STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MVP HEALTH, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 09-6021
	)	
AGENCY FOR HEALTH CARE ADMINISTRATION,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing on February 26, 2010, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Jay Adams, Esquire
Broad and Cassel
Post Office Box 11300
Tallahassee, Florida 32302

For Respondent: D. Carlton Enfinger, II, Esquire
Michael J. Hardy, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop No. 3
Tallahassee, Florida 32308

STATEMENT OF THE ISSUES

The primary 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 Respondent within 21 days after Respondent had timely notified

Petitioner of the need to provide additional information. If Petitioner failed to provide Respondent with information which Respondent timely requested, then Respondent may deny Petitioner's application as incomplete, as it intended to do, provided the information Respondent sought is information Respondent is permitted by law to require. On the other hand, if Petitioner's application was complete, then Petitioner's application is "considered approved," because Respondent failed to grant or deny the application within 60 days after receiving additional information from Petitioner; in that event, a license must be issued to Petitioner, subject to reasonable conditions authorized by law.

PRELIMINARY STATEMENT

On October 20, 2009, Respondent Agency for Health Care Administration issued a Notice of Intent to Deem Application Incomplete and Withdrawn from Further Review, which informed Petitioner MVP Health, Inc., that its pending application for licensure as a home health agency would be rejected as incomplete. Petitioner disagreed that its application was incomplete and timely requested a formal hearing to resolve this disputed issue of material fact. On November 3, 2009, the matter was filed with the Division of Administrative Hearings.

The final hearing took place, after a one-month continuance, on February 26, 2010, with both parties present.

Petitioner's only witness was Rey Gomez, the company's owner. Petitioner's Exhibits 1 through 6 were received in evidence without objection. Respondent did not call any witnesses or tender any exhibits.

The final hearing Transcript was filed on March 12, 2010. Each party timely filed a Proposed Recommended Order in compliance with the deadline (March 22, 2010) that had been established at hearing.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2009 Florida Statutes.

FINDINGS OF FACT

1. The Agency for Health Care Administration ("Agency" or "AHCA") is the state agency responsible for regulating home health agencies in Florida. In this capacity, the Agency determines whether to approve applications for licensure as a home health agency, and it has administrative jurisdiction to enforce the laws governing such licensees, including the authority to take disciplinary measures against licensees who violate the applicable statutes and rules.

2. MVP Health, Inc. ("MVP"), is a corporation which, for a time relevant to this case, held a license to operate as a home health agency. On June 11, 2009, MVP filed an application with AHCA seeking to obtain a new home health agency license, notwithstanding that it was already licensed. Prompting this

seemingly unusual maneuver was the recent acquisition of 100 percent of the company's equity by an individual named Rey Gomez, who had bought out the other shareholders. About one week after submitting its application to AHCA, MVP voluntarily stopped operating as a home health agency under its then-existing license.

3. Pursuant to Sections 120.60(1) and 408.806(3), Florida Statutes, which will be examined below, the Agency was required to notify MVP, within 30 days after receiving MVP's application for licensure, of any errors, omissions, or requests for additional information. By letter dated July 10, 2009 (the "Omissions Letter"), the Agency timely gave MVP such a notice, which provided, in pertinent part, as follows:

> Your application for a home health agency license has been reviewed and was found to be incomplete. Applicants for licensure will receive only **one** omission letter describing the corrections, omissions or revisions needed to complete the application. If the response to the omission letter does not satisfactorily address what is outlined below, the application will be denied. Therefore, pursuant to section 408.806(3)(b), Florida Statutes, no further action can be taken until the following is received:
>
> * * *
>
> Include a separate list showing all health care entities licensed or registered in the State of Florida that are also owned in whole or in part by each of your controlling interests as required by subsection

400.471(2)(g), F.S. Controlling interests as defined in [section] 408.803, F.S., include the applicant or licensee; a person or entity that serves as an officer of, is on the board of directors[,] or has a 5 percent or greater ownership interest in the management company or other entity, related or unrelated[,] with which the applicant or licensee contracts to manage the provider. The term does not include a voluntary board member.

* * *

You have listed Rey Gomez as the sole owner of MVP Health Inc. We currently have a licensed home health agency, MVP Health Inc., HHA #29992195, which our records show as being owned by Virginia Duby, Michael Lee, and Priscilla Lee. We cannot process an initial application for licensure from a company for which we currently have an active license if the owners of record on that existing license differ from the owners of record on the new application. A change of ownership application was recently filed for that agency but that application was denied and withdrawn. Since then we have come to understand that this company's ownership was in dispute. Please submit documentation that the legal issues of ownership of this company have been finally resolved. Please eliminate any inconsistencies in the ownership of this company regarding this initial licensure application and HHA #29992195. Please complete #2A Individual and/or Entity Ownership of Licensee on Health Care Licensing Application page 2 of 5 per reporting requirements of Chapter 408, Part II, Florida Statutes.

* * *

Please send the required information no later than 21 days <u>from the receipt of this letter</u>. If the applicant fails to submit

> all of the information required in the application within 21 days of being notified by AHCA of the omissions, **the application will be denied and the fees shall be forfeited** as required in subsection 408.806(3)(b), Florida Statutes.

