

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DOLPHIN DIAGNOSTICS, LLC,)
)
 Petitioner,)
)
vs.) Case No. 10-0632
)
AGENCY FOR HEALTH CARE)
ADMINISTRATION,)
)
 Respondent.)

)

RECOMMENDED ORDER

On April 14 and 15, 2010, an administrative hearing in this case was conducted by William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Walter R. Carfora, Esquire
Walter R. Carfora, P.A.
111 Second Avenue, Northeast, Suite 917
St. Petersburg, Florida 33701

For Respondent: James H. Harris, Esquire
Agency for Health Care Administration
Sebring Building, Suite 330D
525 Mirror Lake Drive, North
St. Petersburg, Florida 33701

STATEMENT OF THE ISSUE

The issue in the case is whether a license renewal application filed by Dolphin Diagnostics, LLC (Petitioner), should be approved.

PRELIMINARY STATEMENT

On January 4, 2010, the Agency for Health Care Administration (Respondent) issued a Notice of Intent to Deny (Notice) a license renewal application filed by the Petitioner. As stated in the Notice, the basis for the denial was the alleged failure of the Petitioner to provide adequate proof of financial ability and the Respondent's related determination that the Petitioner was "financially unstable." Additionally, the Notice stated that the Petitioner failed to comply with documentation requirements related to adverse incident reporting and to identification of data entry personnel responsible for patient accounts and billing records.

The Petitioner requested an administrative hearing. On February 15, 2010, the Respondent forwarded the request to the Division of Administrative Hearings, which scheduled and conducted the hearing.

On April 7, 2010, the parties filed a Pre-hearing Stipulation, including a statement of agreed facts that have been adopted and incorporated herein as necessary.

At the hearing, the Petitioner presented the testimony of two witnesses and had Exhibits numbered 1 through 6 admitted into evidence. The Respondent presented the testimony of 13 witnesses and had Exhibits numbered 1 through 10 and 12 admitted into evidence.

The Transcript of the hearing was filed on May 11, 2010. Pursuant to the schedule adopted at the conclusion of the hearing, proposed recommended orders were due on June 30, 2010, and the Respondent filed a Proposed Recommended Order on that date. By letter filed on July 2, 2010, the Petitioner advised that it would not file a proposed order.

FINDINGS OF FACT

1. At all times material to this case, the Petitioner has been licensed by the State of Florida as a health care clinic.

2. The Petitioner provided diagnostic ultrasound services in the offices of various medical professionals with whom the Petitioner contracted, using the Petitioner's imaging equipment and technicians.

3. In August 2007, the Petitioner (identified at the time as "Dolphin Ultrasound, LLC") was acquired by Pauline Craig and Dean Hankinson from the previous owner, Sandi Shaffer.

4. Ms. Craig and Mr. Hankinson operated other corporate entities ("Dolphin DX," "Dolphin III Diagnostics, Inc.," and "Dolphin Diagnostic Holdings, Inc.,") that were essentially involved in the same business.

5. Ms. Craig and Mr. Hankinson also created Integrated Medical Testing and Rehab Consultants, Inc. ("Integrated"). which, as of January 2007, was responsible for day-to-day management for the Petitioner, at least through August 31, 2007.

6. Ms. Shaffer testified that, for approximately seven years prior to the sale, the Petitioner operated profitably.

7. Ms. Shaffer testified that the Petitioner's profitability began to decline during the period when Integrated managed the Petitioner.

8. Ms. Shaffer agreed to sell the Petitioner to Ms. Craig and Mr. Hankinson for \$360,000. At the time of the closing, various credits essentially reduced the balance owed to Ms. Shaffer to approximately \$260,000. Ms. Shaffer received a payment of \$10,000 and accepted promissory notes for the remaining balance.

9. In March 2008, an employee of the Respondent conducted a routine survey and determined that the Petitioner was financially unstable. The Petitioner submitted a plan of correction to address the financial instability, and the Respondent took no further action at that time.

10. Mr. Hankinson died in June 2009, and Ms. Craig became the sole owner. At the time of the hearing, the Petitioner was owned by Ms. Craig.

