

**SMITH &
ASSOCIATES**

Offices:

3301 Thomasville Road,
Suite 201
Tallahassee, Florida 32308

1499 S. Harbor City Blvd.,
Suite 202
Melbourne, Florida 32901

Phone:

(321) 676-5555
(850) 297-2006

Website:

www.smithlawtlh.com

**SMITH
&
ASSOCIATES**
ATTORNEYS AND COUNSELORS AT LAW

Health Care, Environmental, Governmental Relations,
Zoning – Land Use, Administrative, Regulatory,
Business, Corporate & Bid Protest Law

Geoffrey D. Smith

May 5, 2015

DEFENDING ALLEGED SURVEY DEFICIENCIES AT ASSISTED LIVING FACILITIES (ALFs) AND SKILLED NURSING FACILITIES (SNFs)



You have probably seen the full page newspaper advertisements by certain law firms trying to solicit Plaintiffs to sue your ALF or nursing home, and placing your recent Survey Deficiencies in big bold print for all the world to see. These tactics highlight the importance of

knowing your rights as an ALF or SNF operator. Whether to challenge a statement of deficiencies or an Administrative Complaint by the Agency for Health Care Administration is an important decision with far reaching consequences. You should know your rights and make an informed decision.

Inspections and Survey Deficiencies
Know Your Rights

Assisted Living Facilities (“ALFs”) (governed by Chapter 429, Part I, Florida Statutes, in addition to Chapter 408, Florida Statutes) and Skilled Nursing Facilities (“SNFs”) (governed by Chapter 400, Part II, Florida Statutes, in addition to Chapter 408, Florida Statutes) need to be aware of their legal rights and responsibilities regarding Agency for Health Care Administration (AHCA or Agency) inspections, surveys, and enforcement actions.

With regard to inspections, pursuant to Florida Statutes, AHCA may conduct unannounced inspections of ALFs and SNFs.¹ If faced with an inspection, an ALF/SNF operator has no legal right to refuse to allow the inspectors access to the facility.² During the inspection, AHCA is entitled to have access to copies of all provider records required during the inspection.³ An ALF/SNF operator may request that an Administrator or other designated representative accompany the inspectors while at the facility. It is advisable that the ALF/SNF operator

immediately consult with legal counsel if an unannounced AHCA inspection is made. During an exit interview, the AHCA representatives should explain their findings, including any alleged deficiencies that were found.

Subsequent to an inspection, AHCA will provide the ALF/SNF Administrator with a survey report that provides a detailed written explanation of the findings made during an inspection. If a violation of a regulation is found during an inspection or investigation, it is cited as a deficiency on the Statement of Deficiencies. Any deficiency must be corrected within 30 calendar days after the provider is notified of inspection results unless an alternative timeframe is approved by the agency.⁴ The ALF/SNF will be given 10 calendar days in which to present a Plan of Correction.⁵ ALFs/SNFs must maintain for a three-year period, and make available upon request, records of all inspection reports pertaining to that provider that have been filed by the agency unless such reports are exempt from public disclosure.⁶

Although seldom asserted, an ALF/SNF operator may assert a legal right to challenge a survey report and petition for a formal administrative hearing pursuant to sections 120.569 and 120.57(1), Florida Statutes, if the provider believes that there were in fact no deficiencies that should result in a Plan of Correction being submitted. However, in most instances, the results of a licensure or complaint survey can be resolved through submission and implementation of a Plan of Correction.

Statutory Framework Regarding
AHCA's Issuance of Deficiencies

Emergency License Suspension Orders

In the event of alleged severe deficiencies which AHCA claims threaten the health, safety or welfare of an ALF/SNF resident, AHCA can impose an immediate moratorium on admis-

**SMITH &
ASSOCIATES**

Offices:

3301 Thomasville Road,
Suite 201
Tallahassee, Florida 32308

1499 S. Harbor City Blvd.,
Suite 202
Melbourne, Florida 32901

Phone:

(321) 676-5555

(850) 297-2006

Website:

www.smithlawtlh.com

**“AHCA can
impose an
immediate
moratorium on
admissions or an
emergency order
of license
suspension.”**

**DEFENDING ALLEGED SURVEY DEFICIENCIES AT ASSISTED LIVING FACILITIES
(ALFs) AND SKILLED NURSING FACILITIES (SNFs)**

sions or an emergency order of license suspension.⁷ However, the right to take such emergency action is limited, and such orders can be challenged legally. AHCA is required by section 120.60(6), Florida Statutes, to make specific findings that document the existence of the emergency situation, and may take only such action as is required to address the emergency. An improper Emergency Suspension Order or Moratorium may be immediately appealed to the District Court of Appeal, and there are numerous decisions where Agency action that is not based on a true emergency has been reversed and set aside.

Further, AHCA must also provide an ALF/SNF operator faced with an emergency moratorium, suspension order, or any other effort to suspend or revoke a license with the opportunity to file a Petition for Formal Administrative Hearing to challenge the validity of AHCA's action or proposed action on the license.⁸ Hearings on license proceedings are held before an independent administrative law judge at the Division of Administrative Hearings. Such hearings are an opportunity to prove that the true facts do not support a moratorium, suspension or revocation of the ALF/SNF license.

In addition to or in lieu of taking direct action against an ALF/SNF operator's license, AHCA may also seek imposition of civil penalties for alleged violation of licensure rules and standards.

Administrative Fines and
Classification of Deficiencies

AHCA imposes administrative fines for violations according to a classification system in statute, based on the nature of the violation and the gravity of its probable effect on facility residents. The agency shall indicate the classification on the written notice of the violation.⁹ In addition, the scope of the violation may be cited as an isolated deficiency (affecting a very limited number of clients), a patterned deficiency (repeated violations affecting more than a limited number of clients), or a widespread deficiency (pervasive or systemic failures that have the potential to affect a large portion of clients).¹⁰

Assisted Living Facilities (ALFs) and
Chapter 429, Florida Statutes

Pursuant to sections 408.813 (AHCA's "Core Licensure Act") and 429.19, Florida Statutes (which governs the operations of an ALF), the "classifications" assigned to the alleged violation and the attendant administrative fines are as follows:

Class I violations: present an imminent danger to clients or a substantial probability that death or serious physical or emotional harm would result. These violations must be corrected within 24 hours. Imposition of a fine is mandatory in an amount not less than \$5,000 and not exceeding \$10,000 per violation, even if the violation is corrected.¹¹

Class II violations: directly threaten the physical or emotional health, safety or security of clients (other than Class I). Imposition of a fine is mandatory in an amount not less than \$1,000 and not exceeding \$5,000 per violation, even if the violation is corrected.¹²

Class III violations: indirectly or potentially threaten the physical or emotional health, safety or security of clients (other than Class I or Class II). AHCA shall impose a fine in an amount not less than \$500 and not exceeding \$1,000 per violation, unless the violation is corrected within the time specified for correction in the citation.¹³ [Note: ALF statute (Ch. 429) provides that fines are mandatory for Class III and Class IV violations, but the core licensure statute (Ch. 408) says that the fine will not be imposed if corrected within a specified time, see discussion below.]

Class IV violations: pertain to reports, forms or documents that do not have the potential of negatively affecting clients (purely paperwork type violations). These violations are those that AHCA has determined do not threaten the health, safety, or security of clients. AHCA shall impose a fine in the amount not less than \$100 and not exceeding \$200 per violation, unless the violation is corrected within the time specified for correction in the citation.¹⁴

Section 408.813, Florida Statutes, expressly

SMITH & ASSOCIATES

Offices:

3301 Thomasville Road,
Suite 201
Tallahassee, Florida 32308

1499 S. Harbor City Blvd.,
Suite 202
Melbourne, Florida 32901

Phone:

(321) 676-5555
(850) 297-2006

Website:

www.smithlawtlh.com

DEFENDING ALLEGED SURVEY DEFICIENCIES AT ASSISTED LIVING FACILITIES (ALFs) AND SKILLED NURSING FACILITIES (SNFs)

provides that no fines shall be imposed for timely corrected Class III and Class IV violations. However, AHCA has been known to take a contrary view, and the specific fine amounts for violation of ALF licensure standards are stated in mandatory language in Chapter 429, Florida Statutes. Section 408.832, Florida Statutes, provides that when the AHCA Core Licensure Act conflicts with the specific facility governing statutes (such as the ALF statute) then the Core Licensure Act should prevail. Applying that principle, then no fines should be imposed for minor Class III and IV violations when they are timely corrected by the ALF. If AHCA were to impose fines for Class III and Class IV violations, the ALF would have appropriate grounds for challenging such fines.