(Boldface and underlining in original.) There were, listed in the Omissions Letter, other items as to which the Agency wanted additional information, but none of these later became the subject of dispute, and thus they require no further mention.

4. Following instructions, MVP filed the requested additional information with AHCA on July 24, 2009, a date which was well within 21 days after MVP's receipt of the Omissions Letter. In its supplemental filing, as it had done previously in its application, MVP identified Mr. Gomez and his wife, Zenaida, as the corporation's only "controlling interests," and represented that neither of them owned any part of any other health care entities. MVP asserted also that Mr. Gomez was its sole shareholder, just as it had done in the application.

5. On August 13, 2009, MVP voluntarily relinquished its then-existing home health agency license. This was done in response to the Agency's assertion, in the Omissions Letter, that the Agency "cannot process an initial application for licensure from a company for which we currently have an active license if the owners of record on that existing license differ from the owners of record on the new application." At the time,

Mr. Gomez believed that AHCA soon would issue MVP a new license, whereupon MVP would be authorized to resume operations as a home health agency.

6. The Agency, however, did not soon issue a license to MVP. Instead, by letter dated October 20, 2009, which was captioned, "Notice of Intent to Deem Application Incomplete and Withdrawn From Further Review" (the "Withdrawal Notice"), the Agency informed MVP that its application had been deemed incomplete and would be withdrawn from further consideration.[1] The Agency described the "outstanding issues remaining for licensure" as follows:

> 1. The applicant could not provide proof of ownership of MVP Health Inc. The ownership of this company has been in dispute for over a year. The applicant was asked to provide proof of ownership of the company but did not do so. A call to the Clerk of Courts in Miami revealed that there is an ongoing legal dispute that has not been resolved regarding the ownership of MVP Health Inc. Rey Gomez claims to be the sole owner, however, there are three previous owners who are involved in the ownership dispute that is ongoing. The Agency cannot issue a license to a corporation where the ownership is not clear.
>
> * * *
>
> 2. The applicant's accreditation was terminated due to not providing services since June of 2009. The home health agency submitted a change of ownership application which was subsequently withdrawn and the license was

> voluntarily terminated. The applicant applied for an initial home health license after the original license was voluntarily terminated. In so doing, the applicant needed to secure accreditation within 120 days of receipt of the initial application in the Home Care Unit. That date would have been October 8, 2009.
>
> * * *
>
> 3. The applicant did not provide a list of all health care entities licensed or registered in the State of Florida that are also owned by each controlling interest.

7. In its Proposed Recommended Order, which was filed after the final hearing in this case, the Agency conceded that because "no evidence was entered to contradict" Mr. Gomez's testimony that "neither he nor MVP Health, Inc. had an ownership interest in any other health care facility," MVP "has met [its] burden and must prevail on this point." The undersigned agrees that, with regard to Item #3 in the foregoing list of alleged deficiencies, MVP's application was complete, as a matter of ultimate fact, no later than July 24, 2009, contrary to AHCA's preliminary determination. No further discussion of this point is required.

8. Regarding Item #1, it is the Agency's position that MVP did not——and indeed could not possibly have——provided "proof" that "the legal issues of ownership of [MVP] have been finally resolved." This contention is based on several undisputed facts

(to which the parties stipulated), namely: (1) Several persons brought suit in the circuit court in Miami-Dade County seeking to establish that they own, in the aggregate, 40 percent of MVP's equity, as against Mr. Gomez's claim to be the company's sole shareholder; (2) On October 28, 2009, the trial court entered a judgment in Mr. Gomez's favor in this litigation, determining that he owns 100 percent of MVP's shares; and (3) As of the final hearing in this case, an appeal from that judgment was pending in the Third District Court of Appeal.

9. The Agency argues that the mere existence of the ongoing litigation clouds the issue of MVP's ownership, which in turn necessarily makes MVP unable to "prove" Mr. Gomez's claim of ownership, and that, without such proof, the Agency is precluded from issuing a license. There are two problems with AHCA's contention.

10. First, the mere fact that some persons (who are not parties to, and did not testify in, this proceeding) dispute certain statements in MVP's application, i.e., that (a) Mr. Gomez owns 100 percent of MVP's shares, and (b) Mr. Gomez and his wife are the only two "controlling interests" of the company, is not terribly persuasive evidence that MVP's statements, which were made under oath, are untrue. In this case, Mr. Gomez testified credibly that he is MVP's sole owner, and that he and Mrs. Gomez are the company's officers. Mr.

Gomez's testimony in this regard is corroborated by the stipulated fact that a judgment vindicating Mr. Gomez's claim of ownership was rendered in a legal proceeding brought specifically to defeat such claim. On the present record, the undersigned does not hesitate to find, based on a preponderance of the evidence, that the statements in MVP's application regarding its owner and officers were true and complete.

