cited Consulate for an uncorrected Class III violation for repeated failure to follow physician orders.

CONCLUSIONS OF LAW

57. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

58. The burden of proof is on AHCA. See Beverly Enterprises - Fla v. Ag. for Health Care Admin., 745 So. 2d 1133 (Fla. 1st DCA 1999). The burden of proof to impose an administrative fine is by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996). The burden of proof for the assignment of licensure status is by a preponderance of the evidence.[5/] See Florida

Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977).

59. Section 400.23(7) provides as follows, in relevant part:

> (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.
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> (a) A standard licensure status means that a facility has no class I or class II deficiencies and has corrected all class III deficiencies within the time established by the agency.
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> (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 followup survey, a standard licensure status may be assigned . . . .

60. Section 400.23(8) provides as follows, in relevant part:

> (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:
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> * * *
>
> (c) A class III deficiency is a deficiency that the agency determines will result in no more than minimal physical, mental, or psychosocial discomfort to the resident or has the potential to compromise the resident's ability to maintain or reach his or her highest practical physical, mental, or psychosocial well-being, as defined by an

> accurate and comprehensive resident assessment, plan of care, and provision of services. A class III deficiency is subject to a civil penalty of $1,000 for an isolated deficiency, $2,000 for a patterned deficiency, and $3,000 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 citation for a class III deficiency must specify the time within which the deficiency is required to be corrected. If a class III deficiency is corrected within the time specified, a civil penalty may not be imposed.
>
> (d) A class IV deficiency is a deficiency that the agency determines has the potential for causing no more than a minor negative impact on the resident. If the class IV deficiency is isolated, no plan of correction is required.

61. Florida Administrative Code Rule 59A-4.107(5) provides: "All physician orders shall be followed as prescribed, and if not followed, the reason shall be recorded on the resident's medical record during that shift."

62. In this case, Consulate was cited by AHCA for three deficiencies that combined to establish an isolated uncorrected[6/] Class III deficiency. AHCA seeks to impose a fine of $1,000 and conditional licensure.

63. Undisputed evidence provided by AHCA's witnesses established that each of the three deficiencies alleged in the Administrative Complaint met the statutory criteria for a Class

III deficiency. The undisputed evidence further established that each of the three deficiencies was in violation of rule 59A-4.107(5).

64. Consulate argued that there was a relevant distinction to be drawn between failure to follow a physician order for showering and failure to follow a physician order for PICC-dressing changes. However, the common factor of failure to follow physician orders overrides the attempted distinction. This is particularly the case where, as here, AHCA has established that there is also a common factual aspect to the physician orders, i.e., infection prevention.

65. Consulate argued that the submission, acceptance and completion of a plan of correction should be held to effectively estop AHCA from finding that Consulate's deficiencies were "not corrected" because the subsequent deficiencies could not have been prevented by the plan of correction. AHCA established that the flaw was in the misguided focus of Consulate's plan of correction. Tag N054 related to following physician orders, not showers. AHCA accepted Consulate's plan because the plan partially addressed the deficient practices found during the July 2, 2013, survey. AHCA's acceptance of the plan did not tie the hands of its surveyors during the revisit survey and did not absolve Consulate from its responsibility to correct every area in which it was found out of compliance.

66. AHCA demonstrated by clear and convincing evidence that Consulate committed the deficiency alleged under Tag N054 for violating rule 59A-4.107(5) during the July 2, 2013, complaint survey and that the cited deficiency was correctly classified as Class III.

67. AHCA demonstrated by clear and convincing evidence that Consulate committed the deficiencies alleged under Tag N054 for violating rule 59A-4.107(5) during the August 12, 2013, revisit survey and that the cited deficiencies were correctly classified as Class III.

68. AHCA demonstrated by clear and convincing evidence that Consulate committed a single uncorrected Class III deficiency. Pursuant to section 400.23(8)(c), an uncorrected Class III deficiency is subject to a fine of $1,000. Pursuant to section 400.23(7)(b), a facility with one or more Class III deficiencies not corrected within the time established by the agency is subject to conditional licensure.

RECOMMENDATION

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

RECOMMENDED that the Agency for Health Care Administration enter a final order imposing a fine of $1,000 and further imposing conditional licensure on Respondent for the period from August 13, 2013 through September 30, 2014.

DONE AND ENTERED this 31st day of December, 2014, in Tallahassee, Leon County, Florida.

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of December, 2014.

ENDNOTES

[1/] Unless otherwise noted, all references to the Florida Statutes are to the 2013 edition.

[2/] Consulate was also cited under federal Tag F312, which follows the federal regulation governing the proper provision of ADLs, 42 C.F.R. 483.25. Florida does not have a state citation for failure to provide ADLs.

[3/] Consulate also emphasized the conceded fact that AHCA did not establish that any of the residents cited in the surveys were shown to have suffered actual harm. Ms. Ball cogently observed that the Class III classification covers potential harm. Any actual harm to the residents would have likely resulted in a classification of Class II.

[4/] At the hearing, counsel for Consulate insinuated that physicians generally do not write orders for showers and that this order was likely written by the physician at Resident 1's request. No evidence was presented to substantiate this insinuation, and Ms. Ball directly testified that she has seen other physician orders for showers following orthopedic surgery.

[5/] The lesser burden for changing Consulate's licensure status is not an issue because AHCA's proof in this case met the clear and convincing standard.

[6/] The term "corrected" is not defined in part II of Chapter 400, Florida Statutes. "Where a statute does not specifically define words of common usage, such words must be given their plain and ordinary meaning." Southeastern Fisheries Ass'n, Inc. v. Dep't of Nat. Res., 453 So. 2d 1351, 1353 (Fla. 1984), citing State v. Hagan, 387 So. 2d 943 (Fla. 1980). In the instant case, there is no question that "corrected" is a word of common usage or that AHCA has applied the plain and ordinary meaning of the word in finding that Consulate's Class III deficiency was "not corrected."

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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.