STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

RENDITION NO.: AHCA-11-0207-FOF-OLC

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Petitioner,

v.

AVALON'S ASSISTED LIVING, LLC d/b/a AVALON'S ASSISTED LIVING and d/b/a AVALON'S ASSISTED LIVING AT AVALON PARK; and AVALON'S ASSISTED LIVING II, LLC d/b/a AVALON'S ASSISTED LIVING AT SOUTHMEADOW,

Respondent.
_____/

DOAH CASE NO. 10-0528
AHCA NOS. 2009009965
2009009966

AVALON'S ASSISTED LIVING, LLC d/b/a AVALON'S ASSISTED LIVING and d/b/a AVALON'S ASSISTED LIVING AT AVALON PARK,

Petitioner,

v.

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

DOAH CASE NO. 10-1672
AHCA NO. 2010002136

AVALON'S ASSISTED LIVING II, LLC d/b/a AVALON'S ASSISTED LIVING AT SOUTHMEADOW,

Petitioner,

v.

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

DOAH CASE NO. 10-1673
AHCA NO. 2010002138

FINAL ORDER

This cause was referred to the Division of Administrative Hearings where the assigned Administrative Law Judge (ALJ), William F. Quattlebaum, conducted a formal administrative hearing. At issue in these cases is whether the allegations in the Agency's Administrative Complaint are correct, and, if so, what penalty should be imposed; whether the Agency should approve the licensure renewal applications of Avalon's Assisted Living, LLC Avalon's Assisted Living and d/b/a Avalon's Assisted Living at Avalon Park (Avalon I) and Avalon's Assisted Living II, LLC d/b/a Avalon's Assisted Living at Southmeadow (Avalon II). The Amended Recommended Order dated January 31, 2011, is attached to this Final Order and incorporated herein by reference, except where noted infra.

RULING ON EXCEPTIONS

Avalon I and II filed exceptions to the Recommended Order.

In Exception No. 1, Avalon I and II take exception to the Amended Recommended Order in general, arguing that the proceedings on which the Amended Recommended Order was based did not comply with the essential requirements of law because the ALJ relied on hearsay evidence in making his findings of fact. There are two problems with Exception No. 1. First, the exception does not clearly identify the disputed portion of the Amended Recommended Order by page number or paragraph. Thus, the Agency need not rule on it. See §120.57(1)(k), Fla. Stat. Second, even if the exception was valid, it raises an argument that is clearly outside of the Agency's substantive jurisdiction. See Barfield v. Dep't of Health, 805 So.2d 1008 (Fla. 1st DCA 2001) (concluding that, based upon the 1999 amendments to Chapter 120, Florida Statutes, the Board of Dentistry lacked substantive jurisdiction to reject the ALJ's conclusion of law that

the grading sheets were inadmissible hearsay evidence). Therefore, the Agency denies Exception No. 1.

In Exception No. 2, Avalon I and II take exception to the findings of fact in Paragraph 6 of the Amended Recommended Order, arguing that the findings of fact are not based on competent, substantial evidence and that the ALJ relied solely on hearsay in making the findings. The findings of fact in Paragraph 6 of the Amended Recommended Order are based on competent, substantial evidence. See, e.g., Transcript, Volume I, Pages 27-39; Agency's Exhibits 6 and 7. As stated in the ruling on Exception No. 1 supra, the issue of whether this evidence is inadmissible hearsay is clearly outside of the Agency's substantive jurisdiction. Therefore, the Agency must deny Exception No. 2.

In Exception No. 3, Avalon I and II take exception to the findings of fact in Paragraph 7 of the Amended Recommended Order, arguing that the findings of fact are based on inadmissible hearsay. The findings of fact in Paragraph 7 of the Amended Recommended Order are based on competent, substantial evidence. See, e.g., Transcript, Volume I, Pages 27-39; Agency's Exhibits 6 and 7. Again, as stated in the ruling on Exception No. 1 supra, the issue of whether this evidence is inadmissible hearsay is clearly outside of the Agency's substantive jurisdiction. Therefore, the Agency denies Exception No. 3.

