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STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

HOSPICE OF PALM BEACH COUNTY, INC.,

Petitioner,

vs.

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION and VITAS HEALTHCARE CORPORATION OF FLORIDA,

Respondents,

and

NORTH BROWARD HOSPITAL DISTRICT,

Intervenor.
_____/

DOAH CASE NO. 04-3165CON
AHCA NO. 2002049098
RENDITION NO. AHCA-06-0061-CON-OLC

FILED
DIVISION OF ADMINISTRATIVE HEARINGS
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FINAL ORDER

This case was referred to the Division of Administrative Hearings (DOAH) where the assigned Administrative Law Judge (ALJ), T. Kent Wetherell, II, conducted a formal administrative hearing. At issue in this proceeding is whether the Agency for Health Care Administration (Agency) should issue a hospice license to Vitas Healthcare Corporation of Florida ("Vitas") in Palm Beach County pursuant to the Agency's change of ownership (CHOW) rule. The Recommended Order dated December 15, 2005, is incorporated herein by reference, except where noted infra.

RULINGS ON EXCEPTIONS

Vitas and North Broward Hospital District ("District") filed exceptions. The Agency and Hospice of Palm Beach County, Inc. ("HOPBC") did not file any exceptions.

Vitas and the District took exception to the Statement of the Issue in the Recommended Order, arguing the Statement of the Issue in their Proposed Recommended Order more accurately reflected the issue. The Statement of the Issue is not a finding of fact or a conclusion of law, which the Agency can overturn. See Section 120.57(1)(*l*), Florida Statutes (2005). It was based on the legal argument of both parties. Furthermore, Vitas and the District did not identify the legal basis for the exception, or include appropriate and specific citations to the record. Therefore, the Agency need not rule on it. See Section 120.57(1)(k), Florida Statutes (2005).

In Exception No. 1, Vitas and the District took exception to Paragraph 23 of the Recommended Order, arguing there was no competent substantial evidence to support the ALJ's finding that Hospice of Gold Coast Home Health Services ("Gold Coast Hospice") "served a small number of patients in Palm Beach County", and that there was no evidence as to what constituted a "small number of patients". However, the ALJ's finding was a reasonable inference based on competent substantial evidence. See, e.g., Transcript, Volume VII, Page 865 ("...I show the high [number of admissions] of 43, the low of 9 in the last ten years it operated."). Thus, the Agency cannot reject the ALJ's finding. See, generally, Section 120.57(1)(*l*), Fla. Stat. (providing in pertinent part that "[t]he agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record . . . that the findings of fact were not based upon competent substantial evidence"); Heifetz v. Department of Bus. Regulation, 475 So.2d 1277, 1281 (Fla. 1985) (holding that an agency "may not reject the hearing officer's finding [of fact] unless there is no competent, substantial evidence from which the finding could reasonably be inferred"). Therefore, Exception No. 1 is denied.

In Exception No. 2, Vitas and the District took exception to Paragraph 30 of the Recommended Order, arguing there was no competent substantial evidence to support the ALJ's finding that "Vitas Healthcare 'sponsored' a CON application to establish a new hospice program in Palm Beach County based, in part, on the contention that Gold Coast Hospice was not an 'active' hospice in the county." However, the ALJ's finding was based on competent substantial evidence. See Transcript, Volume VII, Pages 864-865. Therefore, Exception No. 2 is denied.

In Exception No. 3, Vitas and the District took exception to Paragraph 34 of the Recommended Order, arguing there was no competent substantial evidence to support the ALJ's finding that the District's "staff evaluation focused on the transfer of the District's Palm Beach County hospice operation to a third-party rather than the continuation of that operation by the District." However, the ALJ's finding was a reasonable inference based on competent substantial evidence. See, e.g., Transcript, Volume I, Pages 37-38, 40-41, 44-45; Joint Exhibit 1A and 1B. Thus, the Agency cannot reject the ALJ's finding. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore Exception No. 3 is denied.