In determining if a penalty is to be imposed and in fixing the amount of the fine, AHCA shall consider the following factors:

- the severity of the violation and the extent to which the provision of the applicable laws were violated,
- actions taken by the ALF administrator to correct violations,
- previous violations,
- the financial benefit to the facility of committing the violation, and
- the licensed capacity of the facility.¹⁵

Additionally, each day of continuing violation after the date determined by AHCA for termination of the violation, constitutes an additional, separate, and distinct violation.¹⁶

Because AHCA considers previous violations when imposing penalties, it is important that ALF Administrators ensure that they quickly address and resolve all minor violations so that these will not later serve as a basis for imposing more severe sanctions. Additionally, ALF administrators shall document in writing all actions to correct violations and these shall be verified through AHCA follow up visits. AHCA may impose a fine, and in some instances, revoke or deny a facility's license when a facility administrator fraudulently misrepresents action taken to correct a violation.¹⁷

Additionally, AHCA may impose administrative fines in an amount not to exceed \$500 per violation for violations that are not desig-

nated as Class I, II, III, or IV violations. Unclassified violations include, but are not limited to: violating a condition of the license, violating statutes or rules, exceeding license capacity, and providing services beyond the scope of the license.

Skilled Nursing Facilities (SNFs) and Chapter 400, Florida Statutes

Skilled Nursing Facilities (SNFs) are governed by Chapter 400, Part II, Florida Statutes, as well as Chapter 408, Part II, Florida Statutes. In accordance with section 400.23(7), Florida Statutes, AHCA shall, at least every 15 months, evaluate all nursing home facilities and make a determination as to the degree of compliance. The agency's determination shall be based on the most recent inspection report, as well as findings from other reports and investigations. In addition to the license classification categories authorized under Part II of Chapter 408 (discussed above), AHCA shall assign either a "standard licensure status" or a "conditional licensure status" to each nursing home.¹⁸ 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. 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.¹⁹

The current licensure status of each facility shall be indicated in bold print on the face of the facility's license, and a list of the deficiencies of the facility shall be posted in a prominent place that is in clear and unobstructed public view at or near the place where residents are being admitted to that facility.²⁰

Licensees receiving a conditional licensure status for a facility shall prepare, within 10 working days after receiving notice of deficiencies, a plan for correction of all deficiencies and shall submit the plan to the agency for approval.²¹

An operator has the right to challenge a conditional license rating through the filing of a Petition for Formal Administrative Hearing

SMITH & ASSOCIATES

Offices:

3301 Thomasville Road,
Suite 201
Tallahassee, Florida 32308

1499 S. Harbor City Blvd.,
Suite 202
Melbourne, Florida 32901

Phone:

(321) 676-5555

(850) 297-2006

Website:

www.smithlawtlh.com

“[T]he 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.”

DEFENDING ALLEGED SURVEY DEFICIENCIES AT ASSISTED LIVING FACILITIES (ALFs) AND SKILLED NURSING FACILITIES (SNFs)

and a trial before an independent Administrative Law Judge.

SNF Classification and Civil Penalties/ Administrative Penalties

The “classification” system and attendant penalties for SNF deficiencies are found in section 400.23(8), Florida Statutes, and outlined below. The classifications are similar to that of ALFs, though not identical, and the attendant penalties are quite different. Of note, the SNF statute expressly provides for different levels of fines depending on the whether the deficiency was isolated, patterned, or widespread. Moreover, for Class I, II, and III deficiencies, section 400.23(8)(a), Florida Statutes, provides that “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.” (emphasis added).