In Exception No. 4, Avalon I and II take exception to the finding of fact in Paragraph 10 of the Amended Recommended Order, arguing that the ALJ relied on hearsay in making the finding of fact and that the finding of fact is rebutted by other competent, substantial evidence. The finding of fact in Paragraph 10 of the Amended Recommended Order is based on competent, substantial evidence. See Transcript, Volume I, Pages 40-47; Agency's Exhibits 6 and 7. Avalon I and II are essentially asking the Agency to re-weigh the evidence or consider other

record evidence the ALJ did not give weight to in order to make findings of fact that are more favorable to their position. However, 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 v. Fla. A&M Univ., 799 So.2d 276, 279 (Fla. 1st DCA 2001); Schrimsher v. Sch. Bd. Of Palm Beach County, 694 So.2d 856, 860 (Fla. 4th DCA 1997); Heifetz v. Dep't of Bus. Reg., 475 So.2d 1277, 1281 (Fla. 1st DCA 1985); 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). Additionally, to the extent that Avalon I and II's exception concerns an evidentiary issue, the Agency does not have substantive jurisdiction to rule on it. See Barfield. Therefore, the Agency must deny Exception No. 4.

In Exception No. 5, Avalon I and II take exception to the finding of fact in Paragraph 11 of the Amended Recommended Order, arguing that the ALJ based the finding on hearsay evidence. Again, Avalon I and II's argument concerns an evidentiary issue that is outside of the Agency's substantive jurisdiction. See Barfield. Therefore, the Agency must deny Exception No. 5.

In Exception No. 6, Avalon I and II take exception to the findings of fact in Paragraph 12 of the Amended Recommended Order, once again arguing that the findings of fact are based on hearsay and not competent, substantial evidence. The findings of fact in Paragraph 12 of the Amended Recommended Order are based on competent, substantial evidence. See Transcript, Volume I, Pages 42-43; Agency's Exhibits 6 and 7. The Agency does not have substantive

jurisdiction to determine whether this evidence constitutes hearsay. See Barfield. Therefore, the Agency must deny Exception No. 6.

In Exception No. 7, Avalon I and II take exception to the findings of fact in Paragraph 13 of the Amended Recommended Order, arguing that the ALJ solely relied on hearsay in making these findings. Paragraph 13 of the Amended Recommended Order is a mixed finding of fact and conclusion of law. The first sentence of Paragraph 13 of the Amended Recommended Order contains a finding of fact that is based on competent, substantial evidence. See Transcript, Volume I, Pages 42-43; Transcript, Volume III, Page 374; Agency Exhibits 6 and 7. The Agency does not have jurisdiction to decide whether the evidence on which that finding is based constitutes hearsay. See Barfield. The second sentence of Paragraph 13 of the Amended Recommended Order is a factual finding concerning whether the facts in the first sentence of Paragraph 13 of the Amended Recommended Order, as well as Paragraphs 11 and 12 of the Amended Recommended Order, constitute a violation of law. That factual finding involved the ALJ's weighing of the evidence presented in the matter. The Agency is expressly prohibited by law from re-weighing the evidence in order to reject or modify such a finding of fact. See Heifetz. Therefore, the Agency must deny Exception No. 7.

In Exception No. 8, Avalon I and II make no specific exception, but rather opine that the surveyor's notes were rife with errors and mistakes. This might be Avalon I and II's opinion, but it is not a valid exception. See §120.57(1)(k), Fla. Stat. Thus, the Agency need not rule on Exception No. 8. Alternatively, the Agency cannot overturn any factual findings based on a decision that the evidence on which those findings are based was hearsay. See Barfield. Therefore, the Agency must deny Exception No. 8.

In Exception No. 9, Avalon I and II take exception to the findings of fact in Paragraph 15 of the Amended Recommended Order, arguing that the patient records referenced in the findings were not submitted into evidence. Thus, according to Avalon I and II, the findings are based solely on hearsay. The findings of fact in Paragraph 15 of the Amended Recommended Order are based on competent, substantial evidence. See Transcript, Volume I, Pages 52-54; Transcript, Volume II, Pages 173-180; Agency's Exhibits 6 and 7. The Agency does not have substantive jurisdiction to decide whether this evidence constitutes hearsay. See Barfield. Therefore, the Agency must deny Exception No. 9.

In Exception No. 10, Avalon I and II take exception to the findings of fact in Paragraph 16 of the Amended Recommended Order, arguing that the findings are repetitive of those in Paragraph 13 of the Amended Recommended Order and that they are based solely on hearsay. Paragraph 16 of the Amended Recommended Order is another mixed finding of fact and conclusion of law. The findings of fact in Paragraph 16 of the Amended Recommended Order are based on competent, substantial evidence. See Transcript, Volume I, Pages 42-52, Agency's Exhibits 6 and 7. The Agency does not have substantive jurisdiction to make a ruling as to whether that evidence is inadmissible hearsay. See Barfield. The ALJ's conclusion of law regarding whether these facts constituted a violation of law is outside of the Agency's substantive jurisdiction. See Gross. Therefore, the Agency must deny Exception No. 10.

