

**STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS**

AGENCY FOR HEALTH CARE  
ADMINISTRATION,

Petitioner,

Case No. 21-1832

vs.

CONWAY LAKES HEALTH AND  
REHABILITATION CENTER,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held in Tallahassee, Florida, via Zoom video conference on August 4, 2021, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Richard J. Santurri, Esquire  
Agency for Health Care Administration  
Building 3, Room 3428A  
2727 Mahan Drive  
Tallahassee, Florida 32308

For Respondent: Taylor Huston, General Counsel  
Clear Choice Health Care  
709 South Harbor City Boulevard  
Melbourne, Florida 32901

STATEMENT OF THE ISSUES

Whether Conway Lakes Health and Rehabilitation Center (Respondent), timely submitted its monthly nursing home quality assessment fee for December 2019; and, if not, whether a fine should be imposed for each day that the payment was delinquent.

## PRELIMINARY STATEMENT

Petitioner, Agency for Health Care Administration (Petitioner/Agency/AHCA), by correspondence dated February 10, 2020, informed Respondent that its facility “has an outstanding balance pertaining to a Quality Assessment Fee for December [2019].” Respondent challenged the Agency determination described in the referenced correspondence by timely filing a Petition for Formal Administrative Hearing. On June 9, 2021, Petitioner referred this matter to the Division of Administrative Hearings (DOAH) for assignment of an Administrative Law Judge.

At the final hearing, Petitioner presented the testimony of Katrina Derico-Harris and Rafael DeCambra. Respondent offered testimony from Brittney White. Petitioner’s Exhibits 1 through 8 were admitted into evidence. Respondent’s Exhibits 9 through 19 were also admitted into evidence.

A single-volume Transcript of the final hearing was filed on August 26, 2021. An Order was entered on the parties’ Joint Motion for Additional Time to File Proposed Recommended Orders, which allowed for the filing of proposed recommended orders (PRO) on or before September 27, 2021. Petitioner and Respondent each timely filed a PRO and the same have been considered in preparing this Recommended Order.

## FINDINGS OF FACT

1. AHCA, pursuant to section 409.913, Florida Statutes (2019),<sup>1</sup> is responsible for overseeing and administering the Medicaid program for the State of Florida.

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<sup>1</sup> All subsequent references to Florida Statutes will be to 2019, unless otherwise indicated.

2. At all times relevant hereto, Respondent was a Florida Medicaid provider authorized to provide nursing home services and had a valid Medicaid provider agreement with AHCA.

3. Respondent operates a nursing home facility as defined by section 409.9082(1)(b), and is required, pursuant to section 409.9082(2), to “report monthly to [AHCA] its total number of resident days, exclusive of Medicare Part A resident days, and remit an amount equal to the assessment rate times the reported number of days.” The monthly amount assessed pursuant to section 409.9082 is known as a “Quality Assessment Fee.”

4. Section 409.9082(2) provides, in part, that AHCA “shall collect, and each facility shall pay, the quality assessment each month[,] and [AHCA] shall collect the assessment from nursing home facility providers by the 20th day of the next succeeding calendar month.”<sup>2</sup>

5. Respondent’s Quality Assessment Fee for December 2019 was to be remitted to and received by AHCA on or before January 21, 2020. It is undisputed that on February 28, 2020, AHCA received payment of Respondent’s Quality Assessment Fee for December 2019, and that this was the first instance where Respondent failed to timely remit payment of the fee to AHCA.

6. Brittney White is the accounts payable manager for the management company hired by Respondent to process and remit payment of its Quality

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<sup>2</sup> Chapter 409 is silent regarding the issue of the proper method for determining the due date of the Fee when the “20th day of the next succeeding calendar month” falls on a legal holiday. Section 110.117, Florida Statutes, has set aside “Martin Luther King, Jr.’s Birthday” as a legal holiday. Rule 2.514(a)(1)(C) of the Florida Rules of General Practice and Judicial Administration provides, in part, that for a statute that does not specify a method of computing time, and the time period in the statute is stated in days or a longer unit of time, then “include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday ... the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.” It is undisputed that January 20, 2020, was the date on which Dr. Martin Luther King Jr.’s birthday was recognized. Therefore, January 21, 2020, was the due date for Respondent’s December 2019 Quality Assessment Fee, and January 22, 2020, is the first day of the late period.

Assessment Fees. Ms. White testified that on January 17, 2020, check number 2010032675 in the amount of \$56,577.12 was sent to AHCA via FedEx, and delivered to the Agency's accounts receivable department at 9:36 a.m. on January 21, 2020. According to Ms. White, she included a total of nine checks in the FedEx package, and the previously referenced check, which was submitted on behalf of Conway Lakes Health and Rehabilitation Center, was included in the batch of nine checks.

7. All payments made by check are received by AHCA's Financial Services cash office (mailroom). Upon receipt of a check, staff in the mailroom will stamp the payment as "received," determine what the payment is for, stamp the payment "for deposit," ensure that the appropriate accountant verifies the payment, enter the check information into the FABS system,<sup>3</sup> generate a laser fiche, and then electronically send the check to the bank for deposit.

