

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JEWISH FAMILY HOME CARE, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 97-6005  
 )  
 AGENCY FOR HEALTH CARE )  
 ADMINISTRATION, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a Section 120.57(1) hearing was held in this case on May 1, 1998, by telephone conference call, before Stuart M. Lerner, a duly designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jane B. Sumen, Administrator  
Jewish Family Home Care  
5950 West Oakland Park Boulevard  
Suite 209  
Lauderhill, Florida 33313

For Respondent: Richard A. Patterson, Esquire  
Agency for Health Care Administration  
2727 Mahan Drive, Suite 3431  
Fort Knox Building III  
Tallahassee, Florida 32308-5403

STATEMENT OF THE ISSUES

Whether Petitioner's application for a certificate of need should be deemed withdrawn from further review and consideration

for the reasons stated in the Agency for Health Care  
Administration's November 12, 1997, letter to Petitioner.

PRELIMINARY STATEMENT

By letter dated November 12, 1997, the Agency for Health Care Administration (Agency) advised Petitioner of its intention to deem withdrawn from further review and consideration Petitioner's application for a certificate of need authorizing Petitioner's establishment of a Medicare-certified home health agency. The letter (which was addressed to Petitioner's administrator) read as follows:

In accordance with the provisions of Section 408.037 and 408.039(3), Florida Statutes, you were given until November 10, 1997, to respond satisfactorily to the omissions noted in the correspondence from this office dated October 9, 1997, relative to your proposal on behalf of Jewish Family Home Care to establish a Medicare certified home health agency to be located in Broward County, District 10.

Because of your failure to submit the correct CON filing fee in accordance with Chapter 59C-1.008(3)(b)2, Florida Administrative Code and an audited financial statement of the applicant in accordance with Chapter 59C-1.008(5)(c)1-3, Florida Administrative Code, and Section 408.037(1)(c), Florida Statutes, your application is deemed incomplete and withdrawn from further review. Specifically, the correct filing fee is \$5,662.25 based on a total project cost subject to a fee of \$44,150 (\$5,000 plus .015 of each dollar of the proposed expenditure.) The total fee submitted was \$5,425. With regard to the required financial statements, a profit and loss statement does not constitute an audited financial statement.

You have the right to request an administrative hearing on this decision under the provisions of Florida's Administrative Procedure Act, Chapter 120, Florida Statutes, and under Agency Rule 59C-1.010, Florida

Administrative Code. A request for hearing, if any, must be in writing and must be actually received by this agency within 21 days of the first day of publication of notice of withdrawal in the Florida Administrative Weekly. A request for hearing must contain the information required in Rule 28-5.201, Florida Administrative Code, and must make reference to the "CON Action Number" referred to in this letter. The original and one copy of each request for hearing may be filed with or mailed to the following location: Sam Power, Senior Attorney, Agency Clerk, Agency for Health Care Administration, Fort Knox Executive Center, 2727 Mahan Drive, Building 3, Room 3426A, Tallahassee, Florida 32308.

By letter dated November 19, 1997, which read as follows, Petitioner requested a hearing on the Agency's proposed action:

Under the provisions of Florida's Administrative Procedure Act, Chapter 120, Florida Statutes, and under Agency Rule 59C-1.010, Florida Administrative Code, Jewish Family Home Care is requesting an administrative hearing pursuant to action taken on CON Action Number 8926.

Jewish Family Home Care will at the time of the hearing present a check for \$237.25 correcting the discrepancy in calculation for the CON filing fee.

Jewish Family Home Care will also, at the time of the hearing, present an audited financial statement for Jewish Family Service of Broward County of which Jewish Family Home Care is a division. An audited financial statement for Jewish Family Home Care is not available at this time due to the fiscal year having ended September 30, 1997 and fiscal year 1997 being Jewish Family Home Care's first year in operation.

We look forward to hearing from your office in the near future.

On December 30, 1997, the Agency referred the matter to the Division of Administrative Hearings (Division) for the assignment of a Division Administrative Law Judge to conduct the administrative hearing that Petitioner had requested.

As noted above, the hearing was held on May 1, 1998. Two witnesses testified at the hearing: Jane Sumen, Petitioner's administrator (who testified on behalf of Petitioner); and Alberta Granger, a supervisory employee with the Agency (who testified on behalf of the Agency). In addition to the testimony of these two witnesses, 13 exhibits (Petitioner's Exhibits 1 and 2 and AHCA Exhibits 1 through 11) were offered and received into evidence.

At the conclusion of the evidentiary portion of the hearing, the undersigned, on the record, advised the parties that the deadline for filing proposed recommended orders was 20 days from the date of the Division's receipt of the transcript of the hearing. The hearing transcript was filed with the Division on June 1, 1998. On Monday, June 22, 1998, the Agency filed a proposed recommended order, which the undersigned has carefully considered. To date, Petitioner has not filed a proposed recommended order.