11. Second, however, and more important, the issue in this case is not whether MVP's statements regarding ownership were *true* and complete, but whether such statements were *complete*. This is because AHCA did not deny MVP's application on the grounds that Mr. Gomez is not, in fact, the sole shareholder; that MVP made a material misrepresentation in, or omitted a material fact from, its application[2]; or even that the ongoing litigation is a per se barrier to the issuance of a license (although the Agency seems to believe that this latter proposition is true). Rather, the Agency *deemed incomplete* MVP's application, and on *that* basis refused to consider whether the application should be granted or denied "on the merits."

12. To be sure, the effect of AHCA's intended action, if implemented, would be indistinguishable from denial; indeed, such action——the withdrawal of an allegedly incomplete application——properly can be (and sometimes is[3]) called a denial. But the basis of the action would be materially different from

that justifying the denial of a *completed* application. Simply put, the failure of an applicant to meet the criteria for a license, which results in a denial on the merits, is not, as a logical matter, equal to the failure of an applicant to timely provide requested information (or correct an identified error or omission), which results, as a procedural matter, in a refusal to consider (or to deny) an application consequently deemed to be incomplete. It is one thing, in other words, to say, based on all the necessary information, that a person is ineligible for licensure. It is another thing to say that the person's eligibility cannot and will not be determined because the person has failed to provide all of the necessary information upon which such a determination must be based. Because the Agency has taken the position that MVP failed to submit all of the information that the Agency needed in order to make a decision whether or not to grant MVP's application for licensure, the question in this case is not whether MVP in fact meets the criteria for licensure, but whether MVP timely provided AHCA with all of the information which the Agency requested and was permitted by law to require.

13. The evidence in this case establishes clearly, and the undersigned finds, that MVP timely provided AHCA with all of the legally required information concerning its owner and officers for which it was asked. As will be discussed below, the law

neither requires that an applicant provide, nor authorizes the Agency to demand, as a prerequisite to licensure, "proof of [corporate] ownership" in the form of a final judicial determination of such issue where a legal dispute has arisen. To the extent AHCA sought to require such information from MVP, AHCA was not permitted by law to do so, and thus MVP's application cannot be "deemed incomplete" based on MVP's "failure" to provide such proof (which in this instance did not even exist). MVP identified its owner and officers and provided AHCA with identifying information about them in accordance with the applicable law. No more was required of MVP to make its application complete in regard to matter of ownership.[4]

14. It is determined as a matter of ultimate fact that, with regard to Item #1 in the Withdrawal Notice, MVP's application was complete as of July 24, 2009, at the latest.

15. Item #2 in the Withdrawal Notice, which raised the issue of accreditation for the first time, requires consideration of additional facts not previously discussed. At the time MVP submitted its application to AHCA, MVP was fully accredited by an appropriate accrediting organization known as The Joint Commission. This accreditation was effective beginning February 3, 2009, and was valid for up to 39 months.

16. MVP's accreditation remained in effect up to, and beyond, the date of AHCA's Withdrawal Notice, wherein the Agency

mistakenly stated that MVP's accreditation had been terminated (as of October 20, 2009). In fact, MVP's accreditation remained valid until at least October 27, 2009, on which date The Joint Commission issued a letter to Mr. Gomez that provided as follows:

> The Joint Commission was notified that MVP Health, Inc. closed effective 6/19/2009 and that your organizations [sic] license was surrendered to the state on 8/13/2009.
>
> In order to complete the process of removing the organization, MVP Health, Inc., and all of its services from our records, please return to the Joint Commission the Certificate of Accreditation, since the certificate and all copies remain the property of The Joint Commission. We will update our records accordingly.

The parties stipulated that, as of the final hearing in this case, MVP was not accredited by The Joint Commission or any other accrediting organization. As will be discussed below, Section 400.471(2)(h), Florida Statutes, provides unambiguously that a home health agency must maintain accreditation to maintain licensure.

17. Mr. Gomez believes, based on conversations he has had with The Joint Commission, that The Joint Commission would reinstate MVP's accreditation, without the need for MVP to reapply for accreditation, if AHCA were to indicate that MVP will be licensed. While Mr. Gomez's testimony in this regard is not a legally sufficient basis upon which to find that The Joint

Commission is, in fact, prepared to reinstate MVP's accreditation, Mr. Gomez's credibly articulated belief nevertheless persuades the undersigned to find that the possibility of such reinstatement exists, should a clear path to MVP's licensure emerge.

18. The posture of this case is such that the question at hand is not whether MVP's application should be denied for failure to maintain accreditation, as the Agency urges; the question is whether MVP's application should be withdrawn from further consideration as incomplete. The answer to that question is clearly *no* because, as will be seen, the law prohibits an agency from denying an application for licensure for failure to correct an error or omission or to supply additional information unless the agency notified the applicant of the error, omission, or need for additional information within 30 days after receiving the application. In this case, the Agency did not notify MVP that there was any issue regarding MVP's accreditation until long after this statutory deadline had passed. Indeed, MVP was still accredited 30 days after submitting its application, and the company remained accredited for more than three months after that.

19. It is determined as a matter of ultimate fact that, with regard to Item #2 in the Withdrawal Notice, MVP's application was complete as of June 11, 2009.

20. The upshot of the foregoing findings of fact is that, as a matter of ultimate fact, AHCA had received from MVP a completed application for licensure as a home health agency no later than July 24, 2009.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2009).

