STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

SUNRISE COMMUNITY, INC.,

Petitioner,

v.

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

DOAH CASE NOS. 10-4204, 10-4210 - 10-4218
ENGAGEMENT NOS. DD04-009 - DD04-018
RENDITION NO.: AHCA-11-0887-FOF-MDA

FINAL ORDER

This cause was referred to the Division of Administrative Hearings where the assigned Administrative Law Judge (ALJ), Robert E. Meale, conducted a formal administrative hearing. At issue in these cases is whether, for the 2001-2002 cost reporting year, the costs at issue are allowable for purposes of calculating Petitioner's per diem rate. On April 25, 2011, the ALJ issued a Recommended Order in this matter (Exhibit 1). On June 1, 2011, the Agency remanded the matter back to the ALJ because he had misunderstood the nature of the matter and decided the matter using the wrong burden of proof. On June 2, 2011, the ALJ issued a Recommended Order Following Remand ("ROFR"), which is attached to this Final Order as Exhibit 2 and incorporated herein by reference, except where noted infra.

RULING ON EXCEPTIONS

Both Petitioner and Respondent filed exceptions to the Recommended Order and the ROFR. Both Petitioner and Respondent's exceptions to the ROFR also incorporated their exceptions to the Recommended Order. Thus, the Agency will rule upon both sets of the parties' exceptions in this Final Order.

Petitioner's Exceptions to the Recommended Order

In Exception No. 1 and Paragraph 13 of Petitioner's Exceptions to ROFR, Petitioner asks the Agency to include a provision in the Final Order that the parties' stipulation as to certain items is hereby incorporated by reference. First, the Petitioner's request is not a valid exception. Thus, the Agency need not rule on it. See §120.57(1)(k), Fla. Stat. Second, the Petitioner's request is redundant and unnecessary because the stipulation is already a part of the record of the case. Therefore, the Agency denies Exception No. 1 and Paragraph 13 of Petitioner's Exceptions to ROFR.

In Exception No. 2, Petitioner makes a statement regarding another stipulation. It is unclear from the paragraph what Petitioner is asking from the Agency. Therefore, since it is not a valid exception, the Agency need not rule on it. See §120.57(1)(k), Fla. Stat.

In Exception No. 3 and Paragraph 15 of Petitioner's Exceptions to the ROFR, Petitioner takes exception to the finding of fact in the last sentence of Paragraph 18 of the Recommended Order, arguing that the finding of fact was not based on competent, substantial evidence. Petitioner's exception is correct. A review of the entire record reveals no competent, substantial evidence (or reasonable inference there from) whereby the ALJ could have based his finding that "routine counseling or therapy could have achieved the same results at less cost than a burial service." That was not even an issue in the case. At hearing, the Agency stated that "we've never allowed burial costs in any nursing home, and the plan and the cost reimbursement principles and everything are very similar between [nursing homes and intermediate care facilities for the developmentally disabled ("ICF/DDs")]." Transcript, Volume IV at Page 507. This testimony was unrebutted by the Petitioner. Therefore, Petitioner's Exception No. 3 (and

by extension Paragraph 15 of Petitioner's Exceptions to ROFR) is granted to the extent that the Agency modifies Paragraph 18 of the ROFR to state:

> 18. Petitioner's staff determined that the burial would have therapeutic value to the surviving residents of the deceased's group home. The quality of life of the residents is enhanced to the extent that they identify with each other as family. Petitioner's staff determined that a burial service would help sustain these familial relationships by bringing to the survivors a sense of closure, rather than subjecting them to the jarring experience of an unmarked departure of their fellow resident from their lives. However, regardless of the reason why Petitioner paid for the burial, the costs of the burial are not allowed under the Medicaid State Plan because they are not reasonably related to patient care.

In Exception No. 4, Petitioner took exception to the second sentence of Paragraph 34 of the Recommended Order arguing that the ICF/DD rate plan specifically provides for compensation to providers for cash utilized as operating capital including the small amount of cash at Country Meadows. The findings of fact in Paragraph 34 of the Recommended Order were removed in the ROFR. Therefore, the Agency denies Exception No. 4 as being moot.

In Exception No. 5, Petitioner takes exception to Paragraph 37 of the Recommended Order, arguing that the ALJ's finding that "[t]he costs at issue arise from the expenditures of the State of Florida, not the provider" was directly contradictory to the competent, substantial record evidence presented at hearing. The findings of fact in Paragraph 37 of the Recommended Order were moved to Paragraph 35 of the ROFR and Exception No. 5 mirrors Paragraph 16 of Petitioner's Exceptions to ROFR. Thus, the Agency has addressed this issue in its ruling on Paragraph 16 of Petitioner's Exceptions to ROFR infra.

