STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE ADMINISTRATION,	)	
Petitioner,	)	
vs.	)	Case No. 03-1655
DELTA HEALTH GROUP, INC., d/b/a LONGWOOD HEALTH CARE CENTER,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Jeff B. Clark, held a final administrative hearing in this case on October 10, 2003, in Sanford, Florida.

APPEARANCES

For Petitioner: Gerald L. Pickett, Esquire
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For Respondent: R. Davis Thomas, Jr.
Qualified Representative
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STATEMENT OF THE ISSUES

Whether Respondent, Delta Health Group, Inc., d/b/a Longwood Health Care Center, violated Sections 400.215 and 435.05, Florida Statutes; and whether the violations warrant the imposition of a conditional licensure rating and $2,000 fine.

PRELIMINARY STATEMENT

On April 7, 2003, Petitioner, Agency for Health Care Administration, filed an Administrative Complaint alleging that Respondent, Delta Health Group, Inc., d/b/a Longwood Health Care Center, failed to conduct appropriate employee background screenings and that the failure to conduct appropriate background screenings constituted a patterned, State Class III deficiency which warranted a fine and imposition of a conditional licensure rating.

On April 22, 2003, Respondent filed its Request for Formal Administrative Hearing essentially disputing material facts, requesting dismissal of the Administrative Complaint, and seeking other relief. On May 7, 2003, Petitioner forwarded the matter to the Division of Administrative Hearings.

On May 8, 2003, an Initial Order was forwarded to both parties. On June 10, 2003, the case was scheduled for final hearing on August 12, 2003, in Sanford, Florida. On August 5, 2003, the parties filed a Joint Motion for Abeyance. In

response to the Joint Motion for Abeyance, the case was continued and rescheduled for September 12, 2003. On September 4, 2003, the parties moved for a continuance. The motion for continuance was granted; the case was rescheduled for October 10, 2003.

The case was presented as rescheduled on October 10, 2003. R. Davis Thomas, Jr., who had previously been accepted as a Qualified Representative, represented Respondent. Petitioner presented two witnesses: David Douglas Metcalf and Karen Marie Walker, both experienced surveyors employed by Respondent, and offered two exhibits, which were received in evidence and marked Petitioner's Exhibits 1 and 2. Respondent did not present any witnesses or offer any exhibits.

The Transcript of Proceedings was filed with the Clerk of the Division of Administrative Hearings on October 27, 2003. Both parties submitted Proposed Recommended Orders, which were considered by the undersigned Administrative Law Judge.

FINDINGS OF FACT

Based on stipulations, official recognitions, and oral and documentary evidence presented at the final hearing, the following findings of fact are made:

1. Petitioner is the state agency charged with the licensing of nursing homes and the assignment of licensure status pursuant to Chapter 400, Florida Statutes. Petitioner

evaluates nursing home facilities to determine their degree of compliance with established state rules as a basis for making the required licensure assignment. In addition, Petitioner is responsible for conducting federally mandated surveys of those long-term care facilities receiving Medicare and Medicaid funds for compliance with federally mandated statutory requirements. These federally established requirements are applicable to Florida nursing homes pursuant to Florida Administrative Code Rule 59A-4.1288.

2. Respondent is a licensed nursing home located at 1520 South Grant Street, Longwood, Florida.

3. As authorized by Chapter 400, Florida Statutes, Petitioner surveyed Respondent to determine whether Respondent was in compliance with applicable state and federal laws and regulations. When Petitioner conducts a survey of a nursing home, it issues a survey report, commonly referred to by its form number, a "2567," or, when a state statute or rule is violated, a "3020," referring to the State of Florida form. The forms are identical in format with the exception of their respective form numbers. If deficiencies are noted in the "2567" ("3020"), they are identified by a "Tag" number which identifies the applicable regulatory violation. In addition, the survey report determines the level of deficiency of the regulatory standard believed to have been violated. As a

result, the alleged deficient practice, the particular regulation violated, and the class of the deficiency, are cited in the "2567" or "3020" survey report.

4. Petitioner conducted its annual recertification survey of Respondent, which was completed on October 24, 2002, and issued a 3020 survey report noting certain deficiencies involving state required background screening of employees.

