STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

W. FRANK WELLS NURSING HOME,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case Nos. 02-4752
	)	02-4827
AGENCY FOR HEALTH CARE ADMINISTRATION,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Pursuant to notice this cause came on for formal proceeding before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings in Tallahassee, Florida, on August 13, 2003. The appearances were as follows:

APPEARANCES

For Petitioner: John D. Buchanan, Jr., Esquire
Henry, Buchanan, Hudson,
Suber & Carter, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301

For Respondent: Tom R. Moore, Assistant General Counsel
Agency for Health Care Administration
Office of the Attorney General
2727 Mahan Drive, Building III
Tallahassee, Florida 32308

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Petitioner should be assessed a late fee, pursuant

to Section 400.111, Florida Statutes, for the late filing of the Petitioner's 2001 license renewal application and, if so, the amount of the fee.

PRELIMINARY STATEMENT

This proceeding arose upon the filing of two cases later consolidated, before the Division of Administrative Hearings (DOAH). DOAH Case No. 02-4752 is the earlier case concerning the late filing of the 2001 application for licensure and the related late fee. The issues concerning this case are delineated above. The later case is DOAH Case No. 02-4827 involving the denial by the Agency for Health Care Administration (AHCA) of the 2002 application for license renewal filed by W. Frank Wells Nursing Home (Facility).

A Pre-hearing Stipulation was filed by the parties indicating that the parties had settled the issues regarding the 2002 licensure denial case, with the exception of an issue concerning liability insurance coverage. Upon the convening of the formal hearing, the parties announced that they had resolved that last issue in Case No. 02-4827, thus resolving that case in its entirety and it has been voluntarily dismissed. In conjunction with that announcement the parties modified their Pre-hearing Stipulation by striking substantial portions of it, paragraphs 5, 6, 14, 20 through 32, and 35. This removes those stipulated findings of fact which pertain to issues resolved by

the parties, resulting in a simplified stipulation that relates only to the remaining 2001 late application, late-fee case. The original Pre-hearing Stipulation was accepted as Joint Exhibit A, and the revised Pre-Hearing Stipulation submitted by the parties was denominated as Joint Exhibit B and was accepted. Additionally, the parties have agreed that the late fee at issue is in a maximum amount of $5,000.00.

The parties stipulated that certain exhibits could be admitted, as relevant to the remaining late-filing fee case at issue. Thus, they stipulated that AHCA Exhibits 1 through 5 should be admitted and that Petitioner's Exhibits 1 through 7, 16, 19, and 20 should be admitted. The stipulation was accepted.

AHCA moved ore tenus, that with the advent of the revised Pre-Hearing Stipulation and the admitted exhibits submitted by AHCA, that all material facts as to the remaining late application, late-filing fee case were established and that therefore no genuine issue of material fact remained to be determined in this forum. The Respondent thus moved for relinquishment of jurisdiction or remand to AHCA for an informal proceeding.

The Petitioner asserted that the testimony and evidence should be heard as to certain remaining disputed facts. The Petitioner argued that there were disputed facts concerning

whether the Petitioner could have secured the required bond within the time necessary to timely file its application; whether it had been misled by AHCA concerning the Petitioner's misunderstanding of the existence of an AHCA policy that applications could be timely filed even if incomplete because of a lack of the required lease bond; and concerning also whether AHCA had waived the lease bond requirement because it had accepted "unconditional guarantees" in previous years in lieu of lease bonds.

Because there appeared to be some disputes of fact remaining to be resolved, the Motion to Relinquish or Remand was denied and testimony and evidence was taken concerning the issues referenced next above and as to mitigation of the sought $5,000.00 late-filing fee.

The Petitioner (Facility) presented the testimony of its Chief Executive Officer, Dennis R. Markos, and Maria Allen, the Petitioner's Chief Financial Officer. The Respondent (AHCA) presented the testimony of James A. Kemp, its Health Services and Facilities Consultant, and Molly McKinstrey, AHCA's bureau Chief of the Bureau of Long Term Care Services. Upon concluding the proceeding the parties had the proceedings transcribed and in due course timely submitted Proposed Recommended Orders which have been considered in the rendition of this Recommended Order.

FINDINGS OF FACT

1. The parties have agreed in the Pre-hearing Stipulation and revised Pre-hearing Stipulation to the following undisputed facts. These facts are quoted and numbered in the manner numbered in the stipulations. Where numbered paragraphs are omitted below the omissions are because the parties have agreed that those paragraphs of the stipulations have no relevance to the late-filing fee case which is the only remaining disputed case between the parties. The following facts are thus found in accordance with the parties' stipulations.