Class I deficiency: a deficiency requiring immediate corrective action 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. 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.²²

Class II deficiency: a deficiency that the agency determines has compromised the resident’s ability to maintain or reach his or her highest practicable physical, mental, and psychosocial well-being. A Class II deficiency is subject to a civil penalty of \$2,500 for an isolated deficiency, \$5,000 for a patterned deficiency, and \$7,500 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 investi-

gation since the last licensure inspection. A fine shall be levied notwithstanding the correction of the deficiency.²³

Class III deficiency: a deficiency that the agency determines will result in no more than minimal physical, mental, or psychosocial discomfort to the resident. 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. If a Class III deficiency is corrected within the time specified, a civil penalty may not be imposed.²⁴

Class IV deficiency: 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.²⁵

In addition to the above, section 400.121, Florida Statutes, provides for the denial, suspension, or revocation of nursing home and related health care facility licenses, and also provides for administrative fines. In accordance with section 400.121(1), Florida Statutes, AHCA may revoke or suspend a license, or impose administrative fines not to exceed \$500 per violation per day. Section 400.121(2), Florida Statutes, states:

“Except as provided in 400.23(8), a \$500 fine shall be imposed for each violation. Each day a violation of this part or part II of chapter 408 occurs constitutes a separate violation and is subject to a separate fine, but in no event may any fine aggregate more than \$5,000.”

This section further provides:

“A fine may be levied pursuant to this section *in lieu of* and notwithstanding the provisions of s. 400.23.”²⁶

Thus, the statutes governing administrative fines for skilled nursing facilities appear to be

SMITH & ASSOCIATES

Offices:

3301 Thomasville Road,
Suite 201
Tallahassee, Florida 32308

1499 S. Harbor City Blvd.,
Suite 202
Melbourne, Florida 32901

Phone:

(321) 676-5555

(850) 297-2006

Website:

www.smithlawtlh.com

DEFENDING ALLEGED SURVEY DEFICIENCIES AT ASSISTED LIVING FACILITIES (ALFs) AND SKILLED NURSING FACILITIES (SNFs)

inconsistent and afford the agency significant discretion. On the one hand, it states that “except as provided in 400.23(8), a \$500 fine shall be imposed,” but, on the other hand, it also appears to state that the \$500 per day fine not to exceed the \$5,000 in aggregate may be imposed *in lieu of* the fines provided for in Section 400.23(8) above. An experienced health care attorney can help to navigate these somewhat confusing and contradictory statutes, and seek to have them interpreted and applied in a manner most beneficial to the provider.

Revocation and Suspension: With respect to revoking a SNF license, AHCA may revoke a license where the facility: has had two moratoria issued for substandard care within any 30-month period; is conditionally licensed for 180 continuous days; is cited for two unrelated Class I deficiencies during the same survey; or is cited for two Class I deficiencies arising from separate surveys within a 30-month period.²⁷ If AHCA has placed a moratorium on a facility two times within a 7-year period, AHCA may suspend the nursing home license. The licensee may present factors in mitigation of revocation, and AHCA may determine not to revoke the license based upon the facility’s mitigating factors.

Any action to suspend or revoke a facility’s license under Chapters 400 or 408 shall be heard by the Division of Administrative Hearings within 60 days after the assignment of an administrative law judge (ALJ), unless the time limitation is waived by both parties, and the ALJ shall render a decision with 30 days after receipt of the proposed recommended order.²⁸ Agency action may be overcome by the licensee upon a showing by a preponderance of evidence to the contrary.²⁹

Challenging a Statement of Deficiencies

Existing case law allows a provider to challenge the issuance of Statement of Deficiencies prior to AHCA filing an Administrative Complaint. See e.g., W. Frank Wells Nursing Home v. AHCA, 27 So. 3d 73, 74 (Fla. 1st DCA 2009) (holding that a statement of deficiencies constituted agency action and