5. In an effort to protect residents of nursing homes who are often unable, physically and mentally, to protect themselves, the State of Florida requires that employers conduct statutorily mandated background screenings of prospective employees. For employees who have resided in Florida for five years prior to applying for employment a "Level 1" screening is required. For employees who have not resided in Florida for five years prior to applying for employment in addition to the "Level 1" screening, a "Level 2" screening is required.

6. A "Level 1" screening includes, but is not limited to, employment history checks and statewide criminal correspondence checks through the Florida Department of Law Enforcement and may include local criminal records checks through local law enforcement agencies.

7. A "Level 2" screening includes fingerprinting, statewide criminal and juvenile records checks through the Florida Department of Law Enforcement, federal criminal records

checks through the Federal Bureau of Investigation, and may include local criminal records checks through local law enforcement agencies.

8. Sections 435.03 and 435.04, Florida Statutes (2002), contain an extensive list of criminal offenses, which disqualify a prospective employee from nursing home employment.

9. During the referenced survey, Petitioner examined five of Respondent's current employees' personnel files. This examination revealed that employment history checks had not been completed on two of the five employees checked. By statute, these employees should not have been hired prior to completion of the employment history checks. Respondent does not contest the determination that the employment history checks were not conducted.

10. The survey report ("3020") notes "N620" as the "ID Prefix Tag"; the portion of the 3020 titled "Summary Statement of Deficiencies" contains Section 400.215, Florida Statutes, reprinted verbatim. The 3020 further notes that this deficiency is a "Pattern, Class III, 11/15/02." The date indicates the deadline for correction of the deficiency. Section 400.215, Florida Statutes, states, in part, that "facilities must have in their possession evidence that level 1 screening has been completed before allowing an employee to begin working . . ."

11. Petitioner conducted a "follow-up" survey on December 12, 2002. During the "follow-up" survey, it was noted that Respondent was appropriately conducting employment history checks; however, it was also determined that Respondent had failed to timely request "Level 2" background screening on three of five employees due to its failure to timely submit fingerprinting cards to Petitioner. Subsections 435.05(1)(a) and (c), Florida Statutes, require that fingerprinting cards should be submitted to Petitioner within ten working days of an employee's hiring date. In the three instances cited, the fingerprinting cards were forwarded 37, 27 and 15 days after the employees were hired. Respondent does not dispute that the fingerprinting cards were submitted late. The parties have stipulated in the Joint Prehearing Stipulation filed October 1, 2003, that Respondent had forwarded all fingerprinting cards by December 5, 2002.

12. Respondent urges that employment history checks are an exercise in futility. It is argued that modern-day employers will not advance negative information about a former employee. While this argument may have some practical merit, there may be instances where a former employer will provide information that will result in the denial of employment and protection of residents. A hiring employer may learn some information, not limited to evidence of a conviction or plea to a disqualifying

offense, which may convince the employer not to hire an applicant. In addition, it is the wisdom of the Florida Legislature, not the employer that dictates this requirement of law.

13. Respondent further argues that the delay in submitting the required fingerprinting cards did not result in a potential harm to residents because, in the three instances cited, the results of the Level 2 screening demonstrated that none of the involved employees had been convicted of a disqualifying offense. This "begs the question" of a timely-filed fingerprinting card revealing a disqualifying offense more quickly, resulting in the protection of residents. Were there no time requirement for submitting the information required for the "Level 2" screening, a dilatory employer could wait several months before submitting the required information, conceivably allowing an employee with a disqualifying criminal offense committed in another state to work for six months,[1] exposing residents to potential harm the entire time.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2003).

15. Petitioner has the burden of establishing by a preponderance of the evidence that Respondent violated Section

400.215 and Chapter 435, Florida Statutes (2002), and that such violation is a Class III deficiency. Beverly Enterprises-Florida v. Agency for Health Care Administration, 745 So. 2d 1133 (Fla. 1st DCA 1999); Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 788 (Fla. 1st DCA 1981).