22. The general procedure for licensing is set forth in Section 120.60, Florida Statutes, which provides in pertinent part as follows:

> (1) Upon receipt of an application for a license, an agency shall examine the application and, within 30 days after such receipt, notify the applicant of any apparent errors or omissions and request any additional information the agency is permitted by law to require. An agency shall not deny a license for failure to correct an error or omission or to supply additional information unless the agency timely notified the applicant within this 30-day period. An application shall be considered complete upon receipt of all requested information and correction of any error or omission for which the applicant was timely notified or when the time for such notification has expired. Every application for a license shall be approved or denied within 90 days after receipt of a completed application unless a shorter period of time for agency action is provided by law. The 90-day time period shall be tolled by the initiation of a proceeding under ss. 120.569 and 120.57. Any application for a license that is not

> approved or denied within the 90-day or shorter time period, within 15 days after conclusion of a public hearing held on the application, or within 45 days after a recommended order is submitted to the agency and the parties, whichever action and timeframe is latest and applicable, is considered approved unless the recommended order recommends that the agency deny the license. Subject to the satisfactory completion of an examination if required as a prerequisite to licensure, any license that is considered approved shall be issued and may include such reasonable conditions as are authorized by law. Any applicant for licensure seeking to claim licensure by default under this subsection shall notify the agency clerk of the licensing agency, in writing, of the intent to rely upon the default license provision of this subsection, and shall not take any action based upon the default license until after receipt of such notice by the agency clerk.

23. Section 408.806, Florida Statutes, prescribes the particular process applicable to applications for licensure as a home health agency, and it includes the following relevant provisions:

> (1) An application for licensure must be made to the agency on forms furnished by the agency, submitted under oath, and accompanied by the appropriate fee in order to be accepted and considered timely. The application must contain information required by authorizing statutes and applicable rules and must include:
>
> (a) The name, address, and social security number of:
>
> * * *

> 4. Each controlling interest if the applicant or controlling interest is an individual.
>
> (b) The name, address, and federal employer identification number or taxpayer identification number of the applicant and each controlling interest if the applicant or controlling interest is not an individual.
>
> * * *
>
> (3)(a) Upon receipt of an application for a license, the agency shall examine the application and, within 30 days after receipt, notify the applicant in writing of any apparent errors or omissions and request any additional information required.
>
> (b) Requested information omitted from an application for licensure, license renewal, or change of ownership, other than an inspection, must be filed with the agency within 21 days after the agency's request for omitted information or the application shall be deemed incomplete and shall be withdrawn from further consideration and the fees shall be forfeited.
>
> (c) Within 60 days after the receipt of a complete application, the agency shall approve or deny the application.

24. In connection with the requirements for disclosure of a corporate applicant's "controlling interests,"[5] Florida Administrative Code Rule 59A-8.004 provides as follows:

> (2) The applicant shall identify its legal name, its business name, and the names and addresses of corporate officers and directors, the name and address of each person having at least a 5% equity interest in the entity and other information as required in Section 408.806(1), F.S. For initial and change of ownership applications and corporate name changes, a current

> certificate of status or authorization pursuant to Chapter 607, F.S., is required.

25. As discussed in the findings of fact above, the Agency apparently suspected, based on the fact that a lawsuit was pending in which certain individuals had challenged Mr. Gomez's claim to be MVP's sole owner, that MVP's application contained false, misleading, or incomplete information concerning its ownership. Although it appears that MVP did disclose truthfully to AHCA the existence of the lawsuit involving Mr. Gomez, neither the applicable statute nor rule requires the applicant to disclose information about ongoing litigation that might cause a redistribution of a corporate applicant's equity.[6] More important and to the point, however, is that AHCA has cited no provision of law, and the undersigned has not independently discovered such a legal requirement, compelling a corporate applicant to provide, or authorizing the Agency to demand, on pain of denial, "proof of ownership" in the form of "documentation that the legal issues of ownership . . . have been finally resolved."[7]

26. AHCA was not, in short, "permitted by law to require" MVP to provide such proof of ownership as a condition of completing MVP's application. Thus, it is concluded that MVP was not required, in order to make a complete application, to comply with AHCA's request for extra information, which request

MVP could not possibly have satisfied, in any event, because (as the Agency apparently knew) the lawsuit had not been "finally resolved" as of October 20, 2009, when it sent the Withdrawal Notice, and indeed the litigation was still in process as of the final hearing in this case.

27. As found above, MVP provided AHCA with all of the information about its ownership and officers that it was required to submit in accordance with the requirements of Section 408.806(1), Florida Statutes, and Florida Administrative Code Rule 59A-8.004(2). As a matter of fact and law, MVP's application was complete with regard to this disclosure requirement no later than July 24, 2009.

28. The status of MVP's accreditation raises a dilemma. Two points——one legal, one factual——are clear and undisputed. First, accreditation "must be maintained by the home health agency to maintain licensure." § 400.471(2)(h), Fla. Stat. Second, as of the final hearing, MVP was no longer accredited, although it had been until the end of the (pre-litigation) application process. MVP contends that, if AHCA had not mistakenly deemed MVP's application incomplete, but rather had acted in a timely fashion to issue MVP a license, MVP would not have lost its accreditation. MVP urges that, as a result, MVP should be given a reasonable time within which to secure the

reinstatement of its accreditation, before its completed application is approved or denied.

