

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

TODAY'S WOMEN MEDICAL CENTER OF )  
BROWARD, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 07-3359  
 )  
AGENCY FOR HEALTH CARE )  
ADMINISTRATION, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on February 19, 2008, by video teleconference, with the parties appearing in Fort Lauderdale, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: Vladimir Rosenthal, M.D., pro se  
Rosenthal, Inc.  
3250 South Dixie Highway  
Miami, Florida 33313

For Respondent: Nelson E. Rodney, Esquire  
Agency for Health Care Administration  
Spokane Building, Suite 103  
8350 Northwest 52nd Terrace  
Miami, Florida 33166

STATEMENT OF THE ISSUE

Whether the Petitioner's renewal application for licensure to operate as an abortion clinic should be granted or denied.

PRELIMINARY STATEMENT

In a Notice of Intent to Deny dated June 20, 2007, the Agency for Health Care Administration ("AHCA") notified Vladimir Rosenthal, M.D., Administrator, that it intended to deny the Abortion Clinic Renewal Application # 943 submitted by Today's Women Medical Center of Broward ("Medical Center of Broward") for failure to comply with Section 408.806, Florida Statutes (2006), and with Florida Administrative Code Rule 59A-9.020(6). AHCA asserted as the factual bases for the intended denial of the Medical Center of Broward's application for license renewal that an AHCA surveyor had been denied access to medical records during an inspection of the Medical Center of Broward conducted on February 27, 2007, and that, on a subsequent visit on April 5, 2007, to the Medical Center of Broward to examine the medical records, the surveyor was denied access to the facility. The Medical Center of Broward timely requested a hearing to resolve disputed issues of material fact, and AHCA transmitted the matter to the Division of Administrative Hearings for assignment of an administrative law judge. After two continuances, the final hearing was conducted on February 19, 2008.

At the hearing, the Medical Center of Broward presented the testimony of Yisel Arce and Arlene Mayo-Davis. Petitioner's Exhibits 1 through 9 and 11 through 14 were offered and received into evidence; Petitioner's Exhibit 10 marked for identification was rejected. AHCA presented the testimony of Deatrice Bartley and Alexandra Pelin; Respondent's Exhibits 4 through 7 were offered and received into evidence. The parties also filed a Joint Prehearing Statement that included several facts on which the parties agree.

The one-volume transcript of the proceedings was filed with the Division of Administrative Hearings on March 13, 2008. An extension of time to file proposed findings of fact and conclusions of law was granted, and the parties timely filed their Proposed Recommended Orders, which have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing, the agreed facts contained in the Joint Prehearing Stipulation, and on the entire record of this proceeding, the following findings of fact are made:

1. AHCA is the state agency responsible for licensing abortion clinics. See §§ 390.011(3); 390.012; 390.015; 408.802(3); and 408.806, Fla. Stat.<sup>1</sup>

2. The Medical Center of Broward is located at 6971 West Sunrise Boulevard, Suite 206, Plantation, Florida, and is licensed to operate as an abortion clinic pursuant to Chapter 390, Florida Statutes, and Florida Administrative Code Rule Chapter 59A-9.

3. On February 16, 2007, AHCA conducted a survey at the Medical Center of Broward in conjunction with the Medical Center of Broward's application to renew its license to operate as an abortion clinic.

4. The Medical Center of Broward refused to give the AHCA surveyor access to patient medical records during the inspection on February 16, 2007.

5. In a letter dated February 20, 2007, Diane Reiland, AHCA's field office manager in Delray Beach, Florida, advised Dr. Rosenthal, the administrator of the Medical Center of Broward, that no deficiencies had been found during the re-licensure survey but that "the Agency will contact you regarding a decision on the medical records concern [sic] that was discussed during the Re-Licensure survey."<sup>2</sup>

6. Counsel for AHCA sent a letter to the Medical Center of Broward dated February 27, 2007, setting out a procedure for review of medical records that was agreed to by counsel for the Medical Center of Broward and counsel for AHCA.

7. The procedure set out in the February 27, 2007, letter contemplated a return visit to the Medical Center of Broward by an AHCA surveyor, who would select a sample of approximately 10 clinic patients whose records would be reviewed. The surveyor was to remain at the Medical Center of Broward while office personnel redacted from the records all patient identifying information, and the AHCA surveyor was then to review the records for compliance with the applicable rules and statutes.