8. When an envelope is received in the mailroom, the same is opened, and if there is a check in the envelope it is removed, and the company name, check number, and what the payment is for are recorded.

9. On January 21, 2020, AHCA received a FedEx package which contained several invoices and checks for payment of Quality Assessments. The FedEx package did not contain a check or invoice for Conway Lakes' December 2019 Quality Assessment.

10. AHCA, by correspondence dated February 10, 2020, informed Respondent that payment of its December 2019 Quality Assessment was past due. AHCA finally received Respondent's December 2019 Quality Assessment payment on February 28, 2020.

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<sup>3</sup> FABS is the system used to log in all checks that are received for Quality Assessment payments.

## CONCLUSIONS OF LAW

11. DOAH has jurisdiction over the subject matter of and the parties to this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2021).

12. This is a proceeding in which AHCA seeks to impose a disciplinary sanction, by way of an administrative fine, against Respondent's nursing home facility license. Because disciplinary proceedings are considered to be penal in nature, AHCA is required to prove the allegations against Respondent by clear and convincing evidence. *Dep't of Banking & Fin. v. Osborne Stern & Co.*, 670 So. 2d 932 (Fla. 1996); *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987).

13. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" *In re Graziano*, 696 So. 2d 744, 753 (Fla. 1997). As stated by the Florida Supreme Court, the standard:

entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.

*In re Davey*, 645 So. 2d 398, 404 (Fla. 1994) (citing, with approval, *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); *see also In re Henson*, 913 So. 2d 579, 590 (Fla. 2005). "Although this standard of proof may be met where the evidence is in conflict, it seems to preclude evidence that is ambiguous." *Westinghouse Elec. Corp. v. Shuler Bros.*, 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

14. Section 409.907, which governs Medicaid provider agreements, states, in part, as follows:

(1) Each provider agreement shall require the provider to comply fully with all state and federal

laws pertaining to the Medicaid program, as well as all federal, state, and local laws pertaining to licensure, if required, and the practice of any of the healing arts, and shall require the provider to provide services or goods of not less than the scope and quality it provides to the general public.

15. Section 409.9082 provides, in part, as follows:

(2) A quality assessment is imposed upon each nursing home facility. The aggregated amount of assessments for all nursing home facilities in a given year shall be an amount not exceeding the maximum percentage allowed under federal law of the total aggregate net patient service revenue of assessed facilities. The agency shall calculate the quality assessment rate annually on a per-resident-day basis, exclusive of those resident days funded by the Medicare program, as reported by the facilities. The per-resident-day assessment rate must be uniform except as prescribed in subsection (3). Each facility shall report monthly to the agency its total number of resident days, exclusive of Medicare Part A resident days, and remit an amount equal to the assessment rate times the reported number of days. The agency shall collect, and each facility shall pay, the quality assessment each month. The agency shall collect the assessment from nursing home facility providers by the 20th day of the next succeeding calendar month. The agency shall notify providers of the quality assessment and provide a standardized form to complete and submit with payments. The collection of the nursing home facility quality assessment shall commence no sooner than 5 days after the agency's initial payment of the Medicaid rates containing the elements prescribed in subsection (4). Nursing home facilities may not create a separate line-item charge for the purpose of passing the assessment through to residents.

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(7) The agency may seek any of the following remedies for failure of any nursing home facility provider to pay its assessment timely:

(a) Withholding any medical assistance reimbursement payments until such time as the assessment amount is recovered;

(b) Suspension or revocation of the nursing home facility license; and

(c) Imposition of a fine of up to \$1,000 per day for each delinquent payment, not to exceed the amount of the assessment.

16. Florida Administrative Code Rule 59G-6.010<sup>4</sup> provides, in part, as follows:

(3) Each facility shall report monthly to the Agency for Health Care Administration (AHCA) its total number of resident days and remit an amount equal to the assessment rate times the reported number of days. Facilities are required to submit their full quality assessment payment no later than 20 days from the next succeeding calendar month.

(4) Providers are subject to the following monetary fines pursuant to section 409.9082(7), Florida Statutes (F.S.), for failure to timely pay a quality assessment:

(a) For a facility's first offense, a fine of \$500 per day shall be imposed until the quality assessment is paid in full, but in no event shall the fine exceed the amount of the quality assessment.

(b) For any offense subsequent to a first offense, a fine of \$1,000 per day shall be imposed until the quality assessment is paid in full, but in no event shall the fine exceed the amount of the quality

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<sup>4</sup> The March 25, 2018, version of rule 59G-6.010 was in effect at the time of the quality assessment payment at issue herein. Generally, the law in effect at the time of the alleged violation applies. *See Orasan v. Ag. for Health Care Admin.*, 668 So. 2d 1062 (Fla. 1st DCA 1996).

assessment. A subsequent offense is defined as any offense within a period of five years preceding the most recent quality assessment due date.

(c) An offense is defined as one month's quality assessment payment not received by the 20th day of the next succeeding calendar month.