> 1. BAKER COUNTY MEDICAL is a non-profit 501(c)3 corporation that leases the land and buildings comprising, and operates but does not own, a clinic, a hospital and a nursing home (the latter, the W. FRANK WELLS NURSING HOME, referenced herein as the Facility), in Baker County, Florida. The lease is between BAKER COUNTY MEDICAL as the lessee and the BAKER COUNTY HOSPITAL AUTHORITY [the Authority] as the lessor. [The Authority, according to the prospectus documents, owns the clinic, hospital and nursing home buildings, the site (about 8 acres) and the equipment utilized at the clinic, hospital and nursing home. Petitioner now wishes to assert that it does own the buildings and did own the buildings at all times pertinent to this dispute.]
>
> 2. The Authority and BAKER COUNTY MEDICAL entered into the referenced lease as a condition to the financing by and through the Authority's "Health Care Facilities Revenue Bonds" for the demolition of the old then-existing hospital building and nursing home and the construction of a new hospital and nursing home. The lease runs to 2025

and involves the payoff by Petitioner of the authorized $11,650,000 in revenue bonds by and through the operation of the hospital and nursing home by Petitioner during the period of the lease.

3. The subject nursing home Facility is licensed under Chapter 400, Florida Statutes. The hospital is licensed under Chapter 395, Florida Statutes. AHCA is the state's licensing and regulatory agency for both of these facilities under those chapters.

4. On its 2000 license renewal application, Petitioner indicated that the Facility was leased and thereafter filed a lease bond that met the requirements of Section 400.179(5)(d), Florida Statutes, (2000).

7. By letter dated June 4, 2001, AHCA advised Petitioner that its license would expire on October 31, 2001, and that the license renewal application and fees are due and payable ninety (90) days before the expiration date. See AHCA's Exhibit 1. That is, the annual license renewal cycle for Petitioner's Facility commences each August 1st.

8. On August 13, 2001, Petitioner signed its 2001 license renewal application. This was submitted to and received by AHCA on August 14, 2001. See AHCA's Exhibit 2.

9. AHCA, by letter to Petitioner, dated August 22, 2001, informed Petitioner that the "Medicaid Lease Surety Bond submitted for the (2001) license renewal" was "insufficient in the amount" required by the lease bond statute. AHCA Exhibit 3.

10. Petitioner's 2001 license renewal application was due on August 1, 2001, and was submitted to AHCA 13 days late. Petitioner's license certificate #6304 shows Petitioner's licensure for the period from

11/01/2000 to 10/31/2001. See AHCA Exhibit 4 (license certificate, together with AHCA's cover letter of October 3, 2000).

11. AHCA, by NOTICE OF INTENT TO IMPOSE LATE FINE, dated August 25, 2001, informed Petitioner of its intent to impose a statutory fee of $5,000.00 for the late filing of the 2001 application, pursuant to § 400.111, Florida Statutes, AHCA Exhibit 5.

12. By Petition for Formal Proceeding Under § 120.57, dated September 12, 2001, Petitioner sought administrative review of the 2001 notice to impose the $5,000.00 late fee. In its petition, Petitioner asserts as disputed issues of material fact that:

(a) "The Petitioner was required to file a bond with its renewal application."

(b) "The application could not be filed without the bond."

(c) "There is no provision in 400.111(1), [Florida Statutes] Florida Administrative Code or the rules, to submit the application without the bond with an explanation that the bond could not be attached to the application to avoid a penalty."

13. In response to Petitioner's assertions above, AHCA asserts that it has and has had at all times material to this dispute, a uniformly applied policy and practice for processing annual license renewal applications, as follows: (a) that any license renewal application that is filed by its due date, which application is not complete in some way, including that the application does not include some item that is necessary to the granting of the

application for renewal of the license, is deemed by AHCA as timely filed though incomplete; and (b) that the applicant is thereupon notified by AHCA as to the basis for any determination by AHCA that the application is incomplete.

* * *

15. In years prior to Petitioner's filing of its 2000 license renewal application, AHCA had accepted certain "unconditional guarantees" in lieu of lease bonds from lessees of nursing facilities, including from Petitioner, to establish facilities' compliance with Section 400.179(5)(d), Florida Statutes; however, by the due date of Petitioner's 2000 license renewal application, AHCA had ceased accepting such unconditional guarantees from nursing home applicants. AHCA so informed Petitioner and refused to accept any such unconditional guarantee from Petitioner in lieu of a lease bond to establish compliance with the law as to Petitioner's 2000 annual license renewal.