8. On April 4, 2007, Deatrice Bartley, a health facility evaluator supervisor employed by AHCA, telephoned the Medical Center of Broward and confirmed an appointment for an AHCA surveyor to review medical records on April 5, 2007, at 9:30 a.m. Ms. Bartley asked the person with whom she spoke if any patients would be present at the time of the record review and was told that no patients would be present on the morning of April 5, 2007.

9. Shortly after 8:00 a.m. on April 5, 2007, Ms. Bartley contacted Alexandra Pelin, a health facility evaluator employed by AHCA, via the cell phone AHCA provided Ms. Pelin. Ms. Bartley advised Ms. Pelin of the 9:30 a.m. appointment at the Medical Center of Broward to review medical records. Ms. Bartley further advised Ms. Pelin that the Medical Center of Broward's office opened at 9:00 a.m.<sup>3</sup>

10. After speaking with Ms. Bartley, Ms. Pelin left her home in Palm Beach County, Florida, and drove to the address at which the Medical Center of Broward's office in Plantation, Florida, was located. She arrived at the Medical Center of Broward's office at 9:50 a.m., and went to the second floor of the building, where the office was located. She tried to enter the office, but the office door was locked; she knocked on the door, but there was no answer. She also looked in the window of the office but did not see anyone inside.

11. Ms. Pelin immediately called Ms. Bartley and told her that she was unable to enter the Medical Center of Broward's office. Ms. Bartley gave Ms. Pelin two telephone numbers that had been given to Ms. Bartley by the person she had spoken with at the Medical Center on April 4, 2007. It was Ms. Bartley's understanding that one phone number was for the Medical Center office located in Broward County, Florida, and that the other phone number was for a Today's Women Medical Center clinic located in Miami, Florida.

12. At 9:55 a.m., Ms. Pelin placed a call to 954-792-9171, which was one of the numbers Ms. Bartley had given her.<sup>4</sup> Ms. Pelin became confused when the call was answered, and she hung up and redialed the same number. Ms. Pelin's call was answered by the Medical Center of Broward's answering service. She was told by the answering service that someone would be at

the office at about 10:30 a.m. The answering service also told her that they could not give her the telephone numbers of the physicians working at the Medical Center of Broward, who received telephone calls at the same number she had dialed.

13. Ms. Pelin then telephoned Ms. Bartley again and gave Ms. Bartley the information Ms. Pelin had received from the answering service. Ms. Pelin suggested to Ms. Bartley that she wait until 10:45 a.m. for someone to arrive at the Medical Center of Broward's office, and Ms. Bartley agreed.

14. Ms. Pelin waited in her car in the parking lot outside the Medical Center of Broward's office from 9:57 a.m. until 10:47 a.m. From her location in front of the building that housed the Medical Center of Broward's office, Ms. Pelin had a direct view of the office door, which was located on the second floor of the building. Ms. Pelin did not see anyone enter or leave the office through that door.

15. Ms. Pelin's telephone records indicate that, at 10:44 a.m., she placed another call to 954-792-9171. She expected the call to be answered by the answering service, but, instead, someone in the Medical Center of Broward's office answered the telephone. Although Ms. Pelin had not seen anyone enter the Medical Center of Broward's office, the content of the telephone conversation led Ms. Pelin to conclude that the person was inside the Medical Center of Broward's office.

16. Ms. Pelin talked with this person, who identified herself only as "Yersel," for approximately five minutes. Ms. Pelin asked if she was inside the office, and "Yersel" told Ms. Pelin that she was. "Yersel" told Ms. Pelin that Ms. Pelin could not come into the Medical Center of Broward's office because she was with a patient and that patients would be coming into the office that day. "Yersel" told Ms. Pelin that AHCA inspectors should come to the office before 10:30 a.m. because patients started arriving at that time. "Yersel" also confirmed with Ms. Pelin that she arrived at the office late that morning.

17. After talking with "Yersel'", Ms. Pelin telephoned Ms. Bartley, who told her to contact AHCA's field office manager. Ms. Pelin did so, and the field office manager advised Ms. Pelin to leave the premises. Ms. Pelin left the parking lot of the Medical Center of Broward's office and drove to AHCA's field office in Delray Beach, Florida, where she arrived at 11:34 a.m.<sup>5</sup>

18. Although AHCA surveyors attempt to schedule appointments when no patients are present at an abortion clinic, the surveyors will conduct an inspection even if patients are present under certain circumstances. The surveyors attempt to conduct inspections in a manner that does not disrupt the business of the clinic, and they will try to find a place to work where they do not bother patients. Ms. Pelin could have



reviewed the medical records on April 5, 2007, with the permission of the Medical Center of Broward but did not do so because she was told that she could not enter the office.