16. In the event Petitioner seeks the imposition of an administrative fine, the burden of proof is by clear and convincing evidence. Department of Banking and Finance, Div. of Securities and Investor Protection v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996)(citing Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987)); Nair v. Department of Business & Professional Regulation, 654 So. 2d 205 (Fla. 1st DCA 1995).

17. In Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the Court of Appeal, Fourth District, canvassed the cases to develop a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that

> clear 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 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.

Id. The Florida Supreme Court later adopted the Fourth District's description of the clear and convincing evidence standard of proof. Inquiry Concerning Davey, 645 So. 2d 398, 404 (Fla. 1994). The First District Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Electric Corp., Inc. v. Shuler Brothers, Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992)(citation omitted).

18. Subsection 400.23(7), Florida Statutes (2002), provides, in pertinent part:

> (a) 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.
>
> (b) 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 with criteria established under this part or with rules adopted by the agency. If the facility has no class I, class II, or class III deficiencies at the time of the follow-up survey, a standard licensure status may be assigned.

19. Subsections 400.23(8)(c) and (d), Florida Statutes (2002), provide:

> (c) A class III deficiency is a deficiency that the agency determines will result in no more than minimal physical, mental, or psychosocial discomfort to the resident or has the potential to compromise the resident's ability to maintain or reach his or her highest practical physical, mental, or psychosocial well-being, as defined by an accurate and comprehensive resident assessment, plan of care, and provision of services. . . .
>
> (d) A class IV deficiency is 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.

20. Section 400.215, Florida Statutes (2002), reads, in pertinent part:

> (1) The agency shall require background screening as provided in chapter 435 for all employees or prospective employees of facilities licensed under this part who are expected to, or whose responsibilities may require them to:
>
> (a) Provide personal care or services to residents;
>
> (b) Have access to resident living areas; or
>
> (c) Have access to resident funds or other personal property.
>
> (2) Employers and employees shall comply with the requirements of s. 435.05.

(a) Notwithstanding the provisions of s. 435.05(1), facilities must have in their possession evidence that level 1 screening has been completed before allowing an employee to begin working with patients as provided in subsection (1). All information necessary for conducting background screening using level 1 standards as specified in s. 435.03(1) shall be submitted by the nursing facility to the agency. Results of the background screening shall be provided by the agency to the requesting nursing facility.

(b) Employees qualified under the provisions of paragraph (a) who have not maintained continuous residency within the state for the 5 years immediately preceding the date of request for background screening must complete level 2 screening, as provided in chapter 435. Such employees may work in a conditional status up to 180 days pending the receipt of written findings evidencing the completion of level 2 screening. Level 2 screening shall not be required of employees or prospective employees who attest in writing under penalty of perjury that they meet the residency requirement. Completion of level 2 screening shall require the employee or prospective employee to furnish to the nursing facility a full set of fingerprints to enable a criminal background investigation to be conducted. The nursing facility shall submit the completed fingerprint card to the agency. The agency shall establish a record of the request in the database provided for in paragraph (c) and forward the request to the Department of Law Enforcement, which is authorized to submit the fingerprints to the Federal Bureau of Investigation for a national criminal history records check. The results of the national criminal history records check shall be returned to the agency, which shall maintain the results in the database provided for in paragraph (c). The agency shall notify the administrator of

the requesting nursing facility or the administrator of any other facility licensed under chapter 393, chapter 394, chapter 395, chapter 397, or this chapter, as requested by such facility, as to whether or not the employee has qualified under level 1 or level 2 screening. An employee or prospective employee who has qualified under level 2 screening and has maintained such continuous residency within the state shall not be required to complete a subsequent level 2 screening as a condition of employment at another facility.

21. Subsection 435.03(1), Florida Statutes (2002), reads as follows:

(1) All employees required by law to be screened shall be required to undergo background screening as a condition of employment and continued employment. For the purposes of this subsection, level 1 screenings shall include, but not be limited to, employment history checks and statewide criminal correspondence checks through the Florida Department of Law Enforcement, and may include local criminal records checks through local law enforcement agencies.