In Exception No. 11, Avalon I and II take exception to the findings of fact in Paragraph 17 of the Amended Recommended Order, arguing that the findings are based solely on hearsay. The findings of fact in Paragraph 17 of the Amended Recommended Order are based on competent, substantial evidence. See Agency's Exhibits 6 and 7. The Agency does not have

substantive jurisdiction to review the admissibility of that evidence. See Barfield. Therefore, the Agency must deny Exception No. 11.

In Exception No. 12, Avalon I and II take exception to the finding of fact in Paragraph 18 of the Amended Recommended Order, arguing that the finding is not based on competent, substantial evidence. Paragraph 18 is actually a conclusion of law concerning whether the factual findings constitute a violation of law. The Agency cannot reject or modify that conclusion. See Gross. Therefore, the Agency must deny Exception No. 12.

In Exception No. 13, Avalon I and II take exception to the findings of fact in Paragraph 19 of the Amended Recommended Order, arguing that they are based solely on hearsay, and that the Agency did not prove by clear and convincing evidence that there was a pattern of inadequate performance. Paragraph 19 of the Amended Recommended Order is a conclusion of law concerning whether the facts constitute a violation of law. The Agency cannot reject or modify that conclusion. See Gross. Furthermore, Paragraph 19 of the Amended Recommended Order also reflects the ALJ's weighing of the evidence presented in this case. The Agency cannot re-weigh that evidence to reach a different conclusion. See Heifetz. Therefore, the Agency must deny Exception No. 13.

In Exception No. 14, Avalon I and II take exception to the finding of fact in Paragraph 23 of the Amended Recommended Order, arguing that the finding is not based on competent, substantial evidence. The finding of fact in Paragraph 23 of the Amended Recommended Order is based on competent, substantial evidence. See Transcript, Volume I, Page 63. Thus, Avalon I and II's exception is meritless. Therefore, the Agency denies Exception No. 14.

In Exception No. 15, Avalon I and II take exception to the findings of fact in Paragraph 24 of the Amended Recommended Order, arguing that there is no competent, substantial

evidence to support the finding that Mrs. Carter-Walker identified herself as the administrator of Avalon III during the August 5, 2009 inspection. A review of the record supports Avalon I and II's argument. Therefore, the Agency must grant Exception No. 15, and modify Paragraph 24 of the Amended Recommended Order to state:

> 24. During the August 5, 2009, inspection, Mrs. Carter-Walker arrived at Avalon III. The investigator was familiar with Mrs. Carter-Walker and knew her as the administrator for Avalon I and Avalon II.

In Exception No. 16, Avalon I and II take exception to the finding of fact in Paragraph 25 of the Amended Recommended Order, arguing that there is no competent, substantial evidence that Mrs. Carter-Walker ever identified herself as the "administrator of Avalon III." Contrary to Avalon I and II's argument, the finding of fact in Paragraph 25 of the Amended Recommended Order is a reasonable inference based on ample competent, substantial record evidence. See Transcript, Volume I, Page 63; Transcript. Volume II, Pages 238 and 278; Transcript, Volume III, Pages 317, 346 and 351-352. Thus, the Agency cannot reject or modify it. See §120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, the Agency must deny Exception No. 16.

In Exception No. 17, Avalon I and II take exception to the findings of fact in Paragraphs 26 and 31 of the Amended Recommended Order, arguing that the ALJ improperly shifted the burden of proof in both paragraphs. However, neither paragraph addresses the burden of proof. Instead it appears that Avalon I and II are grasping at straws in an attempt to persuade the Agency to rule in their favor. The findings of fact in Paragraphs 26 and 31 of the Amended Recommended Order are based on competent, substantial evidence. See Transcript, Volume II, Pages 235-240 in regard to Paragraph 26 of the Amended Recommended Order; and Transcript, Volume I, Pages 61-72; Transcript, Volume IV, Pages 537-538 in regard to Paragraph 31 of the Amended Recommended Order. Thus, the Agency cannot reject or modify the ALJ's factual

findings. See §120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, the Agency must deny Exception No. 17.