In Exception No. 4, Vitas and the District took exception to Paragraph 46 of the Recommended Order, arguing there was no competent substantial evidence to support the ALJ's finding that Wendy Delvecchio "made no reference to the 'real' reason for the license split, more likely than not due to the concern that the Agency would consider the District to be 'gaming the system.'" Vitas and the District contended "Ms. Delvecchio did not testify in this matter so the ALJ is simply speculating with regards to Ms. Delvecchio's thoughts or intents in her representation of the District." However, the ALJ's finding was a reasonable inference based on competent substantial evidence. See, e.g, Transcript, Volume I, Pages 39-40; HOPBC Exhibits

19 and 21. Thus, the Agency cannot reject the ALJ's findings. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Exception No. 4 is denied.

In Exception No. 5, Vitas and the District took exception to Paragraph 49 of the Recommended Order, arguing there was no competent substantial evidence to support the ALJ's finding that there was an undisclosed "real" reason for the District's application to license Gold Coast Hospice of Palm Beach ("Gold Coast – Palm Beach"). However, there was competent substantial evidence to support the ALJ's finding. See HOPBC Exhibit 192. Therefore, Exception No. 5 is denied.

In Exception No. 6, Vitas and the District took exception to Paragraph 59 of the Recommended Order, arguing there was no competent substantial evidence to support the ALJ's finding that "between July 27, 2001, and October 23, 2001, and during that three-month period, the inventory of licensed hospice programs in Palm Beach County was four, rather than three." However, there is competent substantial evidence in the record to show that, due to an error on the Agency's part, there were four hospice providers in Palm Beach County during that three-month period. See, e.g., Transcript, Volume II, Pages 217-220. Therefore, Exception No. 6 is denied.

In Exception No. 7, Vitas and the District took exception to Paragraph 67 of the Recommended Order, arguing there was no competent substantial evidence to support the ALJ's finding that Paul Sallrullo did not work in Palm Beach County. The ALJ, in making this finding, stated in Endnote 2 that "[i]n making this finding, the undersigned did not overlook the testimony of the District's former Vice President of Network Operations, Joseph Scott. Mr. Scott testified that Mr. Salarullo worked in Palm Beach County, but that testimony was imprecise and unpersuasive." Vitas and the District are, in essence, asking the Agency to re-

weigh the record evidence in order to make a different finding than that of the ALJ. This it cannot do. See Barfield v. Department of Health, 805 So.2d 1008 (Fla. 1st DCA 2001). Therefore, Exception No. 7 is denied.

In Exception No. 8, Vitas and the District took exception to Paragraph 79 of the Recommended Order, arguing there was no competent substantial evidence to support the ALJ's finding that the reason for the "discrepancies" between the number of patients claimed by the District in this proceeding and what Gold Coast – Palm Beach reported was "more likely than not a result of the District's failure to consistently treat Gold Coast – Palm Beach as an operating unit separate and distinct from Gold Coast Hospice." However, the ALJ made a reasonable inference based on competent substantial evidence. See, e.g., Transcript, Volume II, Pages 151-165; HOPBC Exhibits 126-132. Thus the Agency cannot reject the ALJ's finding. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Exception No. 8 is denied.

In Exception No. 9 Vitas and the District took exception to Paragraph 81 of the Recommended Order, arguing there was no competent substantial evidence to support the ALJ's finding that the Informed Consent for Care/Admission Agreement Form for patients admitted to Gold Coast – Palm Beach remained the same as the form for Gold Coast Hospice. However, the ALJ's finding was based on competent substantial evidence. See HOPBC's Exhibits 126-132. Therefore, Exception No. 9 is denied.

In Exception No. 10, Vitas and the District took exception to Paragraph 83 of the Recommended Order, arguing there was no competent substantial evidence to support the ALJ's finding that two of the patients of Gold Coast – Palm Beach were admitted after the sale of the hospice to Vitas. However, there was competent substantial evidence to support the ALJ's

findings. See, e.g., Transcript, Volume VII, Pages 767-768; HOPBC's Exhibits 130 and 131. Therefore, Exception No. 10 is denied.

In Exception No. 11, Vitas and the District took exception to Paragraph 86 of the Recommended Order, arguing there was no competent substantial evidence to support the ALJ's finding that "it appears that the [Medicare] reimbursements may have been improper." In making this finding, the ALJ cited to competent substantial record evidence. See Endnote 4, wherein the ALJ refers to HOPBC Exhibit Nos. 130, 131, 150. Since the ALJ's finding was a reasonable inference based on competent substantial evidence, the Agency cannot reject it. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Exception No. 11 is denied.

