STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE ADMINISTRATION,	)	
Petitioner,	)	
vs.	)	Case No. 97-2807
A DOCTOR'S OFFICE FOR WOMEN, INC.,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a Section 120.57(1) hearing was held in this case on August 15, 1997, by telephone conference call, before Stuart M. Lerner, a duly designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jean Claude Dugue, Esquire
Agency for Health Care Administration
8355 Northwest 53rd Street, First Floor
Miami, Florida 33166

For Respondent: Rafael A. Centurion, Esquire
2515 West Flagler Street
Miami, Florida 33135

STATEMENT OF THE ISSUES

1. Whether Respondent failed to timely file its application for the renewal of its abortion clinic license, as alleged in the Administrative Complaint.

2. If so, may the Agency for Health Care Administration (Agency) fine Respondent for failing to timely file its renewal

application.

3. If the Agency is authorized to impose such a fine, should it exercise such authority.

4. If so, what is the amount of the fine it should impose.

PRELIMINARY STATEMENT

On June 3, 1996, the Agency issued an Administrative Complaint against Respondent which contained the following allegations:

> 1. The Agency has jurisdiction over Respondent by virtue of the provisions of Chapter 390, Florida Statutes.
>
> 2. Respondent is licensed to operate at 3250 South Dixie Highway, Coconut Grove, Miami, Florida 33133, as an abortion clinic in compliance with Chapter 390, Florida Statutes, and Chapter 59A-9, Florida Administrative Code.
>
> 3. The Respondent has violated the provisions of Chapter 390, Florida Statutes, in that License Number 693 was issued to the Respondent for the period of 3/22/95 through 3/21/96. Respondent's application for renewal was due to be received by the Agency on 1/21/96, sixty days prior to expiration; however, it was received on 04/25/96, which was ninety-five(95) days late. This is in violation of Section 390.016(1), Florida Statutes.
>
> 4. The Agency has determined that $1,000.00 will constitute the administrative fine for filing late the application for renewal of license.
>
> 5. The above-referenced violations constitute grounds to levy this administrative fine pursuant to Section 390.018.

The Administrative Complaint notified Respondent of its right to request an administrative hearing on the matter within 21 days of

its receipt of the Administrative Complaint.

After 21 days had passed, the Agency, believing that Respondent had not requested an administrative hearing, issued a Final Order taking the action proposed in the Administrative Complaint.

Respondent appealed the Agency's Final Order to the Third District Court of Appeal. On June 3, 1997, the Third District Court of Appeal issued the following order:

> Upon consideration, the court relinquishes jurisdiction for ninety (90)days to the Agency for Health Care Administration, with directions to refer this matter to the Division of Administrative Hearings to make a factual determination of whether [A Doctor's Office for Women, Inc.] submitted [a] timely request[] for administrative hearing to the appellee State of Florida, Agency for Health Care Administration. See United Health, Inc. v. Dept. of Health and Rehabilitative Services, 511 So. 2d 684 (Fla. 1st DCA 1987).
>
> The parties shall report the status of this matter within ninety (90) days of the date hereof.

Following the issuance of the Third District Court of Appeal's order relinquishing jurisdiction, the Agency determined that Respondent had in fact timely filed a request for an administrative hearing on the allegations set forth in the Administrative Complaint. Accordingly, the Agency proceeded to take action to vacate its Final Order and to refer Respondent's administrative hearing request to the Division of Administrative Hearings "to conduct all necessary proceedings required under the law, and to submit a Recommended Order to th[e A]gency." The

referral to the Division of Administrative Hearings was made on June 12, 1997.

As noted above, the administrative hearing was held on August 15, 1997. A total of two witnesses testified at the hearing. Robert Van Sickle, a Human Services Program Specialist with the Agency, testified on behalf of the Agency. Dr. Vladimir Rosenthal, Respondent's Chief Operating Officer, testified for Respondent. In addition to the testimony of these two witnesses, five exhibits (Petitioner's Exhibits 1 through 5) were offered and received into evidence.

At the conclusion of the evidentiary portion of the hearing, the undersigned announced on the record that proposed recommended orders had to be filed no later than 15 days from the date of the filing of the transcript of the hearing with the Division of Administrative Hearings. The hearing transcript was filed with the Division of Administrative Hearings on September 22, 1997. On September 25, 1997, the Agency filed its proposed recommended order, which the undersigned has carefully considered. To date, Respondent has not filed any post-hearing submittal.

FINDINGS OF FACT

Based upon the evidence adduced at hearing and the record as a whole, the following findings of fact are made:

1. At all times material to the instant case, Respondent operated an abortion clinic located in Dade County, Florida, at 3250 South Dixie Highway, Coconut Grove, Miami, Florida (Coconut Grove Clinic).

2. License number 693 constituted authorization from the Agency to Respondent to operate the Coconut Grove Clinic for the

one-year period specified in the license.