29. The Agency argues that MVP's lack of accreditation is a trump because without accreditation, MVP is not qualified for licensure as a home health agency. Although the Agency concedes no error or delay in processing MVP's application, the logic of its position is that a mistake on the Agency's part would be irrelevant inasmuch as the facts as they exist *right now* are determinative, regardless of how the present situation developed, or of what was or might have been.

30. The flaw in the Agency's logic is that the Agency did not deny (it its view) a completed application. It expressly withdrew from further consideration (and effectively denied) an application deemed to be incomplete. Doing so was the culmination of a series of mistakes.

31. To begin, the law unambiguously prohibits an agency from "deny[ing] a license for failure to correct an error or omission or to supply additional information unless the agency timely notified the applicant" of the particular deficiency within 30 days after receiving the application. See § 120.60(1), Fla. Stat. The Agency failed to give MVP timely notice, within this 30-day period, that MVP needed to correct an error or omission, or supply additional information, regarding its accreditation. Thus, AHCA was not legally permitted to use

the issue of MVP's accreditation as a basis for deeming MVP's application incomplete.

32. Next, the Agency drew the wrong factual conclusion about the completeness of MVP's application. As set forth above, MVP's application *was* complete, as a matter of fact, no later than July 24, 2009. By then, MVP had provided all of the information about its owner and officers, and their (lack of) ownership interests in other health care facilities, that MVP was legally required to provide——and indeed, had provided all of the information on these matters (for which it was asked) that it could have provided. MVP's application was complete, as well, in regard to the issue of accreditation, for MVP had submitted, with its application, documentation showing that MVP was accredited.

33. Having misperceived the actual status of MVP's application, which was in fact a completed application, the Agency took its eyes off the clock, which had begun to run no later than July 24, 2009, counting down the time remaining for making a decision as to whether to grant or deny MVP's application. The law, as mentioned above, requires that "[e]very application for a license shall be approved or denied within 90 days after receipt of a completed application unless a shorter period of time for agency action is provided by law." § 120.60(1), Fla. Stat. In this case, a shorter period of time,

namely 60 days, is provided by law. See § 408.806(3)(c), Fla. Stat. Thus, the Agency had until September 22, 2009, at the latest, to approve or deny MVP's application. It blew the deadline.[8]

34. Section 120.60(1), Florida Statutes, specifies the consequence of an agency's failure timely to approve or deny a completed application: "Any application for a license that is not approved or denied within the 90-day or shorter time period . . . is considered approved[.]"[9] Because AHCA did not approve or deny MVP's application within 60 days after receiving a completed application, the application must be considered approved. See Lanier v. Turlington, 488 So. 2d 612, 614 (Fla. 1st DCA 1986)(statutory prescription for agency's untimely action on application for licensure is that the application shall be deemed approved subject to the satisfactory completion of all outstanding prerequisites).

35. The undersigned is of course aware that AHCA believed it had not received a completed application and hence would not have thought that the 60-day period had commenced. Nothing in Section 120.60(1), Florida Statutes, suggests, however, that the 90-day or shorter period does not commence until the agency declares the application complete. The statute says that an "application shall be considered complete upon receipt of all requested information[10] and correction of any error or omission

for which the applicant was timely notified or when the time for such notification has expired." § 120.60(1), Fla. Stat. (emphasis added). The date upon which an agency was in receipt of all legally required elements of an application is an historical fact. If the agency never received all of the required elements, that too is a matter of historical fact. The question of whether a particular "application shall be considered complete," therefore, is ultimately a factual one, as is the question of *when* the application was completed, in cases where it is considered complete. If, for whatever reason, the agency misapprehended the historical events as they unfolded, its subjective understanding cannot alter or override the objective reality.[11] The facts, after all, are the facts. Here, MVP's application was complete as of July 24, 2009, regardless of whether the Agency knew that fact. Consequently, the 60-day period began on that date, regardless of whether the Agency noticed.[12]

36. Although MVP's application is considered approved, MVP's lack of accreditation creates the dilemma alluded to above, which is that issuing a license to an applicant who clearly fails to meet a condition of eligibility seems aberrant. Fortunately, Section 120.60(1) provides a way out of the apparent predicament.

37. The court in Lanier v. Turlington, 488 So. 2d 612 (Fla. 1st DCA 1986), confronted this situation. The case arose from the Commissioner of Education's denial of a teacher's application for certification as a "master teacher" based on her failure to include a social security number in the application. Id. at 613. As it happened, the Commissioner had not notified the applicant of this omission within the 30-day period prescribed in Section 120.60(2), Florida Statutes (1985), an earlier version of today's Section 120.60(1), nor had he denied the application within the 90-day period, as required. Due to the Commissioner's delay, the applicant had been unable to take a qualifying test, the successful completion of which was a condition of eligibility for certification. Id. Thus, the applicant was not fully qualified for certification, although she would have been (assuming she had passed the test), had the Commissioner not improperly denied her application due to an omission for which timely notice had not been given.

