

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GWENDOLYN WHITTINGHAM,)
)
 Petitioner,)
)
 vs.) Case No. 97-5693
)
 AGENCY FOR HEALTH CARE)
 ADMINISTRATION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, William J. Kendrick, held a formal hearing in the above-styled case on March 18, 1998, in Miami, Florida.

APPEARANCES

For Petitioner: Gwendolyn Whittingham, pro se
15560 Northwest 26th Avenue
Miami, Florida 33054

For Respondent: Edward M. Lerner, Esquire
Agency for Health Care Administration
8355 Northwest 53rd Street
Miami, Florida 33166

STATEMENT OF THE ISSUE

At issue in this proceeding is whether Petitioner's application for a license to operate an Assisted Living Facility should be approved.

PRELIMINARY STATEMENT

Petitioner, as the applicant for a license to operate an

Assisted Living Facility (ALF), was notified by Respondent on

October 16, 1997, that her application had been denied for the following reasons:

Submission of a fraudulent statement on the notarized application form. The application form asks if you have been arrested for a crime involving injury to persons. You wrote a comment stating "no injury". The background screening results from the Florida Department of Law Enforcement revealed that you have been arrested and convicted of aggravated assault and were received in the Florida Department of Corrections on 03/12/92 and discharged on 11/03/95. Submission of a fraudulent statement on the notarized application form is grounds for denial of this application, section 400.414(2)(i), F.S.

An individual who is convicted of a crime involving injury to persons is considered not to be of suitable character to provide continuing adequate care to residents, section 400.414(2)(b), F.S.

Failure to provide a complete application package. In a letter dated 09/16/97 you were informed that the application package was incomplete and that additional documentation must be provided on or before 10/07/97 or the application would be denied. You did not provide the requested documentation. The Agency is unable to verify that the applicant can provide adequate care to residents without a complete application package being on file, section 400.411(1), F.S.

Petitioner responded to Respondent's letter of denial on October 21, 1997, and disputed the grounds advanced by the Agency for the denial of her application. Consequently, the matter was referred to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct a formal hearing pursuant to Sections 120.569, 120.57(1), and 120.60(3), Florida Statutes.

At hearing, Petitioner testified on her own behalf, but offered no further proof. Respondent called Mary Ippolito, Jo Ann Linch, and Elizabeth Werner as witnesses, and the Respondent's Exhibits 1 through 9 and 11 were received into evidence.¹

The transcript of the hearing was filed April 6, 1998, and the parties were accorded ten days from that date to submit proposed recommended orders. Respondent elected to file such a proposal, and it has been duly considered in the preparation of this recommended order.

FINDINGS OF FACT

Petitioner's application and the Agency's denial

1. On or about September 5, 1997, Petitioner, Gwendolyn Whittingham, submitted an application to Respondent, Agency for Health Care Administration (Agency), for initial licensure of a 4-bed Assisted Living Facility (ALF) to be known as Gwen's Heavenly Resort, and to be located at 15560 Northwest 26th Avenue, Opa Locka, Florida. Respondent was named as the owner and proposed administrator.

2. Pertinent to this case, item VIIA on the application, entitled "Criminal Abuse History," required that Petitioner answer yes or no to the following question by checking the appropriate box:

Has any owner, administrator, partner, or director ever been arrested for -- or convicted of-- a crime involving injury to persons, or involving financial or business

management (e.g. assault, battery, embezzlement, or fraud)?

The question further provided:

If the answer . . . is "YES" attach a separate letter of explanation stating the charges, dates of arrest/conviction, and disposition for each incident. Check will be made for each applicant.

Petitioner did not check either the "YES" box or the "NO" box, but wrote in the words "No Injury."

3. Also pertinent to this case, item VIII of the application provided the following "application checklist" for an initial licensure application:

- _____ Are all sections on this application completed?
- _____ Is the application signed & notarized below?
- _____ Completed Attachment A - Statement of Operations?
- _____ Completed Attachment B - Statement of Assets & Liabilities?
- _____ Completed Attachment C - Zoning Certificate?
- _____ Have you attached Proof of Business Liability Insurance?
- _____ Have you submitted the correct fee?

The check list included the following cautionary statement:

Please note that your application may be denied for failure to submit the documentation required above.