3. License number 693 had an effective date of March 22, 1995, and an expiration date of March 21, 1996.

4. On or about December 22, 1995, the Agency sent Respondent the following letter:

> In reviewing our records, we note that the facility's abortion clinic license expires on 03/21/96.
>
> We are enclosing a copy of Form 3130-1000, Licensure Application, which should be completed and returned to this office along with the appropriate licensure fee of $250.00, pursuant to Rule 59A-9.020 Florida Administrative Code, made payable to the Agency for Health Care Administration.
>
> Incorrect or incomplete information will not be accepted, and the application will be returned.
>
> The application must be received on or before 01-21-96, sixty (60) days prior to the expiration of the current license to comply with section 390.016(1), Florida Statutes.
>
> Your attention to this request will facilitate processing your renewal license.

The letter was delivered to Respondent on December 28, 1995.

5. The General Manager of the Coconut Grove Clinic, Carmen Penaloza, filled out the Licensure Application and gave it to Respondent's Chief Operating Officer, Dr. Vladimir Rosenthal, for his signature. After Dr. Rosenthal affixed his signature to the Licensure Application, he returned the document to Penaloza for mailing to the Agency.

6. The Licensure Application was completed and signed prior to January 21, 1996.

7. Some time after January 21, 1996, the Agency notified Respondent that it had no record of having received a completed and signed Licensure Application from Respondent.[1]

8. Accordingly, Penaloza filled out and Dr. Rosenthal signed another Licensure Application.

9. This completed and signed Licensure Application was received by the Agency on April 25, 1996.

10. On or about May 21, 1996, the Agency issued Respondent License number 0786, authorizing Respondent to operate the Coconut Grove Clinic for the one-year period beginning March 22, 1996, and ending March 21, 1997.

11. On June 3, 1996, the Department issued an Administrative Complaint announcing its intention to fine Respondent $1,000.00 for filing its application to renew its license to operate the Coconut Grove Clinic "ninety-five (95) days late."

CONCLUSIONS OF LAW

12. "No abortion clinic [may] operate in this state without a currently effective license issued by the [A]gency." Section 390.014(1), Florida Statutes.

13. "A separate license [is] required for each clinic maintained on separate premises, even though it is operated by the same management as another clinic." Section 390.014(2), Florida Statutes.

14. "An application for a license to operate an abortion clinic [must]be made to the [A]gency on a form furnished by it for that purpose" and the application must "be accompanied by the . . . license fee" of $250.00. Section 390.014(3), Florida Statutes; Section 390.015.(1), Florida Statutes; Rule 59A-9.020(1) and (2), Florida Administrative Code.

15. Section 390.016, Florida Statutes, addresses the subject of the "expiration" and "renewal" of licenses issued for the operation of abortion clinics. It provides as follows:

> (1) A license issued for the operation of an abortion clinic, unless sooner suspended or revoked, shall expire 1 year from the date of issuance. Sixty days prior to the expiration date, an application for renewal of such license shall be submitted to the [A]gency on a form furnished by the [A]gency. The license may be renewed if the applicant has met the requirements of this chapter and of all rules adopted pursuant to this chapter.
>
> (2) A licensee against which a revocation or suspension proceeding is pending at the time of license renewal may be issued a conditional license which shall be effective until final disposition of the proceeding by the [A]gency. If judicial relief is sought from the order resulting from the revocation or suspension proceeding, the court having jurisdiction may order that the conditional license be continued for the duration of the judicial proceeding.

16. Pursuant to Section 390.017, Florida Statutes, "[t]he license of an abortion clinic may be revoked, or may be suspended for a period not to exceed 2 years, or the [A]gency may refuse to renew such license, if it is determined in accordance with the provisions of chapter 120 that the clinic has violated a

provision of this chapter or any rule or lawful order of the [A]gency."

17. Section 390.018, Florida Statutes, authorizes the Agency to impose an "[a]dministrative penalty in lieu of revocation or suspension" of the abortion clinic's license. It provides as follows:

> If the [A]gency finds that one or more grounds exist for the revocation or suspension of a license issued to an abortion clinic, the [A]gency may, in lieu of such suspension or revocation, impose a fine upon the clinic in an amount not to exceed $1,000 for each violation. The fine shall be paid to the [A]gency within 60 days from the date of entry of the administrative order. If the licensee fails to pay the fine in its entirety to the [A]gency within the period allowed, the license of the licensee shall stand suspended, revoked, or renewal or continuation may be refused, as the case may be, upon expiration of such period and without any further administrative or judicial proceedings.

18. Because they are penal in nature, the provisions of Sections 390.017 and 390.018, Florida Statutes, "must be strictly construed and no conduct is to be regarded as included within [them] that is not reasonably proscribed by [them]. Furthermore, if there are any ambiguities included such must be construed in favor of the . . . licensee." Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

19. The Agency may revoke or suspend an abortion clinic's license pursuant to Section 390.017, Florida Statutes, or impose a fine upon the licensee pursuant to Section 390.018, Florida Statutes (in lieu of revocation or suspension) only if the grounds for such action are established by clear and convincing

evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996)("[A]n administrative fine deprives the person fined of substantial rights in property. Administrative fines . . . are generally punitive in nature. . . . Because the imposition of administrative fines . . . are penal in nature and implicate significant property rights, the extension of the clear and convincing evidence standard to justify the imposition of such a fine is warranted."); Pic N' Save v. Department of Business Regulation, 601 So. 2d 245, 249 (Fla. 1st DCA 1992)("It is now settled in Florida that a business license, whether held by an individual or a corporate entity, is subject to suspension or revocation only upon proof by clear and convincing evidence of the alleged violations."); Section 120.57(1)(h), Florida Statutes ("Findings of fact shall be based on a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute.").