In Exception No. 12, Vitas and the District took exception to Paragraph 90 of the Recommended Order (although the exception erroneously refers to Paragraph 89), wherein the ALJ found that "[t]he other two patients – Nos. 5 and 6 – could not have been served by Gold Coast – Palm Beach because ... they were admitted on or after the date that Gold Coast – Palm Beach was sold to Vitas", arguing there was no competent substantial evidence to support the ALJ's finding. For the reasons set forth in the Ruling on Exception No. 11 supra, Exception No. 12 is also denied.

In Exception No. 13, Vitas and the District took exception to Paragraph 91 of the Recommended Order, arguing there was no competent substantial evidence to support the ALJ's finding that "[h]ospice patients in Palm Beach County were served by the District in the same manner before the license split as they were after the license split, i.e., with clinical staff based in the District's Broward County office." However, the ALJ's finding was a reasonable inference based on competent substantial evidence. See, e.g., HOPBC Exhibit 222 at pages 16-18; HOPBC Exhibit 223 at pages 6, 7, 9, 10 and 12; and HOPBC Exhibit 235 at page 140. Thus, the

Agency cannot reject the ALJ's finding. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Exception No. 13 is denied.

In Exception No. 14, Vitas and the District took exception to Paragraph 102 of the Recommended Order, arguing there was no competent substantial evidence to support the ALJ's finding that the Agency's inspection report alleged "that Gold Coast – Palm Beach was in violation of Section 400.607(4), Florida Statutes" when the report also stated the Agency was not "able to determine" if Gold Coast – Palm Beach had a home-care component. However, the ALJ's finding was based on competent substantial evidence. See HOPBC's Exhibit 70. Therefore, Exception No. 14 is denied.

In Exception No. 15, Vitas and the District took exception to Paragraph 105 and Paragraph 109 of the Recommended Order, arguing there was no competent substantial evidence to support the ALJ's findings that Brian Payne's surveillance operation was thorough and well-documented. However, the ALJ's finding was a reasonable inference based on competent substantial evidence. See Transcript, Volume V, Pages 502-528; HOPBC's Exhibits 157-162. Thus, the Agency cannot reject it. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Further, in order to arrive at a different finding, Vitas and the District are asking the Agency to re-weigh the testimony of Janet Ohm, which the ALJ discounted in Endnote 6. This the Agency cannot do. See Barfield. Therefore, Exception No. 15 is denied.

In Exception No. 16, Vitas and the District took exception to Paragraph 120 of the Recommended Order, arguing there was no competent substantial evidence to support the ALJ's finding that Gold Coast – Palm Beach "back-dated" contract "addenda", or that Lynda Friedman "back-dated" a "declaration", which stated that "[a]s of July 27, 2001, the policies contained in the Policy and Procedure Manual of Hospice of Gold Coast Home Health are applicable to the

operation of Gold Coast Hospice of Palm Beach." However, the ALJ's finding was based on competent substantial evidence. See Transcript, Volume II, Pages 171-173, 181; Joint Exhibit 12. Therefore, Exception No. 16 is denied.

In Exception No. 17, Vitas and the District took exception to Paragraph 122 of the Recommended Order, arguing there was no competent substantial evidence to support the ALJ's finding that "Gold Coast – Hospice [sic] was a hospice in name only at the time of the Agency's March/April 2002 inspections...." First, Vitas and the District stated that "Gold Coast – Hospice" was a typographical error and should be changed to Gold Coast – Palm Beach. The Agency will treat Vitas and the District's argument on this issue as a notice of scrivener's error and will modify Paragraph 122 to state

> 122. The actions taken by the District in response to the Agency's inspections further confirm that Gold Coast – Palm Beach was a hospice in name only at the time of the Agency's March/April 2002 inspections, and that, consistent with Mr. Fielding's observation in his testimony at the final hearing, what happened was that the District "got caught and [it] decided to change [Gold Coast – Palm Beach's] operation and actually make it an operation."