4. Item IX of the application called for the signature of the owner or administrator, and that the application be notarized. The following affirmation was required:

The undersigned hereby swears (or affirms) that the statements in this application, and its attachments, are true and correct and

that to the best of my knowledge and belief all persons in ownership or employment are of good moral character, and that the ownership possesses sufficient funds to operate this facility in a satisfactory manner.

5. Apart from not responding directly to item VIIA, the application submitted by Petitioner (Respondent's Exhibit 7) was not signed and notarized; did not include a "Statement of Operations"; did not include a "Statement of Assets & Liabilities"; did not include a "Zoning Certificate" verified by the local government authority; and did not include "Proof of Business Liability Insurance." Moreover, Petitioner did not sign the application form for the "Florida Protective Services System Background Check" she submitted, and the fee she submitted (\$138.00) was, as discussed infra, not adequate.

6. By letter of September 16, 1997, the Agency advised Petitioner that it had received her application and the fee she had tendered. The letter further advised Petitioner that:

The application submitted was found to be incomplete. The information or documentation requested below must be received back in this office by 10/07/97 or your application will be denied.

APPLICATION

The application form you submitted has not been in use by this Agency in over six years. This form is not acceptable. A current application form is enclosed. Please complete the current application form and have it notarized.

FEE

The fee submitted is incorrect because you submitted an outdated application package. The correct fee cannot be determined until

you submit a current application form. The current application fee is \$253 plus \$33 for each private pay bed. If a bed is to be designated for a recipient of OSS services, there is no per bed fee. Please refigure the fee due and submit the remaining balance due.

INSURANCE

You must submit proof of current business liability insurance coverage for the operation of the Assisted Living Facility. A copy of a certificate of insurance form or a copy of the policy declarations page that includes the facility name, street address, type of facility, type of insurance issued, and the beginning and ending effective dates of coverage. Binders are not acceptable. (Please do not send the entire policy.) Since you are unsure of the effective date of the license, you may submit proof that insurance coverage will begin at a future date. However, no license will be issued until proof of insurance has been provided.

FIRE SAFETY

Please contact the local fire marshal's office that has jurisdiction over the physical location of the facility. A satisfactory fire safety inspection must be completed before you can be licensed. Please submit a copy of the inspection report as proof the inspection has been completed. The report submitted must indicate that any cited deficiencies have been corrected or that you are approved for ALF licensure.

SANITATION INSPECTION REPORT

Please submit a copy of the sanitation inspection report completed by your county public health unit environmental services office. The report submitted must indicate that the inspection report was satisfactory (any cited deficiencies have been corrected).

ZONING

You must contact the Department of Children and Family Services, Community Residential Home Coordinator, Ellison Shapiro, (305) 377-7511, to obtain Form 1786 if the ALF will be in a single family or multiple family zoned

area. The white copy of this form should be sent to the agency.

Verification of zoning approval must be provided from the city or county zoning office having jurisdiction where the facility is located. (This would be the zoning office, not Ellison Shapiro's office.) Zoning authorities must complete the Assisted Living Facility Form 3180-1007, or provide a letter on their letterhead stationery showing the name and address of the facility and that it is approved for use as an ALF. If the local zoning office will not complete the form, please submit proof that the zoning office has had the opportunity to approve or deny your request. (A dated, signed, handwritten note from the zoning authority and a business card stapled to the form would be acceptable.)

HIV TRAINING

Please complete and submit the enclosed HIV Education Confirmation form. This form is used to verify that all employees have been trained or will be trained in the required HIV education material.

ASSETS AND LIABILITIES STATEMENT

Please complete the enclosed assets and liabilities statement or provide a current balance sheet. Directions are on the reverse side of the form. You may desire to seek the assistance of a bookkeeper or an accountant in completing this form. The Agency must be able to verify that you have the financial ability to operate an ALF before your application can be approved. The form must be consistent with the application and the statement of operation form.

STATEMENT OF OPERATION

Please complete the enclosed statement of operation form. Directions are on the reverse side of the form. This form is a projection of anticipated expenses for the first year of operation. Directions for completing the form are on the reverse side of the form. Please consider seeking professional help, such as a bookkeeper or an

accountant in completing the form. The information on this form must be consistent with the application submitted and the assets and liabilities statement.

WARRANTY DEED/LEASE AGREEMENT

You must provide proof that the applicant has the legal right to occupy the premises. Please submit a copy of the recorded warranty deed or a lease agreement in the applicant's name. If the corporation does not own the property, a lease agreement should be submitted between the property owner and the corporation.