17. The essence of Respondent's defense is twofold. First, Respondent contends that the check sent for the December 2019 Quality Assessment was lost by AHCA. Second, Respondent contends that section 409.908(7) gives AHCA "discretion regarding whether to assess penalties against a provider for failure to timely pay a quality assessment fee," and further, that once AHCA realized that payment had not been received, the agency should have contacted Respondent by expedited means so as to minimize the amount of the daily fine.

18. Regarding Respondent's first defense, the evidence failed to establish that Respondent actually mailed the missing payment to AHCA and that the agency actually received the missing payment before the due date. Respondent's inability to establish such a predicate places Respondent squarely within the "mandatory"<sup>5</sup> provisions of section 409.9082, which

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<sup>5</sup> As previously noted, section 409.9082 provides that the agency "shall" collect from a provider the quality assessment by the 20th day of the next succeeding calendar month, and imposes "a fine of up to \$1,000 per day for each delinquent payment." As observed in *Allied Fidelity Insurance Co. v. State*, 415 So. 2d 109, 111 (Fla. 3d DCA 1982):

Whether "shall" is mandatory or discretionary will depend, then, upon the context in which it is used and the legislative intent expressed in the statute. Thus, for example, where "shall" refers to some required action preceding a possible deprivation of a substantive right, or the imposition of a legislatively-intended penalty, or action to be taken for the public benefit, it is held to be mandatory.

Because section 409.9082 uses "shall" in the context of collecting the assessment payment, and imposes a fine when a provider fails to timely remit payment, then it is evident that use of the word "shall" in this context imposes a mandatory obligation on the provider to timely remit payment.



require AHCA to “collect the assessment from nursing home facility providers by the 20th day of the next succeeding calendar month.”

19. Respondent’s second defense is grounded in its belief that section 409.9082(7) grants AHCA discretion to waive delinquent quality assessment payment fines. Respondent, in support of its argument, notes that the statute provides that AHCA “may” seek any of the listed remedies, and therefore, the use of the word “may” implies that AHCA has discretion to significantly reduce the fine, or pursue no remedy at all. While it is true that AHCA has some discretion under the statute, that discretion is not as broad as suggested by Respondent.

20. As previously noted, section 409.9082(7) provides that AHCA “may seek any of the following remedies for failure of any nursing home facility provider to pay its assessment timely.” The phrase “any of the following remedies” is a limitation on AHCA’s authority; and this limitation dictates that AHCA can only exercise its discretion within the framework established by the Legislature. AHCA has acted herein within the framework established by the Legislature by narrowing, or otherwise focusing, the exercise of its discretion, as expressed in rule 59G-6.010, such that the fine for Respondent’s first offense is fixed at \$500 per day until the quality assessment is paid in full. If AHCA exercised its discretion in the manner suggested by Respondent, then the agency, by doing so, would most certainly have acted contrary to its own rule.

21. AHCA proved by clear and convincing evidence that Respondent failed to remit its December 2019 quality assessment payment by the due date of January 21, 2020.

22. AHCA proved by clear and convincing evidence that Respondent’s December 2019 quality assessment payment was received by the agency on February 28, 2020.

23. AHCA proved by clear and convincing evidence that Respondent’s failure to timely remit its December 2019 quality assessment payment

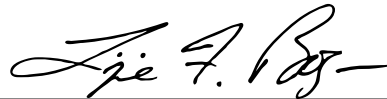
violates section 409.9082, and that this statutory violation is Respondent's first offense within the meaning of rule 59G-6.010.

24. Rule 59G-6.010(4) provides that "[f]or a facility's first offense, a fine of \$500 per day shall be imposed until the quality assessment is paid in full ... ." Respondent's December 2019 quality assessment payment was received by AHCA 38 days after the due date, and therefore, \$19,000 is the fine resulting from the untimely payment.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby RECOMMENDED that Petitioner, Agency for Health Care Administration, enter a final order finding that Conway Lakes Health & Rehabilitation Center committed its first offense of section 409.9082 and imposing a fine of \$19,000.

DONE AND ENTERED this 8th day of October, 2021, in Tallahassee, Leon County, Florida.



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LINZIE F. BOGAN  
Administrative Law Judge  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 8th day of October, 2021.

COPIES FURNISHED:

Taylor Huston, General Counsel  
Clear Choice Health Care  
709 South Harbor City Boulevard  
Melbourne, Florida 32901

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

Simone Marstiller, Secretary  
Agency for Health Care Administration  
2727 Mahan Drive, Building 3  
Tallahassee, Florida 32308-5407

Thomas M. Hoeler, Esquire  
Agency for Health Care Administration  
2727 Mahan Drive, Mail Stop 3  
Tallahassee, Florida 32308

Richard J. Santurri, Esquire  
Agency for Health Care Administration  
Building 3, Room 3428A  
2727 Mahan Drive  
Tallahassee, Florida 32308

William H. Roberts, Acting General  
Counsel  
Agency for Health Care Administration  
2727 Mahan Drive, Mail Stop 3  
Tallahassee, Florida 32308

Shena L. Grantham, Esquire  
Agency for Health Care Administration  
Building 3, Room 3407B  
2727 Mahan Drive  
Tallahassee, Florida 32308

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.