could be challenged in an administrative hearing). However, the decision to file a petition to challenge a Statement of Deficiencies has significant implications on the burden of proof at hearing. AHCA Final Orders have indicated that a party challenging a Statement of Deficiencies has the burden to show that no violations occurred by a preponderance of the evidence. See Water’s Edge Extended Care v. AHCA, Case No. 12-2188 (DOAH RO June 24, 2013; AHCA FO Aug. 5, 2013), 2013 WL 4080436, at *3 (“Here, the Agency issued a document known as a statement of deficiencies. It imposed no penalty on the Petitioner. Nor did it alter Petitioner’s licensure status in any way. Thus, it did not meet the definition of an administrative complaint found in Rule 28-106.2015(1), Florida Administrative Code. Therefore, Petitioner should have born the burden of proof by a preponderance of the evidence.”). In contrast, if AHCA files an Administrative Complaint, then AHCA has the burden to prove the violation by clear and convincing evidence.³⁰

Because the burden on AHCA to prove the violation is much greater when it brings an Administrative Complaint (as compared to when a facility challenges a Statement of Deficiencies), ALFs/SNFs need to seriously consider the pros and cons of challenging a Statement of Deficiencies. In most instances, the best course of action is to challenge the Administrative Complaint, rather than challenging the Statement of Deficiencies. However, the following are circumstances where it may be prudent for a facility to challenge the Statement of Deficiencies:

- When AHCA is requiring some immediate corrective action that the provider believes is unwarranted under the circumstances and that would be unduly burdensome on the provider;
- When the facility reasonably believes that the Statement of Deficiencies will result in a negative stigma affecting its business operations if it fails to challenge the alleged deficiency;
- When the facility reasonably believes that certain payors may take adverse action based on the Statement of Deficiencies being filed and unchallenged.

**SMITH &
ASSOCIATES**

Offices:

3301 Thomasville Road,
Suite 201
Tallahassee, Florida 32308

1499 S. Harbor City Blvd.,
Suite 202
Melbourne, Florida 32901

Phone:

(321) 676-5555

(850) 297-2006

Website:

www.smithlawtlh.com

**“[D]uring the
investigation it
was revealed that
one of the
residents who did
not meet the
residency
requirement...
had sexually
assaulted another
resident several
months prior.”**

**DEFENDING ALLEGED SURVEY DEFICIENCIES AT ASSISTED LIVING FACILITIES
(ALFs) AND SKILLED NURSING FACILITIES (SNFs)**

It should be noted that although administrative case law in certain Final Orders has indicated that the burden on the provider is much greater when it challenges a Statement of Deficiencies, there have been no appellate decisions on this issue to date.

**Case Law Examples
Recent Reported Final Orders**

ALF Final Order Examples

AHCA v. Dayspring Village, Inc., Case No. 13-1451 (DOAH RO April 28, 2014; AHCA FO June 4, 2014), 2014 WL 2624256

Administrative Complaint sought to impose an administrative fine of \$2,000 based on two Class II deficiencies discovered during a complaint inspection of Dayspring Village’s assisted living facility, as well as a \$185.00 survey fee. Specifically, the complaint alleged that the facility failed to provide adequate and appropriate health care consistent with established and recognized standards within the community by allowing diabetic residents to use the same glucometer without disinfecting or cleaning the glucometer device in between resident usage, and failed to properly supervise residents taking their medication.

Holding: The Final Order concluded that AHCA proved its violations by clear and convincing evidence and imposed an administrative fine of \$2,000 and a survey fee of \$185.50 on Dayspring Village, Inc.

AHCA v. Pine Tree Manor, Inc., Case Nos. 13-2011, 13-2397 (DOAH RO Dec. 5, 2013; AHCA FO Feb. 5, 2014), 2014 WL 554674

AHCA charged Pine Tree Manor with two Class I violations and sought to revoke its license for two separate deficiencies. The first alleged Class I violation concerned the facility’s failure to remain generally aware of one of its residents whereabouts. Specifically, a resident wandered off from the facility and the facility did not seek to locate him until the next morning. They were unable to locate him, and he was found, deceased, several days later. The Final Order held that AHCA had not proved by clear and convinc-

ing evidence that the facility was on notice the resident was in “imminent danger of death or serious physical harm” to substantiate a Class I, and held that it was a Class II violation, and imposed a \$5,500 fine. The second alleged violation concerned the facility’s failure to properly respond to an emergency situation where a resident stopped breathing and ultimately died. The employee failed to immediately call 911 and provide CPR. The Final Order held this was a Class I violation, revoked respondent’s license, and imposed an \$8,000 fine.