38. On the subject of remedies available to this applicant, the court stated as follows:

> Although appellant asks that the appellee Commissioner be directed to "grant a make-whole remedy awarding the designation of Associate Master teacher to the Petitioner," we conclude, under the terms of section 120.60(2), supra, the lack of timely notice by appellee results only in appellee being unable to deny certification based on the cited omission from the application.

> Appellant should therefore be permitted to pursue certification as if her application had been complete. Certain time constraints for examination and for other requirements for certification will obviously have been mooted by the intervening appeal. The prescription of section 120.50(2) [sic] in these circumstances appears to be that the application shall be "deemed approved . . . subject to the satisfactory completion" of the required examination and other prerequisites, which would necessarily relate back to the period for which the application is "deemed approved" by the terms of the statute.

Id. at 614.

39. Section 120.60(1), Florida Statutes, provides that, "[s]ubject to the satisfactory completion of an examination if required as a prerequisite to licensure, any license that is considered approved shall be issued and may include such reasonable conditions as are authorized by law." This mandate is similar to the "prescription of section 120.[6]0(2)," which the court in Lanier implemented in directing the Commissioner to issue the applicant a conditional license. The undersigned concludes that the appropriate remedy here, as in Lanier, is the issuance of a license, based on an application which is "considered approved" by operation of law, subject to the condition that the licensee satisfactorily fulfill the remaining prerequisite to licensure, which in this case entails the reinstatement of MVP's accreditation. Once MVP's accreditation is reinstated (assuming it is), the satisfactory completion of

this requirement will relate back to the period for which MVP's application is "considered approved" by the terms of the statute. See Lanier, 488 So. 2d at 614.

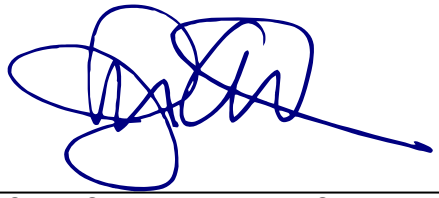
40. As a final point of discussion, the undersigned observes that the outcome would be practically the same even if, for whatever reason, MVP's application were not "considered approved." In that event, based on the facts that (a) MVP's application was complete as of July 24, 2009, and (b) the Agency failed timely to notify MVP concerning any problems with its accreditation (of which there weren't any, either within 30 days after AHCA's receipt of MVP's application, or as of the date of the Withdrawal Notice), the undersigned would recommend that AHCA either grant or deny MVP's completed application within 45 days after the issuance of this Recommended Order. See § 120.60(1), Fla. Stat. MVP would then have a period of time, perhaps of many months' duration,[13] in which to secure the reinstatement of its accreditation, which time period would probably be sufficient for doing so——assuming that, as Mr. Gomez testified, The Joint Commission is prepared to reinstate MVP's accreditation once it appears MVP is on track to be licensed.[14]

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 which, *first,* acknowledges

that MVP's application for licensure as a home health agency is considered approved by the terms of Section 120.60(1), Florida Statutes; and, *second*, directs the Agency Clerk to issue MVP a conditional license, which shall be subject to MVP's (a) providing satisfactory proof of accreditation upon such reasonable conditions as the Agency may prescribe, and (b) meeting such additional reasonable conditions, if any, as AHCA is authorized by law to impose.

DONE AND ENTERED this 22nd day of April, 2010, in Tallahassee, Leon County, Florida.



JOHN G. VAN LANINGHAM
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 22nd day of April, 2010.

ENDNOTES

[1]/ Although the evidence does not conclusively eliminate the possibility that, sometime prior to October 20, 2009, AHCA had verbally notified MVP of its intent to deem MVP's application incomplete, the testimony presented, coupled with the facts to which the parties stipulated, which comprise a chronology of the

operative events, combine to make this possibility extremely remote——so unlikely, in fact, that the undersigned reasonably infers, and hereby finds, based on a preponderance of the evidence, that the Withdrawal Notice constituted the first notice given to MVP that AHCA intended not to issue MVP a license.

[2]/ See § 408.815(1)(a), Fla. Stat.

[3]/ See Fla. Admin. Code R. 59A-8.0086(1)(a)(application shall be denied for failure to "to submit all the information required in the application within 21 days of being notified").

[4]/ To be clear, the fact that an application is complete does not mean that it must be approved. Although this point might seem self-evident, the parties in this case have tended, to one degree or another, to conflate the issue of completeness with that of eligibility. For example, the Agency seems to believe that the existence of a lawsuit concerning MVP's ownership provides a basis to deny MVP's application for licensure, apparently on the theory that the litigation shows Mr. Gomez is *not* the "clear" owner of 100 percent of MVP's shares, contrary to the representation in MVP's application that he *is*. Assuming the Agency had reason to doubt the veracity of the statements made in MVP's application concerning its ownership, the Agency could have given notice of its intent to deny the application on that basis, which would have provided MVP a clear point of entry to seek an administrative determination of whether, in fact, Mr. Gomez is or is not MVP's sole shareholder. That is not, however, what the Agency did, which is why the question here is *not* whether, in fact, Mr. Gomez is the sole shareholder of MVP, but instead whether MVP's application was complete in regard to disclosures concerning ownership.