11. In December 2009, the same agency employee conducted another survey and again determined that the Petitioner was financially unstable because the 2008 plan of correction had not been implemented.

12. At the time of the hearing, there were unsatisfied legal judgments against the Petitioner and/or Ms. Craig, totaling into the tens of thousands of dollars. The judgments were the result of litigation initiated by former business associates and employees of the Petitioner for unpaid professional fees, wages, and rent.

13. At the hearing, Ms. Craig's testimony suggested that the legal disputes resulting in the unsatisfied judgments were the result of disgruntled associates and employees. Whatever the reason for the litigation, the evidence clearly establishes that the litigation was resolved in favor of the supposedly disgruntled litigants and against the Petitioner. There was no credible evidence that the Petitioner has the financial ability to meet the obligations imposed by the judgments.

14. In addition to the judgments, Ms. Shaffer has never received any of the funds owed pursuant to the promissory notes executed at the time she sold the Petitioner to Ms. Craig and Mr. Hankinson.

15. Ms. Craig suggested that her failure to meet her obligation under the promissory notes was related to the cancellation of the Petitioner's Medicaid number, but there was no evidence that the obligation related to the promissory notes had been legally discharged.

16. Upon the surveyor's request for prior year tax returns, the Petitioner provided returns for tax years 2007 and 2008 that were marked "draft," apparently because final returns had not been filed and were not available. It is reasonable to infer that any taxes due for the cited years were not paid, and it is so found.

17. Finally, the Petitioner's check for payment of the renewal application fee was rejected by the financial institution upon which it was drawn due to insufficient funds in the account.

18. The surveyor was unable to identify any active revenue source for the Petitioner. Ms. Craig admitted to the surveyor that the Petitioner had not provided or billed for services for the period from May 5, 2009, to December 17, 2009.

19. Although the Petitioner generated some revenue in February and March 2010, there was no credible evidence that the revenue would continue or be sufficient to meet operating expenses.

20. At the hearing, Ms. Craig attributed the Petitioner's financial difficulties to the litigation referenced herein and to the cancellation of a Medicaid provider number. The evidence established that the Petitioner's financial difficulties existed, and were apparent, prior to the sale, during the time

when the Petitioner held a valid Medicaid number, and Integrated was responsible for management of the Petitioner.

21. The Petitioner's accountant prepared and submitted financial projections to the Respondent to establish that the Petitioner was financially stable and could generate sufficient revenue to operate profitably. The projections are not supported by any credible data.

22. In preparing the projections, the accountant relied entirely on representations made by Ms. Craig as to future revenue sources.

23. At the hearing, Ms. Craig produced a number of contracts executed shortly before the hearing and asserted that such contracts would result in substantial future revenue to the company.

24. There was no credible evidence that any of the contracts produced by Ms. Craig, none of which guarantee minimum revenue and all of which were cancellable upon short notice, would provide any revenue to the Petitioner.

25. Another contract offered at the hearing as a source of potential revenue had been in existence for several years and had been cited as an anticipated revenue source in the 2008 plan of correction. There was no evidence that any substantial revenue had resulted from the contract.

26. No credible evidence was presented at the hearing that the Petitioner can achieve the revenue levels upon which the financial projections were based. Accordingly, the financial projections have been rejected.

27. In addition to the issue of financial stability, the 2009 survey determined that the Petitioner had no documentation establishing compliance with adverse incident reporting requirements. The Petitioner offered no credible evidence to refute the determination by the surveyor.

28. The survey also determined that the Petitioner had no documentation of compliance with identification requirements for persons with data entry responsibility for patient records and billing. The Petitioner offered no credible evidence to refute the determination by the surveyor.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2009).

30. The Petitioner has the burden of establishing by a preponderance of the evidence entitlement to the licensure sought. § 120.57(1)(j), Fla. Stat. (2009); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (1st DCA 1977). In this case, the Petitioner has failed to meet the burden of proof.

31. The basis for the denial of the application was the Petitioner's financial instability and the failure to comply with various documentation requirements.