AHCA v. Stephens Memorial Home, Inc., Case No. 13-0368 (DOAH RO June 6, 2013; AHCA FO July 9, 2013), 2013 WL 3490616

AHCA conducted an unannounced biennial licensure and complaint survey that gave rise to the Administrative Complaint. The Administrative Complaint alleged a widespread Class II deficiency and sought the imposition of an administrative fine of \$1,000 against Respondent. Specifically, the Administrative Complaint alleged that Stephens Memorial failed to insure that one of four sampled residents was free of physical restraints in violation of Florida Statutes because that resident had an activity board attached to his wheelchair that appeared to prevent the resident from getting up from his wheelchair.

Holding: The Final Order held that the resident was able to remove the activity board and that it was prescribed for therapeutic purposes and thus did not meet the definition of a “restraint” and the Administrative Complaint was dismissed.

AHCA v. Dos of Crystal River ALF, Case No. 12-2306 (DOAH RO Dec. 28, 2012; AHCA FO Feb. 8, 2013), 2013 WL 595490

Administrative Complaint alleged a Class III violation for facility’s failure to have a properly completed Residential Health Assessment form for each resident, and Class I violation for failure to provide appropriate supervision to prevent elopement.

Holding: Held that while violations did occur in that the forms were not properly completed, they did not constitute Class III violations

**SMITH &
ASSOCIATES**

Offices:

3301 Thomasville Road,
Suite 201
Tallahassee, Florida 32308

1499 S. Harbor City Blvd.,
Suite 202
Melbourne, Florida 32901

Phone:

(321) 676-5555

(850) 297-2006

Website:

www.smithlawtlh.com

DEFENDING ALLEGED SURVEY DEFICIENCIES AT ASSISTED LIVING FACILITIES (ALFs) AND SKILLED NURSING FACILITIES (SNFs)

because there was no threat to the physical or emotional health of the residents, and thus it was reduced to a Class IV violation with a fine of \$100. With regard to the alleged Class I violation regarding elopement, the Final Order held that the Agency did not prove, by clear and convincing evidence, that the facility violated Florida Statutes with respect to the provision of care and supervision of its residents.

AHCA v. Allan v. Comrie, Case No. 12-0102 (DOAH RO Oct. 3, 2012; AHCA FO Nov. 9, 2012), 2012 WL 5705633

AHCA alleged that Respondent had advertised and operated a facility without first obtaining licensure for that program, had misrepresented the licensure status of the home, had failed to comply with rules governing facilities, and had failed to cooperate with authorities with regard to the facility. As to all alleged violations, Respondent maintained it was not required to hold a license for the subject property as its operation was exempt as a matter of law. Additionally, Respondent averred that any incorrect advertising was merely a clerical error and not an intentional misrepresentation of the licensure status of the facility.

Holding: Although the Administrative Law Judge did not recommend revocation, AHCA entered a Final Order and imposed a \$7,000 fine and revoked Respondent's license. The operator elected not to appeal to the District Court of Appeal.

AHCA v. Avalon's Assisted Living, LLC, Case No. 10-0528 (DOAH RO Jan. 28, 2011; AHCA FO March 4, 2011), 2011 WL 860551

Action to revoke the facilities' licenses due to Class II deficiencies regarding: 1) failure to provide required employee training and falsified training certifications, and 2) the failure to provide residents with appropriate pain medication and required care. The evidence established that the violations posed a direct threat to the physical and emotional health of the residents. License revocation was an appropriate penalty pursuant to section 429.14(1)(e)(2), Florida Statutes, regarding revocation where there are three or more

cited Class II deficiencies.

Holding/Fine: The licenses of the facilities were revoked and an administrative fine of \$3,000 was imposed.