16. Petitioner asserts, and AHCA does not dispute here, that in the summer of 2001, Petitioner had considerable difficulty in securing a lease bond as then required by law of a lessee of a facility, which lease bond Petitioner intended to file with a timely filed 2001 license renewal application.

17. Petitioner also asserts, and AHCA does not dispute, that in the summer of 2001, Petitioner did not understand that AHCA treats a license renewal application as timely filed if it is filed within the deadline for filing, even though the application is incomplete; for example, for not attaching a lease bond.

18. Petitioner further asserts, and AHCA does not dispute, that Petitioner's filing "only" thirteen (13) days late in 2001 was

accomplished by Petitioner due to great effort on Petitioner's part to secure a lease bond from third parties over whom Petitioner asserts that it had no control.

19. In 2002, the Florida Legislature enacted chapter 2002-223, Laws of Florida, effective May 15, 2002, which among other things (in its section 28) added the language to Section 400.179(5)(d), Florida Statutes, which today appears as the last sentence of subparagraph 6 of that section (numbered as subparagraph 5 in the 2002 amendment). The pertinent part reads:

> (d)6 . . . A lease agreement required as a condition of bond financing or refinancing under § 154.213 by a health facilities authority or required under § 159.30 by a county or municipality is not a leasehold for purposes of this paragraph and is not subject to the bond requirement of this paragraph.

33. As to the 2002 lease bond matter, Petitioner represents, and AHCA does not dispute based upon documents provided to AHCA by Petitioner in May 2003:

> (a) that the referenced lease between the Authority and Petitioner is identified as an "Amended and Restated Lease Agreement" dated August 1, 1998, in the documents for issuance of the related "Health Care Facilities Revenue Bonds;"
>
> (b) that the referenced lease was required as a condition of financing through the Authority for the demolition of the old hospital and nursing home and the construction of the new hospital and nursing home operated by Petitioner; and
>
> (c) that the lease between the Authority and the Petitioner contains the indicia of a lease by a health facilities authority under § 154.213, Florida Statutes.

> See letter of July 3, 2003, from counsel for Petitioner, outlining the status of the lease as a lease under the statute, attached hereto as AHCA's Exhibit 9.
>
> 34. In light of such uncontested representations by Petitioner regarding the status of the Authority's lease to Petitioner, AHCA and Petitioner mutually submit a confession of error as to the existence of a legal requirement for Petitioner, even though Petitioner is a lessee of the Facility, to provide a lease bond with its 2002 annual license renewal application. That is, by virtue of the referenced 2002 amendment to the lease bond provisions of the statute, the lease with the Authority is accepted by AHCA as within those leases to which the statutory exemption applies, which thus relieves Petitioner from the requirement for filing a lease bond as to its 2002 renewal application.

2. The Petitioner submits that admitted or stipulated facts 15 through 34, as quoted above, are relevant and material and should entitle the Petitioner to mitigation or reduction, if not elimination, of the late-filing fee. AHCA, by stipulating to the accuracy to those facts, does not, however, agree that those facts require mitigation as to the amount of the late-filing fee for late-filing of the 2001 renewal application.

3. AHCA, on or about June 4, 2001, sent a letter to the Petitioner, wherein it was stated:

> The license to operate the above named Facility expires October 31, 2001. It is a violation of Florida Statutes to operate a nursing home facility without a valid license.
>
> In order to continue to operate the Facility, it is necessary that the enclosed application form(s) be completed and returned with the appropriate license fee. . . .
>
> The application and fee are due 90 days before the expiration date noted above. Failure to file a renewal application within this time frame will result in the imposition of a late fee as allowed by Florida Statute. Application without licensure fees will not be accepted, and the application will be returned without processing. . . (Petitioner Exhibit 2 in evidence.)

4. The instructions under "number 12" of the instructions accompanying that letter stated:

> Attach a copy of the surety bond or membership in a self-insurance pool.

5. There are no instructions in that letter to the effect that an incomplete application could be filed and would be accepted as timely-filed even if incomplete.

6. Maria Allen is the CFO of Baker County Medical Services, Inc. (Facility). She was designated as the person responsible for filing the nursing home renewal application at issue. Ms. Allen relied upon the instructions in the above-referenced letter and on the form and understood that a completed application had to be filed with the agency. It was

Ms. Allen's understanding that the application had to be submitted in complete form including both relevant surety bonds. Thus, she was under the impression that the application could only be submitted in complete form. Neither Ms. Allen nor the Facility was ever informed by any personnel of AHCA, verbally or in writing, that an incomplete application could be submitted and would be considered as timely, provided the necessary fee was submitted with an incomplete application.