FLOOR PLAN

Submit a floor plan of the facility indicating those rooms and areas that are to be licensed as part of the ALF. Each room should be labeled indicating the use of the room (example: bedroom, living room, bathroom, kitchen). The plan should be drawn on 8 1/2" X 11" paper. A simple hand drawn plan is acceptable. Architectural drawings are too large to fit into the Agency's files and should not be submitted to meet this requirement.

BACKGROUND SCREENING

Florida Abuse Hotline Information System Background Form AHCA 3110-0003 must be completed by each ALF owner with 10 percent or more interest, the administrator, general partner, each limited partner, and corporate officers (president, vice-president, secretary, and treasurer). The fee for background screening is included in the license fee. Please complete and sign the form.

7. Petitioner did not respond to the Agency's letter of September 16, 1997. Consequently, by letter of October 16, 1997, the Agency advised Petitioner as follows:

Your application for an initial license to operate the above Assisted Living Facility (ALF) is denied. It has been determined by the Agency for Health Care Administration

that your application does not meet nor comply with the standards as an ALF pursuant to section 400.414, Florida Statutes (F.S.), and Chapter 58A-5, Florida Administrative Code (F.A.C.).

The specific basis for this determination is:

Submission of a fraudulent statement on the notarized application form. The application form asks if you have been arrested for a crime involving injury to persons. You wrote a comment stating "no injury". The background screening results from the Florida Department of Law Enforcement revealed that you have been arrested and convicted of aggravated assault and were received in the Florida Department of Corrections on 03/12/92 and discharged on 11/03/95. Submission of a fraudulent statement on the notarized application form is grounds for denial of this application, section 400.414(2)(i), F.S.

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The letter further advised Petitioner of her right to request a formal administrative hearing to challenge the Agency's decision to deny her application.

8. By letter of October 21, 1997, Petitioner responded to the Agency's letter of denial, and requested a formal hearing. With regard to the Agency's charge that she had submitted a fraudulent statement by stating "No Injury" in response to item VIIA, Petitioner stated her response was accurate because "I stated that I was convicted [and] wrote in the words 'no injuries' because it was worded as if with injury only." In response to the claim that her "conviction of a crime involving injury to others" rendered her of unsuitable character to qualify for licensure, Petitioner apparently disputed the Agency's contention that the crime involved injury to others, or that she was otherwise disqualified. She did not, however, dispute her conviction of a crime, which resulted in a sentence of imprisonment for a term of three years. Finally, with regard to the Agency's claim that she had failed to submit a complete application package, Petitioner responded, "I have no idea nor was I told of any documents missing out of package - please provide copy of document request and whatever documents are needed."

Petitioner's criminal conviction

9. Pertinent to Petitioner's conviction of a criminal offense, the proof demonstrates that on or about September 17, 1990, an Information was filed in the Circuit Court, Dade County, Florida, under Case No. 90-34662, which charged that Petitioner did, on August 27, 1990:

. . . unlawfully and feloniously commit an aggravated assault upon OFFICER GARCIA, a Law Enforcement Officer during the course of or in the scope of said victim's duty and/or engaged in the lawful performance of his or her duty, by intentionally threatening by word or act to do violence to said victim, coupled with an apparent ability to do so, by point a SHOTGUN at said victim and threatened to kill him with a DEADLY WEAPON, to wit: A SHOTGUN, in violation of 784.021 and 784.07 and 775.0823 and 775.087 Florida Statutes.

Based on the facts alleged, the Information charged Petitioner with three counts or violations of law, as follows:

- I. AGGRAVATED ASSAULT ON A LAW ENFORCEMENT OFFICER 784.021 & 784.07 & 775.0823 Fel.
- II. IMPROPER EXHIBITION OF A DANGEROUS WEAPON
- III. RESISTING OFFICER WITHOUT VIOLENCE TO HIS PERSON

10. On or about February 27, 1992, Petitioner was tried and found guilty of Count I, Aggravated Assault on a Law Enforcement Officer with a Deadly Weapon (a shotgun), a second degree felony proscribed by Sections 784.021, 784.07, 775.0823, and 775.087, Florida Statutes. As a result, Petitioner was sentenced to a term of three years and committed to the custody of the

Department of Corrections until her discharge on November 3, 1995, upon expiration of her sentence.

Further findings regarding Petitioner's failure to file a complete application

11. At hearing, Petitioner did not dispute her application was incomplete or that the Agency, by letter of September 16, 1997, had requested additional information and documentation. Rather, in an apparent effort to avoid the consequences of an incomplete application, Petitioner averred she did not receive the Agency's letter of September 16, 1997.