SNF Final Order Examples

AHCA v. Tallahassee Facility Operations, LLC, Case No. 14-0436 (DOAH RO Dec. 31, 2014; AHCA FO Jan. 30, 2015), 2015 WL 510385

Administrative Complaint sought to impose an administrative fine in the amount of \$1,000 and conditional licensure status based on one uncorrected Class III deficiency discovered during a revisit survey inspection conducted on August 12, 2013. AHCA conducted a survey of the facility in July 2013 and found a Class III deficiency for failure to follow physician orders that patient be bathed daily. Respondent submitted a corrective action plan which was approved by AHCA. AHCA re-surveyed respondent in August 2013, and found additional Class III violations regarding failure to follow physician orders concerning PICC-dressing changes in violation of rule 59A-4.107(5), Florida Administrative Code. AHCA alleged the August violation constituted an uncorrected violation of the earlier failure to follow physician orders.

Respondent argued that the August violation was different than the July violation, and thus the August violation should not be construed as an "uncorrected violation." AHCA argued that both violations concerned the failure to follow physician orders and thus the second violation was an "uncorrected violation." AHCA further argued that its acceptance of the corrective action plan did not absolve Respondent from its responsibility to correct every area in which it was found out of compliance.

Holding: AHCA demonstrated by clear and convincing evidence that Respondent committed an uncorrected Class III deficiency. Final Order imposed a fine of \$1,000 and further imposed conditional licensure on Respondent for the period from August 13, 2013 through September 30, 2014.

**SMITH &
ASSOCIATES**

Offices:

3301 Thomasville Road,
Suite 201
Tallahassee, Florida 32308

1499 S. Harbor City Blvd.,
Suite 202
Melbourne, Florida 32901

Phone:

(321) 676-5555
(850) 297-2006

Website:

www.smithlawtlh.com

**“Final Order...
further imposed
conditional
licensure on
Respondent for
the period from
August 13, 2013
through
September 30,
2014 ”**

**DEFENDING ALLEGED SURVEY DEFICIENCIES AT ASSISTED LIVING FACILITIES
(ALFs) AND SKILLED NURSING FACILITIES (SNFs)**

Water’s Edge Extended Care v. AHCA,
Case No. 12-2188 (DOAH RO June 24,
2013; AHCA FO Aug. 5, 2013), 2013 WL
4080436

AHCA conducted a complaint survey and issued a statement of deficiencies for alleged violation of section 400.0255, Florida Statutes, regarding transfers or discharges initiated by nursing homes. The statement of deficiencies was challenged by petitioner and the matter was referred to DOAH. The ALJ found that section 400.0255, Florida Statutes, was inapplicable to the circumstances, as the physician initiated the Baker Act transfer, not the nursing home.

Holding: The Final Order found that the Agency failed to establish that respondent violated section 400.0255, Florida Statutes, by improperly discharging or transferring the resident, and they Agency withdrew its Statement of Deficiencies.

AHCA v. Greenbriar NH, LLC, Case No. 11-4379 (DOAH RO April 3, 2012; AHCA FO June 7, 2012), 2012 WL 2191285

Administrative Complaint alleged that Respondent failed to comply with background screenings and alleged a Class II deficiency.

Holding: the Respondent failed to comply with the relevant law regarding background screenings as well as its own policies and procedures when it hired new employee. However, AHCA failed to prove that these failures constituted a Class II deficiency. The Final Order dismissed the Administrative Complaint and replaced the Conditional License with a Standard License for the time period in question.

AHCA v. SA-PG Sun City Center, LLC, Case No. 10-4740 (DOAH RO Dec. 21, 2010; AHCA FO Feb. 2, 2011), 2011 WL 379931

Administrative Complaint alleged that Respondent failed to follow established and recognized practice standards regarding care to its residents, and failed to comply with the rules governing skilled nursing facilities adopted by AHCA.

Holding: There is no competent and substantial evidence that Respondent failed to follow established practice standards that resulted in harm to its residents and failed to comply with rules governing skilled nursing facilities, or that otherwise warrants a fine or Conditional rating. Respondent was marginally deficient in two minor areas concerning their own policies, but neither violation is a Class II deficiency, nor warrants imposition of a sanction.