Second, Vitas and the District argued there was no definition under law or rule for the phrase "hospice in name only" and that the ALJ's finding was wholly irrelevant to the proceeding. However, Vitas and the District failed to cite a legal basis for this exception. Further, the ALJ's finding was based on competent substantial evidence. See, e.g., Transcript, Volume III, Pages 313-315, 316, and 365; HOPBC's Exhibits 157-162. Third, Vitas and the District argued the ALJ's finding conflicted with Section 90.407, Florida Statutes, in that "[e]vidence of measures taken after an injury or harm caused by an event, which measures if taken before the event would have made injury or harm less likely to occur, is not admissible to prove ... culpable conduct in connection with the event." In making this argument, Vitas and the District are essentially

asking the Agency to rule on an evidentiary issue that is outside of the Agency's substantive jurisdiction. This the Agency cannot do. See Barfield. Therefore, Exception No. 17 is denied.

In Exception No. 18, Vitas and the District took exception to Paragraphs 130 and 131 of the Recommended Order, arguing there was no competent substantial evidence to support the ALJ's findings that Gold Coast – Palm Beach did not have the capability of providing inpatient services to hospice patients. However, the ALJ's finding was a reasonable inference based upon competent substantial evidence. See, e.g., Transcript, Volume II, Pages 143-149; Joint Exhibit 2; HOPBC Exhibit 117. Thus, the Agency cannot reject the ALJ's finding. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Exception No. 18 is denied.

In Exception No. 19, Vitas and the District took exception to Paragraph 138 of the Recommended Order, arguing there was no competent substantial evidence to support the ALJ's finding that the Public Notice referred to the sale of the hospice license, in addition to the assets. However, the ALJ's finding was based on competent substantial evidence. See HOPBC's Exhibit 60. Therefore, Exception No. 19 is denied.

In Exception No. 20, Vitas and the District took exception to Paragraph 168 of the Recommended Order, arguing there was no competent substantial evidence to support the ALJ's finding that "[t]he Agency did not provide formal notice of its approval of Vitas' CHOW application (or a point-of-entry to contest that agency action) to HOPBC or anyone else." According to Vitas and the District, the ALJ incorrectly presumed that the Agency's governing laws and rules require the Agency to provide such notice and a point of entry into the administrative process. However, regardless of what the ALJ may have presumed in making this finding, the finding itself was based on competent substantial evidence. See Joint Exhibits 9 and 10. Therefore, Exception No. 20 is denied.

In Exception No. 21, Vitas and the District took exception to Paragraph 187 of the Recommended Order, arguing there was no competent substantial evidence to support the ALJ's finding that "Gold Coast – Palm Beach was established and separately licensed for the sole purpose of enabling the District to sell the Palm Beach County portion of its hospice program." However, the ALJ's finding was a reasonable inference based on competent substantial evidence. See, e.g., Transcript, Volume I, Pages 37-38, 40-41, 44-45; Joint Exhibit 1A and 1B; and HOPBC Exhibit 192. Thus, the Agency cannot reject the ALJ's finding. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, Exception No. 21 is denied.

In Exception No. 22, Vitas and the District took exception to Paragraphs 188-195 of the Recommended Order, arguing there is no statutory definition of a "sham" hospice and nothing in law or administrative rule supports the ALJ's finding that the hospice was a "sham." The ALJ's findings in Paragraphs 188, 189, 190, 191, 192, 193, and 195 were based on competent substantial evidence. See, e.g., the rulings on Exception Nos. 13, 14, 17 and 18 supra; HOPBC's Exhibits 157-162; and Transcript, Volume VIII, Pages 945-965. In regards to the ALJ's use of the term "sham" in Paragraph 194, that term was quoted from Page 6 of HOPBC's Petition for Formal Administrative Hearing. According to Merriam-Webster's Online Dictionary[1], a "sham" is "a trick that deludes", a "cheap falseness", or "an imitation or counterfeit purporting to be genuine." Competent substantial record evidence established that "Gold Coast – Palm Beach was a hospice in name only at the time of the Agency's March/April 2002 inspections." See Paragraph 122 of the Recommended Order and the Agency's ruling on Exception No. 17 supra. However, each of the definitions for "sham" quoted above implies that the party accused of engaging in a "sham" intended to do so. There was no competent substantial record evidence to

[1] www.m-w.com/dictionary

support a finding that the District intended to operate Gold Coast – Palm Beach as a "sham" hospice. Therefore, Exception No. 22 is granted and Paragraph 194 is changed to state

> 194. Gold Coast – Palm Beach had operational deficiencies at the time it was transferred to Vitas.