32. Section 400.991, Florida Statutes (2009), provides, in relevant part, as follows:

(1)(a) The requirements of part II of chapter 408 apply to the provision of services that require licensure pursuant to this part and part II of chapter 408 and to entities licensed by or applying for such licensure from the agency pursuant to this part. A license issued by the agency is required in order to operate a clinic in this state. Each clinic location shall be licensed separately regardless of whether the clinic is operated under the same business name or management as another clinic.

(b) Each mobile clinic must obtain a separate health care clinic license and must provide to the agency, at least quarterly, its projected street location to enable the agency to locate and inspect such clinic. A portable equipment provider must obtain a health care clinic license for a single administrative office and is not required to submit quarterly projected street locations.

* * *

(4) In addition to the requirements of part II of chapter 408, the applicant must file with the application satisfactory proof that the clinic is in compliance with this part and applicable rules, including:

* * *

(c) Proof of financial ability to operate as required under s. 408.810(8). As an alternative to submitting proof of financial

ability to operate as required under s. 408.810(8), the applicant may file a surety bond of at least \$500,000 which guarantees that the clinic will act in full conformity with all legal requirements for operating a clinic, payable to the agency. The agency may adopt rules to specify related requirements for such surety bond. (Emphasis supplied)

33. Subsection 408.810(8), Florida Statutes (2009), provides, in relevant part, as follows:

408.810 Minimum licensure requirements.--In addition to the licensure requirements specified in this part, authorizing statutes, and applicable rules, each applicant and licensee must comply with the requirements of this section in order to obtain and maintain a license.

* * *

(8) Upon application for initial licensure or change of ownership licensure, the applicant shall furnish satisfactory proof of the applicant's financial ability to operate in accordance with the requirements of this part, authorizing statutes, and applicable rules. The agency shall establish standards for this purpose, including information concerning the applicant's controlling interests. The agency shall also establish documentation requirements, to be completed by each applicant, that show anticipated provider revenues and expenditures, the basis for financing the anticipated cash-flow requirements of the provider, and an applicant's access to contingency financing. A current certificate of authority, pursuant to chapter 651, may be provided as proof of financial ability to operate. The agency may require a licensee to provide proof of financial ability to operate at any time if there is evidence of financial instability,

including, but not limited to, unpaid expenses necessary for the basic operations of the provider. (Emphasis supplied)

34. Florida Administrative Code Rule 59A-33.004 provides, in relevant part, as follows:

59A-33.004 Renewal License Applications.

(1) At least 90 days prior to the expiration of the license, all licensed health care clinics must submit a complete renewal application on AHCA Form 3110-0013, Application for Health Care Clinic Licensure July 2006, in accordance with the Instructions for Completing the Application for Health Care Clinic Licensure in the same form and check the renewal box. This form is adopted by reference. All information required by the form and instructions must be submitted. All forms and these rules may be obtained by contacting the Agency in accordance with Rule 59A-33.007, F.A.C.

(2) Special Provisions. Submission of the renewal application must be in accordance with Rule 59A-33.002, F.A.C. Proof of financial ability to operate shall not be required for a renewal application unless the Agency determines that there is evidence of financial instability. If the Agency notifies the health care clinic in writing of such evidence of instability, the clinic will be required to demonstrate proof of financial ability to operate in order to meet the licensure requirements of the Act. (See Rule 59A-33.009, F.A.C., relating to financial instability).

(3) An unannounced onsite inspection and survey will be conducted by the Agency prior to license expiration. All requirements for licensure under these rules and the Act must be met during the survey. (Emphasis supplied)

35. Florida Administrative Code Rule 59A-33.009 provides, in relevant part, as follows:

59A-33.009 Financial Instability.

When evidence of financial instability of a health care clinic is substantiated, the Agency will notify the health care clinic in writing that satisfactory proof of financial ability to comply with Part X, Chapter 400, F.S., must be provided.

(1) Evidence of financial instability of a health care clinic shall, without limitation, include issuance of checks and drafts for which there are insufficient funds, delinquent bills for such items as personnel salaries, drugs, lease, mortgage, utilities or other operational costs, appointment of a receiver, a voluntary or involuntary petition for bankruptcy, a voluntary arrangement with creditors, health care clinic closure, discontinuance of health care clinic business for more than 60 consecutive days or insolvency.