Conclusion

Preventative measures are the best way to protect against survey deficiencies. ALF/SNF administrators should develop and implement trainings and staff education to ensure compliance with Florida Statutes and rules. Qualified health care consulting firms and health care attorneys can assist with developing compliant materials and compliance programs. An ounce of prevention in this respect will be well worth avoiding the costs of a bad survey or inspection by AHCA.

However, even with a good education and compliance program in place, AHCA may still seek to suspend or revoke a license, or impose a moratorium on admissions or levy substantial fines. In order to assess penalties, AHCA is required to file an Administrative Complaint. ALFs/SNFs have the right to demand a formal hearing to challenge the facts, and to challenge the amount or appropriateness of the fines being imposed.

ALF/SNF administrators in such situations should consult and retain experienced legal counsel to contest and defend against such actions by filing a Petition for Formal Administrative Hearing pursuant to Chapter 120. The timeframe for responding to an Administrative Complaint is 21 days from receipt of the Complaint, and failure to timely file a petition may result in an admission of the facts alleged in the Complaint and entry of a Final Order by the agency. ALF/SNF administrators need to be aware of their legal rights *prior* to receiving an Administrative Complaint and need to be sure to consult with counsel prior to inadvertently waiving any rights. Hiring experienced legal counsel is crucial in any challenge to an Administrative Complaint. Experienced counsel can not

**SMITH &
ASSOCIATES**

Offices:

3301 Thomasville Road,
Suite 201
Tallahassee, Florida 32308

1499 S. Harbor City Blvd.,
Suite 202
Melbourne, Florida 32901

Phone:

(321) 676-5555

(850) 297-2006

Website:

www.smithlawtlh.com

**DEFENDING ALLEGED SURVEY DEFICIENCIES AT ASSISTED LIVING FACILITIES
(ALFs) AND SKILLED NURSING FACILITIES (SNFs)**

only help to protect your due process rights, but can also ensure that the State is required to prove its case by clear and convincing evidence.

also AHCA v. Tallahassee Facility Operations, LLC, Case No. 14-0436 (DOAH RO Dec. 31, 2014; AHCA FO Jan. 30, 2015), 2015 WL 510385.

Geoffrey D. Smith is a shareholder in the law firm of Smith & Associates, and has practiced in the area of health care law for over 20 years.

¹ §408.811(1), Fla. Stat., §429.34(1), Fla. Stat., §400.19, Fla. Stat.

² §408.811(1), Fla. Stat.

³ §408.811(3), Fla. Stat.

⁴ §408.811(4), Fla. Stat.

⁵ §408.811(5), Fla. Stat.

⁶ §408.811(6), Fla. Stat.

⁷ §408.814(1), Fla. Stat.

⁸ §120.60(7), Fla. Stat.

⁹ §429.19(2), Fla. Stat.

¹⁰ §408.813(2), Fla. Stat.

¹¹ §408.813(2)(a), Fla. Stat.; §429.19(2)(a), Fla. Stat.

¹² §408.813(2)(b), Fla. Stat.; §429.19(2)(b), Fla. Stat.

¹³ §408.813(2)(c), Fla. Stat.; §429.19(2)(c), Fla. Stat.

¹⁴ §408.813(2)(d), Fla. Stat.; §429.19(2)(d), Fla. Stat.

¹⁵ §429.19(3), Fla. Stat.

¹⁶ §429.19(4), Fla. Stat.

¹⁷ §429.19(5), Fla. Stat.

¹⁸ §400.23(7), Fla. Stat.

¹⁹ §400.23(7)(a) and (b), Fla. Stat.

²⁰ §400.23(7)(d), Fla. Stat.

²¹ §400.23(7)(d), Fla. Stat.

²² §400.23(8), Fla. Stat.

²³ §400.23(8), Fla. Stat.

²⁴ §400.23(8), Fla. Stat.

²⁵ §400.23(8), Fla. Stat.

²⁶ §400.121(2), Fla. Stat. (emphasis added).

²⁷ §400.121(3), Fla. Stat.

²⁸ §400.121(5), Fla. Stat.

²⁹ §400.121(7), Fla. Stat.

³⁰ The burden of proof on AHCA 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. 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). See