In Exception No. 23, Vitas and the District took exception to Paragraphs 199 and 200 of the Recommended Order, arguing the ALJ erred in his interpretation of Hospice of Palm Beach County, Inc. v. State of Florida, Agency for Health Care Administration, 876 So.2d 4 (Fla. 1st DCA 2004). In the Hospice opinion the Court stated

> Here, HPBC's allegations were sufficient to at least raise a factual question as to whether the issuance of a license resulted from the issuance of a de facto CON. HPBC, a hospice provider in Palm Beach County, has statutory standing to intervene in a competitor's CON proceedings. Section 408.039(5)(c) provides that "[e]xisting health care facilities may initiate or intervene in an administrative hearing upon a showing that an established program will be substantially affected by the issuance of any certificate of need ··· to a proposed facility or program within the same district." We find persuasive HPBC's allegation that after AHCA split NBHD's license, it issued another license to NBHD's Broward County hospice which authorized it to operate in both Broward and Palm Beach counties. Taking this allegation as true, as we must for purposes of our analysis, the end result of such an action is the establishment of a new licensed hospice provider in Palm Beach County in the absence of CON review as required by section 408.036(e), Florida Statutes.
>
> Although AHCA has already issued a preliminary license to Vitas, this will not deprive HPBC of its opportunity to challenge Vitas' entitlement to a CON or CON exemption. We have previously held that an existing health care provider must be provided with clear point of entry into CON proceedings. *See Florida Med. Ctr. v. Dep't of Health and Rehab. Servs.*, 484 So.2d 1292, 1296 (Fla. 1st DCA 1986). Because the granting of a de facto CON offers no such clear point of entry into the administrative process, AHCA cannot deny standing to contest such a CON simply because a license has issued. *See Univ. Psychiatric Ctr. v. Dep't of Health and Rehab. Servs.*, 597 So.2d 400 (Fla. 1st DCA 1992) (finding allegations that the agency granted a de facto CON were sufficient to establish standing); *Univ. Cmty. Hosp. v. Dep't of Health and*

Rehab. Servs., 555 So.2d 922, 922 n. 1 (Fla. 1st DCA 1990) (noting that a competitor may intervene after the agency has determined a CON exemption applies).

The Court, taking HOPBC's allegations as true, found they were sufficient to raise a factual question as to whether the license issued to Gold Coast – Palm Beach was a de facto CON. Thus, the Court held HOPBC was entitled to a formal hearing on that issue. However, the ALJ concluded in Paragraph 200 of the Recommended Order that HOPBC had "standing to raise these issues and to contest the issuance of the license to Vitas pursuant to the CHOW rule." That conclusion is erroneous and in direct conflict with existing caselaw. See Associated Home Health Agency, Inc. v. State Department of Health and Rehabilitative Services, 453 So.2d 104 (Fla. 1st DCA 1984); and Hospice of Southwest Florida, Inc. v. Agency for Health Care Administration, 1995 WL 1053196 (AHCA 1995), per curiam aff'd, 675 So.2d 937 (Fla. 2nd DCA 1996). The Agency finds that it has substantive jurisdiction over the conclusion of law in Paragraph 200 of the Recommended Order. Therefore, Exception No. 23 is granted and the last sentence of Paragraph 199, Endnote 12, and Paragraph 200 of the Recommended Order are stricken in their entirety.

FINDINGS OF FACT

The Agency hereby adopts the findings of fact set forth in the Recommended Order, except where noted supra.

CONCLUSIONS OF LAW

The Agency adopts the conclusions of law set forth in the Recommended Order, except where noted supra.

ORDER

Based upon the foregoing, Vitas' application for a hospice license pursuant to the CHOW rule is approved nunc pro tunc to November 13, 2002.

DONE and **ORDERED** this 20 day of February, 2006, in Tallahassee, Florida.

Alan Levine

ALAN LEVINE, SECRETARY
AGENCY FOR HEALTH CARE ADMINISTRATION

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO A JUDICIAL REVIEW WHICH SHALL BE INSTITUTED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A SECOND COPY ALONG WITH THE FILING FEE AS PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR WHERE A PARTY RESIDES. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been furnished by U.S. Mail, or by the method indicated, to the persons named below on this 23rd day of February, 2006.

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