19. It is AHCA's practice to deny an application to renew a license to operate an abortion clinic after two unsuccessful attempts to inspect the clinic's facility and patient medical records because AHCA has not been able to determine whether the clinic is in compliance with the statutes and rules governing such clinics.

#### CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2007).

21. Because the Medical Center of Broward has applied for renewal of its license to operate as an abortion clinic, it has the burden of proving by a preponderance of the evidence that it meets all the requirements for receiving approval of its application. See Department of Banking & Fin. v. Osborne Stern, 670 So. 2d 932, 934 (Fla. 1996)("[W]hile the burden of producing evidence may shift between the parties in an application dispute proceeding, the burden of persuasion remains upon the applicant to prove [] entitlement to the license."); see also § 120.57(1)(j), Fla. Stat.("Findings of fact shall be based upon

a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute . . . .").

22. With some exceptions not pertinent in this proceeding, an "'[a]bortion clinic' or 'clinic' means any facility in which abortions are performed. § 390.011(2), Fla. Stat.<sup>6</sup> Pursuant to Section 390.015, Florida Statutes, "an application for a license to operate an abortion clinic shall be made to the agency [AHCA]," and, pursuant to Section 390.014(1), Florida Statutes,

[t]he requirements of part II of chapter 408 shall apply to the provision of services that require licensure pursuant to ss. 390.011-390.018 and part II of chapter 408 and to entities licensed by or applying for such licensure from the Agency for Health Care Administration pursuant to ss. 390.011-390.018. A license issued by the agency is required in order to operate a clinic in this state.

23. Abortion clinics regulated by Sections 390.011 through .018, Florida Statutes, are also governed by the licensure provisions of Chapter 408, Part II, Florida Statutes. See § 408.802(3), Fla. Stat. Section 408.806(7)(a), Florida Statutes, provides in pertinent part that an applicant for an initial license and an applicant for renewal of a license "must demonstrate compliance with the requirements in this part, authorizing statutes, and applicable rules during an inspection pursuant to s. 408.811, as required by authorizing statutes."

24. Section 408.811, Florida Statutes, provides in pertinent part:

(1) An authorized officer or employee of the agency may make or cause to be made any inspection or investigation deemed necessary by the agency [AHCA] to determine the state of compliance with this part, authorizing statutes, and applicable rules. . . . Any application for a license issued under this part, authorizing statutes, or applicable rules constitutes permission for an appropriate inspection to verify the information submitted on or in connection with the application.

\* \* \*

(3) The agency shall have access to and the licensee shall provide copies of all provider records required during an inspection at no cost to the agency.

25. Pursuant to Section 408.815(1)(c), Florida Statutes, a license may be denied if there has been "[a] violation of this part, authorizing statutes, or applicable rules." Florida Administrative Code Rule 59A-9.020(6) likewise provides that "[w]here the agency finds that there has been a failure to comply with the requirements established under this part or in rules promulgated hereunder, the agency is authorized to deny, modify, suspend, or revoke a license."

26. Based on the findings of fact herein, the Medical Center of Broward has failed to prove by a preponderance of the evidence that its license to operate as an abortion clinic should be renewed. Rather, the evidence establishes that the

Medical Center of Broward failed to provide AHCA's surveyor with access to redacted patient medical records, inspection of which was required by AHCA in order to determine if the Medical Center of Broward's license to operate as an abortion clinic should be renewed. By failing to provide such access, the Medical Center of Broward has violated Section 408.811(3), Florida Statutes, which violation is a ground for denial of the Medical Center of Broward's license renewal application. See § 408.815(1)(c), Fla. Stat., and Fla. Admin. Code Rule 59A-9.020(6).<sup>7</sup>

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Agency for Health Care Administration enter a final order denying the application of Today's Women Medical Center of Broward for renewal of its license to operate an abortion clinic.

DONE AND ENTERED this 30th day of May, 2008, in Tallahassee, Leon County, Florida.



---

PATRICIA M. HART  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 30th day of May, 2008.

