STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

MVP HEALTH, INC.,

Petitioner,

v.

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

DOAH CASE NO. 09-6021
AHCA NO. 2009012001
RENDITION NO.: AHCA-10-000 7 -FOF-OLC

FINAL ORDER

This cause was referred to the Division of Administrative Hearings where the assigned Administrative Law Judge (ALJ), John G. Van Laningham, conducted a formal administrative hearing. At issue in this case is whether Petitioner's application for licensure as a home health agency was complete upon Petitioner's submission of additional information to the Agency within 21 days after the Agency had timely notified Petitioner of the need to provide additional information. The Recommended Order dated April 22, 2010, is attached to this Final Order and incorporated herein by reference, except where noted infra.

RULING ON EXCEPTIONS

Respondent filed exceptions to the Recommended Order, and the Petitioner filed a response to Respondent's exceptions.

In determining how to rule on the exceptions and whether to adopt the ALJ's Recommended Order in whole or in part, the Agency for Health Care Administration ("Agency" or "AHCA") must follow section 120.57(1)(*l*), Florida Statutes, which provides in pertinent part:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules

> over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. . . .

§ 120.57(1)(*l*), Fla. Stat. Additionally, "[t]he final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." § 120.57(1)(k), Fla. Stat.

It is the sole prerogative of the Administrative Law Judge (ALJ) to consider the evidence, resolve conflicts in the evidence, judge the credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on the competent, substantial evidence of record. The Agency may reject an ALJ's findings only where there is no competent, substantial evidence from which those findings can reasonably be inferred. See Heifetz v. Dep't of Bus. Reg., 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); Belleau v. Dep't of Envt'l Protection, 695 So.2d 1305 (Fla. 1st DCA 1997); Strickland v. Fla. A&M Univ., 799 So.2d 276, 278 (Fla. 1st DCA 2001). The Agency is not authorized to substitute its judgment for that of the ALJ by taking a different view of or placing greater weight on the same evidence, re-weighing the evidence, judging the credibility of witnesses, or otherwise interpreting the evidence to fit its desired ultimate conclusion. See Prysi v. Dep't of Health, 823 So.2d 823, 825 (Fla. 1st DCA 2002); Strickland, 799 So.2d at 279; Schrimsher v. Sch. Bd. Of Palm Beach County, 694 So.2d

856, 860 (Fla. 4th DCA 1997); Heifetz, 475 So.2d at 1281; Wash & Dry Vending Co. v. Dep't of Bus. Reg., 429 So. 2d 790, 792 (Fla. 3d DCA 1983); D'Antoni v. Dept. of Envtl. Prot., 22 F.A.L.R. 2879, 2880 (DEP, May 4, 2000); Brown v. Criminal Justice Standards & Training Comm'n., 667 So.2d 977, 979 (Fla. 4th DCA 1996). Simply put, the Agency may not reject recommended findings of fact when the question turns on the weight or credibility of testimony by witnesses, when the factual issues are otherwise susceptible of ordinary methods of proof, or when the Agency may not claim special insight as to those facts, if the finding is otherwise supported by competent, substantial evidence. See McDonald v. Dep't of Banking & Fin., 346 So.2d 569, 579 (Fla. 1st DCA 1977); Gross, 819 So.2d at 1002; Schrimsher, 694 So.2d at 860; See also McGann v. Fla. Elections Comm'n, 803 So.2d 763, 764 (Fla. 1st DCA 2001) (concluding that an agency could not reject ALJ's finding of fact on ultimate issue of "willfulness" by recasting findings as a conclusion of law); Harac v. Dep't of Prof'l Reg., 484 So.2d 1333, 1337 (Fla. 3d DCA 1986) (stating that the agency was not permitted to substitute its findings for those of ALJ on issue of architect's "competency," even though the determination of design competency required specialized knowledge and experience, because it is not so unique as to defy ordinary methods of proof in formal adversarial proceedings).

In accordance with these legal standards, the Agency makes the following rulings:

In Exception Number One to the Recommended Order, Respondent takes exception to the ALJ's Statement of the Issues in the Recommended Order. However, the Statement of the Issues is not a finding of fact or conclusion of law to which a party is permitted to take exception. See §120.57(1)(k) and (1), Fla. Stat. Therefore, the Agency must deny Exception Number One. However, the substance of Respondent's argument will be addressed in the ruling on Exception Number Three infra.

In Exception Number Two, Respondent takes exception to the findings of fact in Paragraph 17 of the Recommended Order, arguing that the ALJ's finding that reinstatement of Petitioner's accreditation would occur if it received a license is not based on competent, substantial evidence. However, the Respondent misconstrues the ALJ's findings. The ALJ actually found that "the possibility of such reinstatement exists, should a clear path to MVP's licensure emerge." This finding is based on the testimony of Mr. Gomez (See Transcript, Pages 32-35), which constitutes competent, substantial evidence. See, e.g., Stinson v. Winn, 938 So. 2d 554 (Fla. 1st DCA 2006) (finding that an ALJ is entitled to rely on the testimony of one witness even if that testimony conflicts with the testimony of several other witnesses). Therefore, the Agency denies Exception Number Two.