12. If true, Petitioner's plea does not excuse her failure to file a complete application or foreclose the Agency from relying on the incompleteness of the application as a basis for denial. Rather, what is dispositive is that, within 30 days of its receipt of the application, the Agency provided Petitioner with written notice by mail, at her address of record, of the errors or omissions in her application. The timely notice to Petitioner, which was not returned by the United States Postal Service, and not the actual receipt of the letter by Petitioner, preserves the Agency's right to deny the application as incomplete. Subsections 120.60(1) and (3), Florida Statutes. Notably, notwithstanding the de novo nature of these proceedings, Petitioner had not, as of the date of hearing, corrected the omissions in her application.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has

jurisdiction over the parties to, and the subject matter of,

these proceedings. Sections 120.569, 120.57(1), and 120.60, Florida Statutes.

14. Pertinent to this case, Section 400.14(2), Florida Statutes, provides that the Agency may deny an application for licensure on the following grounds:

(b) The determination by the agency that the facility owner or administrator is not of suitable character or competency, or that the owner lacks the financial ability, to provide continuing adequate care to residents, pursuant to the information obtained through s. 400.411, s. 400.417, or s. 400.434.

* * *

(i) A fraudulent statement on an application for a license or any other documents required by the agency that is signed and notarized.

15. Here, the Agency predicates its denial under subsection 400.14(2)(b) on the incompleteness of Petitioner's application, as well as Petitioner's conviction of aggravated assault, as proscribed by Section 784.021, Florida Statutes. First, with regard to the incompleteness of the application, the Agency has demonstrated that Petitioner's application failed to provide the information required by Section 400.411, Florida Statutes, and Rule 58A-5.014, Florida Administrative Code; that it provided Petitioner with timely notice of the omissions; that Petitioner failed to correct the deficiencies; and, that absent such information, the Agency could not reasonably verify the applicant's ability to provide adequate care to residents. Second, with regard to Petitioner's conviction of aggravated

assault, the Agency has demonstrated that, pursuant to Section

435.03(2)(g), Florida Statutes, Petitioner is disqualified from the licensure she seeks.²

16. Finally, the Agency contends Petitioner's application should be denied under subsection 400.14(2)(i) because, in response to the question "[Have you] . . . ever been arrested for -- or convicted of -- a crime involving injury to persons . . . ?" Petitioner responded "No injury." According to the Agency, such response was fraudulent.

17. Here, it cannot be reasonably concluded that Petitioner's response was false or misleading, or that she knowingly and intentionally sought to deceive the Agency.³ As importantly, since the application was not "signed and notarized," no violation of subsection 400.14(2)(i) could be shown under any circumstances.⁴

RECOMMENDATION

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

RECOMMENDED that a Final Order be entered which denies Petitioner's application for a license to operate an Assisted Living Facility.

DONE AND ENTERED this 21st day of April, 1998, in Tallahassee, Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building

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Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of April, 1998.

ENDNOTES

1/ Petitioner's objection to Respondent's Exhibit 10 was sustained, and it was not received in evidence.

2/ Petitioner may, however, apply for an exemption from disqualification under Section 435.07, Florida Statutes.

3/ To establish that an applicant committed a violation of subsection 400.14(2)(i), the Agency must show not only that the applicant provided false or misleading information on her application, but that she did so knowingly and intentionally. Gentry v. Department of Professional and Occupational Regulations, 293 So. 2d 95, 97 (Fla. 1st DCA 1974) (statutory provision prohibiting physician from "[m]aking misleading, deceptive and untrue representations in the practice of medicine" held not to apply to "representations which are honestly made but happen to be untrue"; "[t]o constitute a violation, . . . the legislature intended that the misleading, deceptive and untrue representations must be made willfully (intentionally)"). Accord, Munch v. Department of Professional Regulation, 592 So. 2d 1136 (Fla. 1st DCA 1992), and Walker v. Department of Business and Professional Regulation, 23 Fla. L. Weekly D292 (Fla. 5th DCA 1998).

4/ In determining whether Petitioner violated the provisions of subsection 400.14(2)(i), as alleged, one "must bear in mind that it is, in effect, a penal statute. . . . This being true, the statute must be strictly construed and no conduct is to be regarded as included within it that is not reasonably proscribed by it." Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

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.