7. Ms. Allen was aware that the application should be filed by August 1, 2001. She was having difficulties with the surety company because, as shown by Exhibit 20 in evidence, the surety company had moved its offices and had misplaced the nursing home's bond application documents. She repeatedly called the surety company or its broker or agent to determine when the surety bond would be ready. The surety bond was promised by the surety company prior to the deadline. In fact, the surety bond was delayed and was submitted to Ms. Allen some 11 to 12 days later. When she received the bond, she thereupon "over-nighted" a completed application with the bond accompanying it to the Respondent, such that the application was filed 13 days late. In the fact of the surety bond company's delay, it was unreasonable and impracticable for Ms. Allen to seek an alternative surety bond company or agency because it

would take considerably more time to get a new surety company to issue a surety bond, after starting that process over again.

8. After she submitted the application 13 days late, she never had any advice from AHCA to the effect that she could have submitted an incomplete application.

9. Mr. James Kemp is the Health Services and Facilities consultant who reviewed and received renewal applications, including that of the Petitioner. Mr. Kemp maintains that he seldom received a renewal application with the renewal bond attached. He maintains that only ten percent of applications are first submitted in complete fashion. He stated that the same instructions are sent out to all nursing facilities that are leased. Incomplete applications come in with defects such as typing errors or other errors or omissions. AHCA reviews for errors or omissions and informs the applicant as to what is needed to properly complete an application. If a nursing home does not correct the omission within 90 days, the date of license expiration, AHCA will send a notice of intent to deny. Mr. Kemp stated that there was no fine or penalty for nursing homes if omissions or errors are corrected within 90 days.

10. The W. Frank Wells Nursing Home only filed a lease bond once before, with its 2000 application. Prior to that time it was not legally required to file a lease bond. The prior lease bond and application filed for the year 2000 was filed on

time. Thus, there was no reason at that time for the Facility to have known of any policy which would allow an incomplete application to be submitted on the due date, to be completed within 90 days thereafter. Because neither Mr. Kemp nor any other agency personnel, by letter, written instructions, or verbally, ever informed the Petitioner that AHCA would accept an incomplete application as timely filed, the only way the Facility could have learned of that policy would be to inquire of the Agency by letter or by phone call. This was not done because the Facility and Ms. Allen had no information that would alert them to that possibility.

11. Ms. Molly McKinstrey is Bureau Chief for Long Term Care Services. In her testimony she acknowledged that the statute, Section 400.111, Florida Statutes, does not use the modifier "incomplete" or "complete." She also admits that the language of the letter, Petitioner's Exhibit Two, referenced-above, as well as the application document, references the requirement that the application be completed and returned with the appropriate license fee. She also admits that the Agency has a regularly-established, unwritten policy that the Agency will accept an incomplete application, filed before the deadline, as a timely application.

12. There is no evidence that the Respondent Agency makes a practice of giving notice of this policy in any way unless a

substantially affected party makes inquiry of the Agency. If Ms. Allen and the Facility had been informed, before the August 1 deadline, of this routinely followed, unwritten policy, the Facility would have filed the application timely and then submitted the surety bond at such time thereafter as it was obtained. Further, the evidence establishes that Ms. Allen, in June 2001, soon after receiving the notice letter of June 4, 2001, began immediate steps to timely obtain the required surety bond. The bond was not obtained in time to submit the application with the bond on August 1 due to no fault of the Facility but rather due to the mistakes made by the surety bond company or its agents.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Florida Statutes (2003).

14. Pursuant to Section 400.411, Florida Statutes, a skilled nursing facility such as the Petitioner is required to file an annual application for renewal of its license at least 90 days prior to the expiration of its current license.

15. In this license renewal statute the Legislature provides for a late-filing fee in the following language:

> The failure to file an application within the period established in this subsection shall result in a late fee charged to the

> licensee by the Agency in an amount equal to 50 percent of the fee in effect on the last preceding regular renewal date. A late fee shall be levied for each and every day the filing of the license application is delayed, but in no event shall such fine aggregate more than $5,000.00.

16. The use of the word "shall" in the above-quoted statutory authority for the assessment and amount of such fee would appear to be mandatory language. AHCA, however, did not cite any decisional law which would preclude an administrative law judge the authority to mitigate a late-filing fee imposed pursuant to Section 400.411, Florida Statutes. AHCA submitted that it knew of no such authority for the agency itself to reduce the fee amount established by this statute, except through and as a part of settlement of litigation. That acknowledgement, however, is tacit recognition that the statutory requirement to assess the late fee is waivable by the party which has authority to assess the late fee.