[5]/ The term "controlling interest" is defined as follows:

> (7) "Controlling interest" means:
>
> (a) The applicant or licensee;
>
> (b) A person or entity that serves as an officer of, is on the board of directors of, or has a 5-percent or greater ownership interest in the applicant or licensee; or
>
> (c) A person or entity that serves as an officer of, is on the board of directors of, or has a 5-percent or greater ownership

> interest in the management company or other entity, related or unrelated, with which the applicant or licensee contracts to manage the provider.
>
> The term does not include a voluntary board member.

§ 408.803(7), Fla. Stat.

[6]/ It is not necessary to decide whether AHCA is permitted by law to require the submission of information regarding a pending lawsuit that might affect a corporate applicant's ownership because AHCA (a) requested only to be assured that the lawsuit was over, which it was not; and (b) has never asserted, and did not attempt to prove at hearing, that MVP failed timely to provide, upon request, *available* information about the lawsuit, which necessarily would not include documentation showing the final disposition, as the suit was ongoing.

[7]/ AHCA was not looking merely for additional "proof of ownership," which would have been superfluous. MVP had submitted statutorily sufficient proof of ownership in its application, stating under oath that Mr. Gomez owned all of the company's shares. What AHCA wanted was proof of *undisputed* ownership, where "undisputed" meant "not presently the subject of an unresolved lawsuit." AHCA's demand for such proof reflects an intention to impose an eligibility criterion (absence of pending litigation over ownership) that is nowhere to be found in the licensing statute. AHCA is not permitted to create new qualifications for licensure except via rulemaking—— and then only to the extent it has been delegated such legislative authority.

[8]/ The Withdrawal Notice, recall, was dated October 20, 2009, and no timely verbal notice had been given. Cf. Department of Transp. v. Calusa Trace Dev. Corp., 571 So. 2d 543, 546 (Fla. 2d DCA 1990)(verbal denial is sufficient to satisfy the time limitations of § 120.60); accord, Sumner v. Dep't of Prof'l Regulation, 555 So. 2d 919 (Fla. 1st DCA 1990).

[9]/ There are circumstances in which the 90-day or shorter period may be extended. One involves litigation: the "90-day time period shall be tolled by the initiation of a proceeding under ss. 120.569 and 120.57." § 120.60(1), Fla. Stat. In such event, the agency has until "45 days after a recommended order

is submitted to the agency and the parties" to approve or deny the application; if the agency fails timely to act, the application is "considered approved unless the recommended order recommends that the agency deny the license." Id. Another such circumstance arises when a "public hearing is held on the application," in which case the agency must approve or deny the application within 15 days after the conclusion of the public hearing, if that deadline is beyond the 90-day period, or else the application will be considered approved. Id.

Neither of these situations has occurred here. There was not a "public hearing" on MVP's application in the sense that the term is used in the statute (and if there were the 15-day period would have expired). And while MVP obviously initiated a proceeding under §§ 120.569 and 120.57 (this one), the proceeding began *after* the 60-day period had run. Logically, a time period that has expired cannot thereafter be tolled by a subsequent event; there is nothing still moving to stop from running. The upshot is that the Agency had the 60-day period in which to grant or deny MVP's application, no more.

[10]/ In this context, the set of "all requested information" must either be a subset of, or coterminous with, the universe of information that "the agency is permitted by law to require," as the first sentence of § 120.60(1), Fla. Stat., makes clear. This is because, obviously, an agency should not request information that it is not permitted by law to demand as essential to the completion of the application. If, however, the agency does that which it should not do, and calls for, as a condition of an application's completion, the provision of information it has no warrant to demand, then the applicant's failure or inability to comply with the unauthorized request for extra information should not be found to prevent the application from being considered complete, for allowing an agency to benefit (or an applicant to suffer) in consequence of the agency's ultra vires act, besides being patently unfair, would give agencies an incentive to impose such unauthorized requirements, or at least would remove a disincentive to doing so. It should be added, though, that when an applicant fails or refuses to comply with an agency's request for additional information, the applicant necessarily takes a chance that the request will later be found legitimate, with the result that the applicant's application will properly be deemed incomplete, or alternatively that the agency will nevertheless consider the application complete but then deny it on the merits, forcing the applicant to initiate an administrative proceeding during which

the previously requested information might well be discoverable and relevant as evidence at hearing. As a practical matter, applicants should probably comply with requests for information that are not outlandish and at least reasonably likely to result in the submission of information relevant to the statutory conditions for licensure. In this case, MVP did the best it could to satisfy the Agency's requests for information. The problem for MVP was that AHCA had requested information that did not exist.