20. "'[C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.'" In re Davey, 645 So. 2d

398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

21. The Agency, through service of its Administrative Complaint, has notified Respondent of its intent to impose a $1,000.00 fine upon Respondent "for filing late the application for renewal of [its] license [to operate the Coconut Grove Clinic]." The Agency has alleged in the Administrative Complaint that Respondent's late filing of its renewal application "constitutes grounds to levy this administrative fine pursuant to Section 390.018, Florida Statutes."

22. At the Section 120.57(1) hearing held in the instant case (at Respondent's request), clear and convincing evidence was presented establishing that Respondent failed to file its application to renew its license to operate the Coconut Grove Clinic 60 days before the expiration date of the license, as required by Section 390.16(1), Florida Statutes.

23. The lateness of Respondent's renewal application may have provided the Agency with a basis upon which to refuse to renew Respondent's license,[2] but it did not constitute grounds for revocation or suspension of the license. Cf. Terrell Oil Company v. Department of Transportation, 541 So. 2d 713, 715 (Fla. 1st DCA 1989)("[W]e do not find that the order appealed [denying the Appellant's application for renewal of its DBE certification] is one that 'has the effect of suspending or revoking a license.' Indeed, it is clear under the applicable statute and the rules implementing it that a DBE certification is

of finite duration and that the enterprise must submit a complete updated application in order to remain certified. . . . We find a qualitative difference between the type of order appealed here that denies renewal of a license that has expired or is about to expire and one which suspends or revokes an active license.").

24. Section 390.018, Florida Statutes, authorizes the Agency to impose a fine "in lieu of [license] suspension or revocation." It does not give the Agency the authority to fine a licensee as an alternative to denying license renewal. See City of Cape Coral v. GAC Utilities, Inc., of Florida, 281 So. 2d 493, 495-96 (Fla. 1973)("All administrative bodies created by the Legislature are not constitutional bodies, but, rather, simply mere creatures of statutes. This, of course, includes the Public Service Commission. . . As such, the Commission's powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State. . . . Any reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof, . . . the further exercise of the power should be arrested."); State Department of Environmental Regulation v. Puckett Oil Company, 577 So. 2d 988, 992 (Fla. 1st DCA 1991)("Article I, Section 18, of the Florida Constitution prohibits an administrative agency from imposing a sentence of imprisonment or any other penalties except as provided by law. Pertinent case law reveals that an agency possesses no inherent power to impose sanctions, and that any such power must be

expressly delegated by statute."); Willner v. Department of Professional Regulation, Board of Medicine, 563 So. 2d 805, 806 (Fla. 1st DCA 1990)("We agree that the $60,000 payment is a

penalty. As a penalty, it can only be upheld if the legislative authority relied upon by the agency is sufficiently specific to indicate a clear legislative intent that the agency have authority to exact the penalty prescribed.").

25. Because the Agency lacks statutory authority to impose a monetary penalty for the late filing of an application to renew an abortion clinic license,[3] the Administrative Complaint filed against Respondent proposing the assessment of such a penalty must be dismissed.

RECOMMENDATION

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

RECOMMENDED that the Agency issue a final order dismissing the Administrative Complaint against Respondent.

DONE AND ENTERED this 10th day of October, 1997, in Tallahassee, Leon County, Florida.

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of October, 1997.

ENDNOTES

[1] The record evidence is insufficient to support a finding that the Licensure Application was actually mailed to and received by the Agency after it was signed by Dr. Rosenthal. Dr. Rosenthal's testimony that Penaloza (who was out of the country and did not testify at the final hearing) told him that she had mailed the completed and signed Licensure Application to the Agency constitutes hearsay evidence that would not be admissible over objection in a civil proceeding. In a Section 120.57(1) hearing, "[h]earsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." Section 120.569(1)(c), Florida Statutes.

[2] See Vantage Healthcare Corporation v. Agency for Health Care Administration, 687 So. 2d 306 (Fla. 1st DCA 1997)(Agency erred in accepting late-filed letter of intent from health care provider; doctrine of equitable tolling may not be applied to extend time for filing certificate of need application).

[3] Had the Legislature intended to authorize the Agency to impose such a monetary penalty, it could have, for instance, used language similar to that found in Section 479.07(8), Florida Statutes (which deals with the expiration and renewal of sign permits issued by the Department of Transportation), to clearly express such intent. The absence of such a clear expression of legislative intent is fatal to the Agency's efforts to exact a late-filing fee from Respondent as a penalty for failing to timely renew its abortion clinic license for the North Miami Clinic.

COPIES FURNISHED:

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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.

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