(2) The licensee shall submit to the Agency a written plan of correction to resolve specific financial problems that the Agency has identified as evidence of financial instability. Should the financial instability not be resolved within 90 days of the original notice, the licensee shall be subject to disciplinary action, fine, suspension or revocation of the license.

36. As set forth herein, the evidence fails to establish that the Petitioner is financially stable. There was no credible evidence presented that the Petitioner has current or projected revenue sufficient to meet operating expenses, much

less to meet obligations related to the unpaid promissory notes and the unsatisfied judgments.

37. There was no credible evidence presented that the Petitioner can achieve the financial projections supplied by the Petitioner's accountant to the Respondent.

38. Section 400.9935, Florida Statutes (2009), provides, in relevant part, as follows:

400.9935 Clinic responsibilities.—

(1) Each clinic shall appoint a medical director or clinic director who shall agree in writing to accept legal responsibility for the following activities on behalf of the clinic. The medical director or the clinic director shall:

* * *

(f) Ensure compliance with the recordkeeping, office surgery, and adverse incident reporting requirements of chapter 456, the respective practice acts, and rules adopted under this part and part II of chapter 408.

39. Florida Administrative Code Rule 59A-33.012(5) provides, in relevant part, as follows:

59A-33.012 Survey Requirements and Process.

(5) To facilitate a licensure survey, the health care clinic shall have the following materials readily available for review at the time of the survey:

* * *

(g) Any policies, procedures, guidelines, checklists that demonstrate compliance with

adverse incident reporting requirements and injury disclosure.

(h) Personnel files.

* * *

(q) An all-inclusive and up to date listing of original signatures and initials of all persons entering information on billing and patient records, the printed name and medical designation, if any, such as PA, RN, MD, etc. The log shall be kept and concurrently maintained at the health care clinic. Information required by this rule shall be stored and maintained by the health care clinic for a period of 5 years.

* * *

(s) Documentation for the past two years or from the date of licensure, whichever is earlier, demonstrating in writing compliance, when, and what action was taken by the medical or clinic director to perform the functions, duties and clinic responsibilities under Sections 400.9935(1)(a)-(g), F.S. Such documentation shall be made available to authorized agency personnel upon request.

40. The surveyor determined that the Petitioner did not have written materials documenting compliance with adverse incident reporting requirements and other requirements related to identification of data entry personnel with patient record and billing responsibilities. Although the Petitioner asserted that the materials were present and available to the surveyor at the time of the survey, they were not provided to the surveyor, and the Petitioner offered no credible evidence at the hearing

to counter the surveyor's finding. The materials were not offered at the hearing. There was no credible evidence that the Petitioner complied with the requirements set forth in Florida Administrative Code Rule 59A-33.012(5).

41. At the hearing, the Petitioner asserted that the Respondent had failed to provide an opportunity for the Petitioner to correct the deficiencies cited in the survey conducted in December 2009. However, the primary determination in that survey was that the Petitioner was financially unstable, which was the primary determination in the previous survey conducted in March 2008. The Petitioner's plan of correction, submitted in response to the 2008 survey, failed, and the deficiency remained uncorrected 21 months later.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Agency for Health Care Administration enter a final order denying the license renewal application filed by the Petitioner.

DONE AND ENTERED this 9th day of August, 2010, in
Tallahassee, Leon County, Florida.

William F. Quattlebaum

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

Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of August, 2010.

COPIES FURNISHED:

Walter R. Carfora, Esquire
Walter R. Carfora, P.A.
111 Second Avenue, Northeast, Suite 917
St. Petersburg, Florida 33701

James H. Harris, Esquire
Agency for Health Care Administration
Sebring Building, Suite 330D
525 Mirror Lake Drive, North
St. Petersburg, Florida 33701

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

Justin Senior, General Counsel
Agency for Health Care Administration
Fort Knox Building, Suite 3431
2727 Mahan Drive, Mail Station 3
Tallahassee, Florida 32308

Thomas W. Arnold, Secretary
Agency for Health Care Administration
Fort Knox Building, Suite 3116
2727 Mahan Drive
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.