#### FINDINGS OF FACT

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

1. Petitioner is a division of Jewish Family Service of Broward County, which operates under the umbrella of the Jewish Federation of Broward County.

2. On August 1, 1997, Petitioner submitted to the Agency a letter indicating its intent to seek a certificate of need authorizing the establishment of a Medicare-certified home health agency in Broward County.

3. By letter dated August 27, 1997, the Agency advised Petitioner that Petitioner's letter of intent "had been accepted . . . for submission of an application in the upcoming review cycle" and that the application filing deadline was September 24, 1997. In its letter, the Agency provided the following additional advisement:

The application filing fee is \$5,000.00 plus 0.015 times the total project cost up to a maximum fee of \$22,000.00. The minimum fee for projects with no capital expenditure is now \$5,000.00. The non-refundable filing fee should be submitted with the application on or before the application due date listed above [September 24, 1997].

4. Petitioner filed its application for a certificate of need on September 24, 1997.

5. The application indicated that the "project cost subject to fee" (Schedule 1, Line 51, which excludes the base application filing fee of \$5,000.00) would be \$44,150.00.

6. Accompanying Petitioner's application, among other things, was a check in the amount of \$5,000.00 and an audited financial statement of Jewish Family Service of Broward County

covering the fiscal year ending September 30, 1995. No other audited financial statements were provided.

7. By letter dated October 9, 1997 (Agency's omissions letter), the Agency advised Petitioner that Petitioner had submitted neither the "appropriate [filing] fee," nor the audited financial statement(s), "needed to implement formal review" of Petitioner's application, and it requested that Petitioner cure these deficiencies by providing the appropriate fee and by furnishing "audited financial statements of the applicant's most recent complete fiscal year of operation," or, "[i]f the most recent fiscal year ended within 120 days prior to the application filing deadline and the audited financial statements [we]re not yet available, [of] the prior fiscal year." In its omissions letter, the Agency issued Petitioner the following warning:

Section 408.039, (1992 Supplement to Florida Statutes), requires that you file a response to the attached omissions with the agency and the appropriate health council by November 10, 1997. Failure to file your written response to this office and the appropriate local health council by 5 p.m. on that date will result in your application being deemed withdrawn from consideration, pursuant to Rule 59C-1.010, Florida Administrative Code.

8. Petitioner received the Agency's omissions letter on October 14, 1997.

9. Petitioner submitted its response to the Agency's omissions letter on November 10, 1997. It provided the Agency with a check in the amount of \$425.00 and financial statements and reports (including a profit and loss statement covering the

period starting October 1996 and ending September 1997) that were not audited. In a cover letter, Petitioner explained that, "[a]t this time, there is no complete financial audit for Jewish Family Home Care, since its first fiscal year just ended on September 30, 1997."

10. On November 12, 1997, the Agency sent a letter to Petitioner advising that, "[b]ecause of [Petitioner's] failure to submit the correct CON filing fee in accordance with Chapter 59C-1.008(3)(b)2., Florida Administrative Code and an audited financial statement of the applicant in accordance with Chapter 59C-1.008(5)(c)1.-3., Florida Administrative Code, and Section 408.037(1)(c), Florida Statutes, [Petitioner's] application [would be] deemed incomplete and withdrawn from further review."

11. Petitioner thereafter requested an administrative hearing on the matter.

#### CONCLUSIONS OF LAW

12. Sections 408.031 through 408.045, Florida Statutes, contain the "Health Facility and Services Development Act" (Act). Section 408.031, Florida Statutes.

13. Section 408.034(1), Florida Statutes, of the Act designates the Agency "as the single state agency to issue, revoke, or deny certificates of need and to issue, revoke, or deny exemptions from certificate-of-need review in accordance with the district plans, the statewide health plan, and present and future federal and state statutes."



14. A "certificate of need," as that term is used in the Act, is defined in Section 408.032(3), Florida Statutes, as "a written statement issued by the agency evidencing community need for a new, converted, expanded, or otherwise significantly modified health care facility, health service, or hospice."

15. With certain exceptions not applicable to the instant case, an application for a certificate of need must be filed with the Agency before a Medicare-certified home health agency may be established. Section 408.036(1)(e), Florida Statutes. These applications are subject to comparative review.

16. "An application for a certificate of need must contain . . . [a]n audited financial statement of the applicant." Section 408.037(1)(c), Florida Statutes. "The audited financial statement of the applicant must be for the most current fiscal year. If the most recent fiscal year ended within 120 days prior to the application filing deadline and the audited financial statements are not yet available, then the prior fiscal year will be considered the most recent." Rule 59C-1.008(5)(c)1, Florida Administrative Code.<sup>1</sup> If the applicant is an existing health care facility, audited financial statements of the two most recent consecutive fiscal years must be provided. Section 408.037(1)(c), Florida Statutes; Rule 59C-1.008(5)(c)2, Florida Administrative Code. "Only audited financial statements of the applicant will be accepted. Audited financial statements of any part of the applicant, including but not limited to

subsidiaries, divisions, specific facilities or cost centers, will not qualify as an audit of the applicant. Nor shall the audited financial statements of the applicant's parent corporation qualify as an audit of the applicant." Rule 59C-1.008(5)(c)3, Florida Administrative Code.