[11]/ This case provides a good example of why this must be so. Although the evidence here shows that the Agency sincerely, but mistakenly, believed that MVP's application was incomplete, suppose for argument's sake, hypothetically, that AHCA instead realized, too late, that it had missed the deadline for granting or approving MVP's application in accordance with § 408.806(2)(c), Fla. Stat. If an agency, faced with this situation, were allowed to circumvent the decision deadline by the expedient of rejecting the application as incomplete, its notice to the applicant would probably look a lot like the Withdrawal Notice, from which it appears, actually, that the Agency had all of the information it needed to deny the application based on the legal dispute concerning MVP's ownership and MVP's lack of accreditation. The point is that if an agency were permitted to avoid the 90-day or shorter decision period simply by preventing its commencement through the stratagem of deeming an application incomplete, this "exception" would engulf the rule requiring that applications be granted or denied within 90 (or fewer) days after receipt of a complete application: a clever agency could always frame the grounds for denial in terms of the application's "incompleteness."

[12]/ The lesson here is that an agency which believes an application is fatally incomplete should always notify the applicant of that determination within the 90-day or shorter period. That way, if the application were later found in a substantial-interests proceeding to have been complete, the application would not be considered approved (because the 90-day or shorter period would have been tolled by the administrative litigation), and the agency would have up to 45 days after the issuance of the recommended order within which to grant or deny the application. On the other hand, when an agency delays announcing its intent to withdraw from consideration an application deemed incomplete, thinking the decision period has not yet commenced, and waits to act for more than 90 days (or fewer if the period is shorter) after receiving what is, or

seems reasonably likely to be, the applicant's final submission, the agency runs the risk of being found to have missed the deadline, if the application is later determined, in a § 120.57 proceeding, to have been complete. While there may be good reasons for taking such a chance, delay——even if ultimately vindicated (where, for example, the application is later found to have been incomplete, as the agency believed)——seems to be contrary to the spirit of § 120.60(1), Fla. Stat., which favors reasonably prompt action on applications for licensure.

[13]/ If the Agency denied the application, MVP would be entitled to request a § 120.57 hearing. If that were to happen, MVP would have, as a practical matter, at least until the final hearing to obtain its accreditation. This is because the dispute would be heard de novo, and the administrative law judge would be able to receive and consider evidence of the relevant extant conditions, including, for example, the recent reinstatement of accreditation, were that to occur. See McDonald v. Department of Banking and Finance, 346 So. 2d 569, 584 (Fla. 1st DCA 1977). As the court explained in McDonald,

> The hearing officer's decision to permit evidence of circumstances as they existed at the time of the hearing was correct. The agency may appropriately control the number and frequency of amendments to licensing applications and may by rule prevent substantial amendment of the application in midproceeding. But the hearing officer or agency head conducting Section 120.57 proceedings should freely consider relevant evidence of changing economic conditions and other current circumstances external to the application. Section 120.57 proceedings are intended to formulate final agency action, not to review action taken earlier and preliminarily.

Id. at 584 (footnote omitted).

[14]/ In the Withdrawal Notice, the Agency asserted that MVP needed to have secured accreditation no later than October 8, 2009, which was 120 after the Agency's receipt of MVP's application. If this were true, MVP would be out of time. The Agency's position was based on § 400.471(2)(h), Fla. Stat., which provides in relevant part as follows:

> In the case of an application for initial licensure, [the applicant must file either] documentation of accreditation, or an application for accreditation, from an accrediting organization that is recognized by the agency as having standards comparable to those required by this part and part II of chapter 408. Notwithstanding s. 408.806, an applicant that has applied for accreditation must provide proof of accreditation that is not conditional or provisional within 120 days after the date of the agency's receipt of the application for licensure or the application shall be withdrawn from further consideration. Such accreditation must be maintained by the home health agency to maintain licensure.

(Emphasis added.)

MVP was fully accredited when it submitted its application to AHCA, and, accordingly, pursuant to § 400.471(2)(h), MVP filed documentation showing that it possessed valid accreditation, thereby fulfilling the statutory requirement. Under the plain and unambiguous language of the statute, the obligation to file with AHCA a copy of the applicant's application for accreditation arises only in cases where the applicant is not yet accredited and thus must apply for accreditation. It is likewise clear, based on the plain language of the statute, that the only applicants who "must provide proof of accreditation that is not conditional or provisional within 120 days after the date of the agency's receipt of the application for licensure" are those who, at the time of applying for licensure, are awaiting accreditation. MVP was not in that group. MVP therefore was not subject to the 120-day limitation period. To the extent AHCA contended otherwise, it did so based on a misreading of an unambiguous statute that, in this regard, requires no interpretation. MVP, in short, is not out of time to obtain accreditation by virtue of § 400.471(2)(h), Fla. Stat.

COPIES FURNISHED:

Jay Adams, Esquire
Broad and Cassel
Post Office Box 11300
Tallahassee, Florida 32302

D. Carlton Enfinger, II, Esquire
Michael J. Hardy, Esquire
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop No. 3
Tallahassee, Florida 32308

Richard J. Shoop, Agency Clerk
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop No. 3
Tallahassee, Florida 32308

Justin Senior, General Counsel
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop No. 3
Tallahassee, Florida 32308

Thomas W. Arnold, Secretary
Agency for Health Care Administration
2727 Mahan Drive, Mail Stop No. 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.