17. The preponderant evidence culminating in the above Findings of Fact establishes that there are circumstances which should excuse the assessment of the late fee. The Petitioner had, for many years, not been required to file the subject surety bond but rather was allowed to submit "unconditional guarantees" to AHCA upon filing of the annual renewal applications. That course of dealing between the parties was ended the year before when the 2000 renewal application was

filed, at which point AHCA began requiring of the Petitioner the filing of a surety bond with its renewal application. The Petitioner did so and filed its application and the bond timely in the year 2000. Thus, it really had no occasion to learn that there was an unwritten policy followed by AHCA which would have permitted it to file an incomplete application on a timely basis without being deemed untimely provided the errors or omission were corrected within 90 days thereafter.

18. When June 2001 arrived and the June 4, 2001, notice letter regarding the filing date of the application was sent to the Petitioner by AHCA, there still was no notice to the Petitioner of this unwritten policy. Through the entire application process, and even after the filing date of August 1, 2001, there was no communication or notice of this unwritten policy to the Petitioner.

19. While it is true that had the Petitioner started early, perhaps in April or May of 2001, to prepare its application and take steps to obtain a surety bond, it might have obtained a surety bond on a timely basis so that it could file the entire, completed application on August 1, 2001; that did not occur. Although it did not occur, the evidence shows that, immediately upon receiving the June 4th notice letter from the Agency, the Facility began preparing to file its application and took steps to obtain the surety bond. The surety bond could

not be obtained on a timely basis through no reasonable fault of the Petitioner because the surety company apparently lost the relevant bond application documents and this rendered the bond incapable of being delivered on or before August 1. The evidence shows that when this became known, late July, it was too late to get another surety company because that would have entailed even more delay.

20. The Petitioner had made a number of communications to the surety company to try to speed the bonding process, to no avail. The evidence shows that the Petitioner began its application preparation steps, including applying for the surety bond on a reasonable and practicable timely basis. Credible evidence shows that, had it known of that policy, it would have submitted its application by August 1 in incomplete fashion so as to prevent the issue of the late fee arising.

21. Although the Petitioner could have inquired of the Agency as to an acceptable course of action when it saw that it could not obtain the bond by August 1, there was no communication by the Agency to the Petitioner which would indicate any basis for it to make such inquiry concerning the excusing of a late or incomplete filing, and certainly the policy which would have allowed such was never communicated to the Petitioner. The fact that the Petitioner was unaware of the policy is borne out by the fact the Petitioner was still

proceeding with all possible haste, after the deadline, to complete the application by obtaining the bond and submitting it. This is evidenced by the fact that, as soon as the bond reached the hands of the Petitioner, it "overnight-mailed" it with the then-complete application to AHCA.

22. It certainly seems clear that, although a fair interpretation of the above statute would seem to indicate that the late-filing fee is a mandatory assessment that, as acknowledged by the Respondent in its Proposed Recommended Order, even that legislatively-imposed requirement can be waived in settlement of litigation. This is because, in effect, a party to litigation can waive its statutory rights if it chooses to do so.

23. Moreover, the above, preponderantly-proven circumstances show that, in effect, substantial compliance with the above statutory requirement and the filing deadline has been met because of the circumstance of the Petitioner filing the complete application only 13 days late and because the above facts show "excusable neglect." It is appropriate that excusable neglect, encompassed by the doctrine of "equitable tolling," should excuse the late-filing to the extent that, under the peculiar facts and circumstances confined to this case, that the late filing fee should not be assessed. See Machules v. Dept. of Administration, 523 So. 2d 1132 (Fla.

1988); Broward County Board of County Commissioners v. State Dept. of Environmental Regulation, 495 So. 2d. 863 (Fla. 4th DCA 1987). It is so concluded.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a Final Order be entered by AHCA excusing the Petitioner herein of the payment of the $5,000.00 late fee for the late filing of its 2001 application for its renewal of licensure. It is further

RECOMMENDED that, as to DOAH Case No. 02-4827, in view of the withdrawal by AHCA of its denial of the 2002 application for licensure renewal and withdrawal of its intent to seek an administrative fine for failure to have professional liability insurance, that Case No. 02-4827 be dismissed.

DONE AND ENTERED this 15th day of December, 2003, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
Administrative Law Judge
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Filed with Clerk of the
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this 15th day of December, 2003.

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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.