

STATE OF FLORIDA  
AGENCY FOR HEALTH CARE ADMINISTRATION

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AHCA  
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2009 JUL -2 P 2: 31

MIAMI JEWISH HOME AND HOSPITAL  
FOR THE AGED, INC.,

Petitioner,

vs.

DOAH CASE NO. 09-0695

FRAES NO. 2009001185

STATE OF FLORIDA, AGENCY FOR  
HEALTH CARE ADMINISTRATION,

RENDITION NO.: AHCA-09-567 -FOF-CON

Respondent.

**FINAL ORDER**

This case was referred to the Division of Administrative Hearings (DOAH) where the assigned Administrative Law Judge (ALJ), David M. Maloney, conducted a formal administrative hearing. At issue in this proceeding is whether the Agency for Health Care Administration ("Agency") should have waived the requirement that Miami Jewish Home and Hospital for the Aged, Inc. ("Miami Jewish Home") make its request for an extension of its CON's validity period 15 days in advance of the CON's expiration. The Recommended Order dated May 11, 2009 is attached to this final order and incorporated herein by reference, except where noted infra.

**RULINGS ON EXCEPTIONS**

The Agency filed exceptions to the Recommended Order and Miami Jewish Home filed a response to the Agency's exceptions.

In Exception Nos. 1 and 2, the Agency took exception to the conclusion of law in Paragraph 116 of the Recommended Order, wherein the ALJ concluded that Miami Jewish Home demonstrated "that the purpose of the underlying statute (the Act) will be achieved by

waiving the 15-day Notice Requirement,” and that Miami Jewish Home “demonstrated that application of the 15-Day Notice Requirement will create a substantial hardship.” In essence, the Agency is arguing that Miami Jewish Home failed to demonstrate it met the requirements for granting a variance or waiver from Rule 59C-1.018(3)(c), Florida Administrative Code.

First, contrary to the ALJ’s conclusion, there was no demonstration by Miami Jewish Home that granting its request for waiver will achieve the purpose of the underlying statute by other means. The underlying purpose of Rule 59C-1.018(3)(c), Florida Administrative Code, and Section 408.040, Florida Statutes is to prevent a CON from being extended beyond 18 months when no construction on the project has been commenced, unless an extension has been requested and granted by the Agency. The competent, substantial evidence presented by the parties in this matter and used by the ALJ in making his findings of fact demonstrated that Miami Jewish Home had not commenced construction prior to the expiration of its CON. See Paragraphs 13-16 of the Recommended Order. The competent, substantial evidence presented by the parties in this matter and used by the ALJ in making his findings of fact also demonstrated that Miami Jewish Home did not comply with Rule 59C-1.018(3)(c), Florida Administrative Code, by requesting an extension of its CON 15-days prior to the CON’s expiration date. See Paragraph 31 of the Recommended Order. Granting Miami Jewish Home’s petition for waiver would not achieve the purpose of the underlying statute.

Second, Miami Jewish Home did not demonstrate that the application of Rule 59C-1.018(3)(c), Florida Administrative Code would create a substantial hardship or violate the principles of fairness. While Miami Jewish Home argued that the 15-day deadline in Rule 59C-1.018(3)(c), Florida Administrative Code, was arbitrary and capricious, it nevertheless has the force and effect of law. See State v. Jenkins, 469 So.2d 733 (Fla. 1985). If Miami Jewish Home

believed that the rule was arbitrary and capricious, it had the ability to challenge it through a rule challenge proceeding. Rule 59C-1.018(3)(c), moreover, is a procedural rule that creates a deadline. When a party misses the deadline, it yields the same result every time: termination of the party's CON. As a procedural rule, the rule in question here did not create a substantial hardship. Instead, Miami Jewish Home caused its own alleged "substantial hardship" by not complying with the rule, and did not demonstrate that its failure to comply was due to any circumstances that were beyond its control. In Panda Energy Intern. v. Jacobs, 813 So.2d 46 (Fla. 2002.), an intervenor in a case filed a motion for continuance 2 days prior to the hearing, thus violating the five-day requirement of Rule 28-106.210, Florida Administrative Code, In treating the motion as a request for a waiver of the Public Service Commission's rule implementing statutory deadlines for need proceedings, the court upheld the Public Service Commission's denial of the motion for continuance, stating that "[b]ecause the limited amount of time for preparing for this case was a direct result of Panda's decision to delay intervening, Panda has demonstrated neither a 'substantial hardship' nor a violation of 'principles of fairness.'" See Panda at 51.

Based upon the preceding, the Agency finds that it has substantive jurisdiction over the conclusions of law in Paragraph 116 of the Recommended Order and that it could substitute conclusions of law as or more reasonable than those of the ALJ. Specifically, the Agency concludes that the competent, substantial evidence presented in this matter does not support the ALJ's conclusion that granting Miami Jewish Home's petition for waiver would achieve the purpose of Section 408.040, Florida Statutes. Moreover, Rule 59C-1.018(3)(c) did not create a substantial hardship for Miami Jewish Home, and instead Miami Jewish Home created a substantial hardship for itself. Therefore, Respondent's exceptions are granted and Paragraph

116 of the Recommended Order, as well as Paragraph 117 since it is interconnected with Paragraph 116, are stricken in their entirety.

Nevertheless, the Agency recognizes that there are unique facts specific to this matter that warrant an extension of Miami Jewish Home's CON. There is a general rule that "it is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it." See United Telephone Co. of Fla. v. Mayo, 345 So.2d 648, 653 (Fla. 1977) citing NLRB v. Monsanto Chemical Co., 205 F.2d 763, 764 (C.A.8 1953). The Agency believes that the facts specific to this case warrant relaxation of the 15-day requirement in Rule 59C-1.018(3)(c), Florida Administrative Code. Therefore, the Agency will accept Miami Jewish Home's late-filing of its request for an extension of its CON and grant the extension.

#### **FINDINGS OF FACT**

The Agency hereby adopts the findings of fact set forth in the Recommended Order.

#### **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, the Petition for Waiver is denied, but the Agency will extend Miami Jewish Home's CON for an additional 60 days from the date of rendition of this Final Order.

DONE and ORDERED this 2<sup>nd</sup> day of July, 2009, in Tallahassee, Florida.


  
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HOLLY BENSON, 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 2<sup>nd</sup> day of July, 2009.



\_\_\_\_\_  
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