22. Subsection 435.04(1), Florida Statutes (2002), reads as follows:

(1) All employees in positions designated by law as positions of trust or responsibility shall be required to undergo security background investigations as a condition of employment and continued employment. For the purposes of this subsection, security background investigations shall include, but not be limited to, fingerprinting for all purposes and checks in this subsection, statewide criminal and juvenile records checks through the Florida Department of Law Enforcement, and federal criminal records checks through

the Federal Bureau of Investigation, and may include local criminal records checks through local law enforcement agencies.

23. Section 435.05, Florida Statutes (2002), reads as follows:

(1)(a) Every person employed in a position for which employment screening is required must, within 5 working days after starting to work, submit to the employer a complete set of information necessary to conduct a screening under this section.

(b) For level 1 screening, the employer must submit the information necessary for screening to the Florida Department of Law Enforcement within 5 working days after receiving it. The Florida Department of Law Enforcement will conduct a search of its records and will respond to the employer agency. The employer will inform the employee whether screening has revealed any disqualifying information.

(c) For level 2 screening, the employer or licensing agency must submit the information necessary for screening to the Florida Department of Law Enforcement within 5 working days after receiving it. The Florida Department of Law Enforcement will conduct a search of its criminal and juvenile records and will request that the Federal Bureau of Investigation conduct a search of its records for each employee for whom the request is made. The Florida Department of Law Enforcement will respond to the employer or licensing agency, and the employer or licensing agency will inform the employee whether screening has revealed disqualifying information.

(d) The person whose background is being checked must supply any missing criminal or other necessary information to the employer within 30 days after the employer makes a

> request for the information or be subject to automatic disqualification.
>
> (2) Unless otherwise prohibited by state or federal law, new employees may be placed on probationary status pending a determination of compliance with minimum standards set forth in this chapter.
>
> (3) Each employer required to conduct level 2 background screening must sign an affidavit annually, under penalty of perjury, stating that all covered employees have been screened or are newly hired and are awaiting the results of the required screening checks.

24. The evidence, uncontested by Respondent, demonstrates two areas of noncompliance with statues requiring background screening designed to protect nursing home residents from employees who, based on prior conduct, present a potential of harm to the residents. Electing to ignore a required screening process or failing to timely file certain required information, admittedly different statutory violations, clearly demonstrate substantial non-compliance with the requirement to conduct background screening. The distinction suggested by Respondent in argument between the two areas of non-compliance is a distinction without a difference. The evidence demonstrated by both surveys is that Respondent was not in substantial compliance with the statutory background screening requirements.

25. The evidence is equally compelling that failure to perform either of the two required background screening

activities as required presents the potential for harm to residents or, in the language of Subsection 400.23(8)(c), Florida Statutes (2002), ". . . has the potential to compromise the resident's ability to maintain or reach his or her highest practicable physical, mental, and psychosocial well-being, . . ."

26. The December 12, 2002, "follow-up" survey that discovered the lateness in filing the fingerprinting cards also determined that, effective December 5, 2002, the fingerprinting cards had been forwarded to Petitioner, albeit late. December 5, 2002, appears to be the appropriate date for terminating the Conditional licensure status of Respondent and restoring the Standard licensure status.

27. As stated hereinabove, Respondent had cured the specific deficiency initially cited, failure to pursue employment history checks, at the time of the "follow-up" survey. Even though I have determined that the failure of Respondent to timely submit fingerprinting cards is a component of the patterned Class III deficiency, the imposition of an administrative fine as suggested in Subsection 400.23(8), Florida Statutes (2002), appears to be excessive when it is considered that Conditional licensure status is a significant penalty.

RECOMMENDATION

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

RECOMMENDED that Petitioner enter a final order finding that Respondent violated Section 400.215, Florida Statutes (2002), by failing to comply with requirements regarding employee background screening and awarding Respondent a Conditional licensure status from October 24, 2002, through December 5, 2002.

DONE AND ENTERED this 25th day of November, 2003, in Tallahassee, Leon County, Florida.

JEFF B. CLARK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of November, 2003.

ENDNOTE

1/ Subsection 400.215(2)(b), Florida Statutes, the "level 2" screening statute, allows employment for a period of 180 days while Level 2 screening takes place.

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.