In Exception No. 18, Avalon I and II take exception to the conclusions of law in Paragraph 43 of the Amended Recommended Order, arguing that, contrary to the ALJ's conclusions, the Agency did not meet the burden of proof as to the allegations against Avalon I. Avalon I and II's exception concerns an evidentiary issue that the Agency does not have substantive jurisdiction to rule on. See Barfield. Furthermore, the Agency is prohibited from rejecting the ALJ's conclusions regarding whether the factual findings constitute a violation of law. See Gross. Therefore, the Agency must deny Exception No. 18.

In Exception No. 19, Avalon I and II take exception to the conclusions of law in Paragraph 44 of the Amended Recommended Order, arguing that the ALJ's conclusions are based solely on hearsay. Once again, Avalon I and II's exception concerns an evidentiary issue that the Agency does not have substantive jurisdiction to rule on. See Barfield. Furthermore, the Agency is prohibited from rejecting the ALJ's conclusions regarding whether the factual findings constitute a violation of law. See Gross. Therefore, the Agency must deny Exception No. 19.

In Exception No. 20, Avalon I and II take exception to the conclusions of law in Paragraph 45 of the Amended Recommended Order based on three separate arguments. First, Avalon I and II argue that the ALJ relied on hearsay in making the findings of fact that led to these conclusions of law. Second, Avalon I and II argue that the Agency gave them inadequate notice prior to alleging these additional violations. Third, Avalon I and II argue that the Agency failed to prove the violations. In regard to Avalon I and II's first argument, it concerns an evidentiary issue that is clearly outside of the Agency's substantive jurisdiction. See Barfield. Thus, the Agency cannot address it. In regard to Avalon I and II's second argument, this issue

was raised by Avalon I and II before the Agency prior to these cases being referred to the Division of Administrative Hearings (See Agency's Order on Respondent's Motion to Dismiss Administrative Complaint rendered on February 1, 2010), and before the ALJ (See Transcript, Volume I, Pages 18-24), who obviously found it to be without merit as evidenced by his conclusions of law in Paragraph 45 of the Amended Recommended Order. The Agency finds no basis to reject the ALJ's conclusions of law on this issue. In regard to Avalon I and II's third argument, the Agency cannot reject an ALJ's conclusion of law regarding whether the facts constitute a violation of law. See Gross. Therefore, the Agency must deny Exception No. 20.

In Exception No. 21, Avalon I and II take exception to the conclusions of law in Paragraph 46 of the Amended Recommended Order, arguing that the conclusions of law are not supported by the evidence and ignore the language in §408.812(3)&(5), Fla. Stat. The ALJ's conclusions of law in Paragraph 46 of the Amended Recommended Order concern whether the facts constitute a violation of law. Thus, the Agency cannot reject or modify them. See Gross. Therefore, the Agency must deny Exception No. 21.

In Exception No. 22, Avalon I and II take exception to the ALJ's recommended penalty, arguing that the penalty is not commensurate with the evidence presented in these cases. Again, Avalon I and II's argument concerns an evidentiary issue that is outside of the Agency's substantive jurisdiction. See Barfield. Additionally, the record evidence relied on by the ALJ in recommending the penalty clearly supports his recommendation and is within the statutory guidelines for such violations. After carefully reviewing the entire record, the Agency could not find any mitigating evidence that would warrant a reduction of the ALJ's recommended penalty. See Criminal Justice Standards and Training Commission v. Bradley, 596 So.2d 661 (Fla. 1992). Therefore, the Agency must deny Exception No. 22.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW

The Agency adopts the conclusions of law set forth in the Amended Recommended Order.

ORDER

Based upon the foregoing, the licenses of Avalon I and Avalon II are hereby revoked; the licensure renewal applications of Avalon I and Avalon II are hereby denied; and an administrative fine of $3,000 is hereby imposed on Avalon I and Avalon II for violations alleged in the Agency's Administrative Complaint.

Unless payment has already been made, payment in the amount of $3,000 is now due from Avalon I and Avalon II as a result of the agency action. Such payment shall be made in full within 30 days of the date of rendition of this Final Order. The payment shall be made by check payable to Agency for Health Care Administration, and shall be mailed to the Agency for Health Care Administration, Attn. Revenue Management Unit, Office of Finance and Accounting, 2727 Mahan Drive, Fort Knox Building 2, Mail Stop 14, Tallahassee, FL 32308.

DONE and ORDERED this 4 day of March, 2011, in Tallahassee, Florida.

Elizabeth Dudek

ELIZABETH DUDEK, INTERIM 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 4th day of March, 2011.

RICHARD J. SHOOP, Agency Clerk
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