In Exception Number Three, Respondent takes exception to the conclusions of law in Paragraphs 33 through 35 of the Recommended Order, arguing the issue of licensure by default under §120.60(1), Fla. Stat., was not raised in any pleadings, noticed or litigated before the ALJ. Contrary to Respondent's argument, this is not a "new issue." Rather, the ALJ's conclusions of law in Paragraphs 33 through 35 of the Recommended Order are the ALJ's attempt to craft a remedy for the Petitioner which had proved its licensure application was complete when the Agency deemed it incomplete and withdrew it from further consideration. While the ALJ's reasoning might apply in certain situations, there is a statutory impediment to granting a default license in this case because Petitioner is no longer accredited.

In the instant case, the ALJ considered only the general provisions of the Administrative Procedures Act, Ch. 120, Fla. Stat., and did not consider the more specific provisions of the Home Health Services Act, Ch. 400, Pt. III, §§400.461 through 400.518, Fla. Stat., which is administered by the Agency, in determining that Petitioner should receive a default home health

agency license. As noted by the ALJ, §120.60(1), Fla. Stat., requires the Agency to grant or deny a license application within 90 days after or the application will be considered approved and the license shall be issued. However, under §400.471(2)(h), Fla. Stat., a license applicant must submit proof that it has achieved accreditation "that is not conditional or provisional" before the Agency may process its application and then must maintain accreditation to maintain licensure. There is, then, a conflict between §120.60(1), Fla. Stat. and §400.471(2)(h), Fla. Stat. In Florida, when a conflict arises between a specific law and a general law, the "special act takes precedence over a general law dealing with the same subject matter." See J.M. v. State, 783 So.2d 1204 (Fla. 1st DCA 2001). Thus, accreditation is always condition precedent to attaining home health agency licensure, default or otherwise; because Petitioner has lost its accreditation, the Agency may not grant Petitioner a license at this time.

The Agency finds that it has substantive jurisdiction over the conclusions of law in paragraphs 33 through 35 of the Recommended Order since it is the licensing agency and the agency responsible for administering Chapter 400, Part III, and finds that it can substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency grants Exception Number Three, rejecting the conclusions of law in Paragraphs 33 through 35 of the Recommended Order. Instead, the Agency substitutes the following conclusions of law:

> 33. The evidence presented in this matter demonstrates that the Agency erroneously found the Petitioner's initial licensure application to be incomplete. In actuality, the Petitioner's application was complete, and Petitioner met all the requirements for licensure at the time the application was submitted. Thus, the Agency should have approved Petitioner's licensure application.
>
> 34. In the meantime, Petitioner has lost its accreditation and no longer meets the requirements for licensure. Thus, even if the Petitioner is otherwise entitled to a license by default under the provisions of §120.60(1), Fla. Stat., the Agency cannot grant the

home health agency license at this time because Petitioner is not accredited. See §400.471(2)(h), Fla. Stat.

In Exception Number Four, Respondent takes exception to the conclusions of law in Paragraphs 36 through 39 of the Recommended Order, arguing that the case of Lanier v. Turlington, 488 So.2d 612 (Fla. 1st DCA 1986), cited to by the ALJ, is inapplicable to this proceeding and that the Agency does not have legal discretion to modify the statutory requirement for the maintenance of accreditation. Respondent's argument is valid. Unlike in the Lanier case, §400.471(2)(h), Fla. Stat., presents an absolute bar to the Agency granting Petitioner's licensure application at this point in time. See the ruling on Exception Number Three supra. The reasoning in Lanier is, then, not applicable to this case. The Agency finds that it has substantive jurisdiction over the conclusions of law in paragraphs 36 through 39 of the Recommended Order since it is the licensing agency and the agency responsible for administering Chapter 400, Part III, and that it can substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency grants Exception Number Four and rejects Paragraphs 36 through 39 of the Recommended Order.

FINDINGS OF FACT

The Agency 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, Petitioner's application for licensure as a home health agency was complete as of July 24, 2009, and the Agency should have processed the application accordingly. However, because Petitioner has since lost its accreditation, the Agency cannot

grant the Petitioner a license at this point in time. Nevertheless, in the interest of fairness, the Agency shall give the Petitioner 120 days from the date of rendition of this final order in which to achieve accreditation. If the Petitioner becomes accredited during that time period, the Agency shall grant the Petitioner's licensure application. If the Petitioner fails to become accredited by the expiration of the 120-day period, the Agency shall deny the Petitioner's licensure application.

DONE and ORDERED this 26 day of May, 2010, in Tallahassee, Florida.

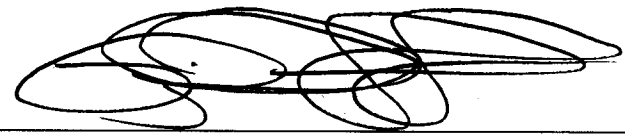
THOMAS W. ARNOLD, SECRETARY
AGENCY FOR HEALTH CARE ADMINISTRATION

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW, WHICH SHALL BE INSTITUTED BY FILING THE ORIGINAL NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A COPY, ALONG WITH THE FILING FEE 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 THE 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. or interoffice mail to the persons named below on this 27th day of May, 2010.



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