17. An application for a certificate of need must also be accompanied by the correct application filing fee. Rule 59C-1.008(5), Florida Administrative Code. The amount of the fee is to be calculated as follows:

- (1) A minimum base fee of \$5,000.
- (2) In addition to the base fee of \$5,000, 0.015 of each dollar of proposed expenditure, except that a fee may not exceed \$22,000.

Section 408.038, Florida Statutes. "For the sole purpose of calculating the application fee, the proposed expenditure includes only the items of cost contributing to capital expenditures of the proposed project." Rule 59C-1.008(3)(a), Florida Administrative Code.

18. An application not accompanied by at least the "minimum base fee" will not be accepted by the Agency. Rule 59C-1.008(3)(a), Florida Administrative Code.

19. Agency staff must determine, within 15 days after the expiration of the application filing deadline, whether an application is complete and accompanied by the correct filing fee. If the application is incomplete or if the amount tendered is insufficient to cover the filing fee, Agency staff must, in

writing, so notify the applicant and request that any deficiencies be cured. Pursuant to Section 408.039(3)(a), Florida Statutes, "the staff may make only one such request" and "[i]f the requested information is not filed with the [Agency] within 21 days of the receipt of the staff's request, the application shall be deemed incomplete and deemed withdrawn from consideration." Rule 59C-1.008(3)(b)2, Florida Administrative Code, similarly provides that, where an applicant has submitted the base fee of \$5,000.00, but less than the full amount of the total fee, "if the correct fee is not received by the agency staff by the close of business on the promulgated applicant omissions deadline, the application will be deemed incomplete and deemed withdrawn from further review." These mandatory provisions of Section 408.039(3)(a), Florida Statutes, and Rule 59C-1.008(3)(b)2, Florida Administrative Code, may not be disregarded by the Agency. See Vantage Healthcare Corporation v. Agency for Health Care Administration, 687 So. 2d 306 (Fla. 1st DCA 1997); NME Hospitals, Inc. v. Department of Health and Rehabilitative Services, 492 So. 2d 379 (Fla. 1st DCA 1986).

20. The burden was on Petitioner at hearing to establish, by a preponderance of the evidence, that it timely submitted a complete application and the correct filing fee. See Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932, 934 (Fla. 1996); Pershing Industries, Inc. v. Department of Banking and Finance, 591 So. 2d 991, 994 (Fla. 1st DCA 1991);

Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778, 787-88 (Fla. 1st DCA 1981); 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.").

21. Petitioner did not meet its burden of proof. The record evidence reveals that: Petitioner's application was accompanied by neither the "audited financial statement of the applicant" required by Section 408.037(1)(c), Florida Statutes, and Rule 59C-1.008(5)(c), Florida Administrative Code, nor the full amount of the application filing fee required by Section 408.038, Florida Statutes, and Rule 59C-1.008(3) and (5), Florida Administrative Code; the Agency, in accordance with Section 408.039(3)(a), Florida Statutes, requested Petitioner, in writing, to cure these deficiencies by November 10, 1997; Petitioner received the Agency's written request on October 14, 1997, more than 21 days prior to the November 10, 1997, deadline the Agency established; and Petitioner failed to submit by the November 10, 1997, deadline either the required "audited financial statement of the applicant" or the correct filing fee. Under such circumstances, the Agency must follow the mandate of Section 408.039(3)(a), Florida Statutes, and Chapter 59C-1.008(3)(b)2, Florida Administrative Code, and (as it indicated it would in its November 12, 1997, letter to Petitioner) deem

Petitioner's application to be incomplete and to have been withdrawn from further review and consideration.

RECOMMENDATION

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

RECOMMENDED that the Agency enter a final order taking the action proposed in its November 12, 1997, letter to Petitioner.

DONE AND ENTERED this 29th day of June, 1998, in Tallahassee, Leon County, Florida.

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STUART M. LERNER  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
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 29th day of June, 1998.

ENDNOTE

<sup>1</sup> The Agency has "permit[ted] applicant's to file audited financial statements for a partial year, if that is how long they have been in business." Providence Home Health Care v. Agency for Health Care Administration, AHCA Case No. 95-995-FOF-CON (AHCA July 17, 1995)(Final Order)

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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<sup>1</sup> The Agency has "permit[ted] applicant's to file audited financial statements for a partial year, if that is how long they have been in business." Providence Home Health Care v. Agency for Health Care Administration, AHCA Case No. 95-995-FOF-CON (AHCA July 17, 1995)(Final Order)