ENDNOTES

- <sup>1/</sup> All references to Florida Statutes herein are to the 2007 edition unless indicated otherwise.
- <sup>2/</sup> Petitioner's Exhibit 1.
- <sup>3/</sup> Ms. Pelin is also the surveyor who conducted the re-licensure survey at the Medical Center of Broward on February 16, 2007, when she attempted to review the Medical Center of Broward's medical records.
- <sup>4/</sup> This is also the telephone number of the Medical Center of Broward included in its Petition for Formal Hearing.
- <sup>5/</sup> The Medical Center of Broward offered the testimony of Yisel Arce to rebut the testimony of Ms. Pelin regarding the events of the morning of April 5, 2007. At the time pertinent to this proceeding, Ms. Arce was employed in the Medical Center of Broward's office on Sunrise Boulevard in Broward County, Florida. She worked Mondays through Fridays during the Medical Center of Broward's office hours, which were from 9:00 a.m. until 4:00 p.m.

On direct examination by Dr. Rosenthal, Ms. Arce testified that she recalled that an AHCA surveyor visited the Medical Center of Broward's office in February 2007, but that she could not recall anything about the surveyor's visit. She further testified that she recalled Dr. Rosenthal's telling her to expect another visit from an AHCA inspector and telling her to allow the inspector to review medical records, but she could not recall whether anyone from AHCA came to the office to inspect medical records.

Ms. Arce's timesheet for April 5, 2007, reflects that she arrived at the Medical Center of Broward's office at 9:30 a.m. She testified, however, that she could not recall anything that happened at the Medical Center of Broward on that date, and she testified specifically that she had no recollection of refusing to allow an AHCA surveyor access to the premises at any time. Ms. Arce also testified that she had no recollection of having

ever spoken on the telephone with anyone from AHCA, either to schedule an appointment for a surveyor's visit or for any other purpose.

After careful consideration of Ms. Arce's testimony, it is concluded that her testimony is not persuasive. Ms. Arce's testimony was vague throughout, and her inability to recall anything about the events of the morning of April 5, 2007, especially in light of the subsequent denial of the Medical Center of Broward's license renewal application, seriously diminishes her credibility as a witness. Upon weighing the credibility of Ms. Arce's testimony and of Ms. Pelin's testimony, Ms. Pelin's testimony regarding the events of the morning of April 5, 2007, is accepted over that of Ms. Arce, and Ms. Pelin's testimony forms the basis for the findings of fact regarding those events.

<sup>6/</sup> It is the general rule in Florida that "a change in a licensure statute that occurs during the pendency of an application for licensure is operative as to the application, so that the law as changed, rather than as it existed at the time the application was filed, determines whether the license should be granted." Lavernia v. Department of Professional Regulation, Bd. of Medicine, 616 So. 2d 53, 53-54 (Fla. 1st DCA 1993). See also Agency for Health Care Admin. v. Mount Sinai Medical Ctr., 690 So. 2d 689, 691 (Fla. 1st DCA 1997) ("Where there is a change in law in a licensure matter, the law at the time of the decision, rather than when the application was filed, determines whether the license should be granted."). Accordingly, the licensure statutes and rules currently in effect are applicable in this proceeding.

<sup>7/</sup> Because the denial of the Medical Center of Broward's application for a license renewal was not based on a substantive violation of any laws or rules governing the operation of abortion clinics, the denial should not be an impediment to Medical Center of Broward's re-application for a license.

COPIES FURNISHED:

Vladimir Rosenthal, M.D.,  
Rosenthal, Inc.  
3250 South Dixie Highway  
Miami, Florida 33313

Nelson E. Rodney, Esquire  
Agency for Health Care Administration  
Spokane Building, Suite 103  
8350 Northwest 52nd Terrace  
Miami, Florida 33166

Holly Benson, Secretary  
Agency for Health Care Administration  
Fort Knox Building, Suite 3116  
2727 Mahan Drive  
Tallahassee, Florida 32308

Craig H. Smith, General Counsel  
Agency for Health Care Administration  
Fort Knox Building, Suite 3431  
2727 Mahan Drive, Mail Stop 3  
Tallahassee, Florida 32308

Richard J. Shoop, Agency Clerk  
Agency for Health Care Administration  
2727 Mahan Drive, Mail Stop 3  
Tallahassee, Florida 32308

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.