In Exception No. 6, Petitioner takes exception to the conclusion of law in Paragraph 74 of the Recommended Order, arguing that the statutory citation contained therein has no application to this proceeding. These conclusions of law, while slightly altered, appear in Paragraph 78 of

the ROFR. As explained in the reasoning set forth in the ruling on Respondent's Exception Nos. 9 through 15 to the ROFR infra, the Agency finds that it has substantive jurisdiction over the conclusions of law in Paragraph 78 of the ROFR and that it could substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency grants Petitioner's Exception No. 6 and rejects Paragraph 78 of the ROFR in its entirety.

In Exception No. 7, Petitioner takes exception to the conclusions of law in Paragraph 78 of the Recommended Order on the basis that the statute cited therein does not apply to the Petitioner. The conclusions of law in Paragraph 78 of the Recommended Order were moved to Paragraph 81 of the ROFR and have been addressed by the Agency in its ruling on Paragraph 17 of Petitioner's Exceptions to ROFR infra. Therefore, the Agency denies Exception No. 7 as moot.

In Exception No. 8, Petitioner takes exception to the conclusions of law in Paragraph 81 of the Recommended Order, based on its arguments in Exception No. 7. The conclusions of law in Paragraph 81 of the Recommended Order were moved to Paragraph 84 of the ROFR, to which Petitioner took exception in Paragraph 19 of its Exceptions to ROFR. Since the Agency addressed these arguments in its ruling on Paragraph 19 of Petitioner's Exceptions to ROFR infra, it denies Exception No. 8 as being moot.

In Exception No. 9, Petitioner takes exception to the conclusions of law in Paragraphs 99 and 100 of the Recommended Order based on the arguments set forth in its Exception Nos. 2 and 4. Since this issue was removed by the ALJ in the ROFR, the Agency denies Exception No. 9 as being moot.

In Exception No. 10, Petitioner took exception to Paragraph 101 of the Recommended Order, arguing that the ALJ mischaracterized the nature of the services the state was providing.

The conclusions of law in Paragraph 101 of the Recommended Order were moved to Paragraph 99 of the ROFR, and the Petitioner took exception to Paragraph 99 of the ROFR in Paragraph 20 of its Exceptions to ROFR, which has been ruled upon by the Agency infra. Therefore, the Agency denies Exception No. 10 as being moot.

Exception No. 11 is duplicitous of Paragraph 21 of Petitioner's Exceptions to ROFR and has been addressed by the Agency in the ruling on that exception.

In Exception No. 12, Petitioner takes exception to the proposed legal position of the ALJ that "the benefit of a prima facie case is the reward for a lawful audit" found in Paragraph 110 of the Recommended Order. That particular language was removed by the ALJ in the ROFR. Therefore, the Agency denies Exception No. 12 as being moot.

Petitioner's Exceptions Nos. 13 and 14 are no longer relevant after the ALJ issued the ROFR. Additionally, the arguments raised in Exception No. 14 are duplicative of those raised in Paragraph 23 of Petitioner's Exceptions to ROFR and have been addressed by the Agency in its ruling on Paragraph 23 of Petitioner's Exceptions to ROFR infra. Therefore, the Agency denies Exception Nos. 13 and 14 as being moot.

Petitioner's Exceptions to ROFR
and Objection to Sua Sponte Order of Remand

First, in regard to Petitioner's Objection to Order of Remand, the Objection is moot at this point since the Order has already been entered and the ALJ has responded to it by issuing a ROFR. Second, contrary to Petitioner's objection, the Order of Remand was not contrary to law. In the Order of Remand, the Agency cited directly to case law that allows for such an avenue. See Page 2 of the Agency's June 1, 2011 Order of Remand. The Agency shall reserve further discussion on this issue for its ruling on Respondent's Exception Nos. 9 through 15 to ROFR infra.

Paragraphs 13 and 15 of Petitioner's Exceptions to the ROFR mirror Exception Nos. 1 and 3 of its original exceptions, so they have been addressed in the ruling on Petitioner's Exception Nos. 1 and 3 supra.

In Paragraph 16 of Petitioner's Exceptions to the ROFR, Petitioner takes exception to Paragraph 35 of the ROFR, arguing that the finding was contrary to the record evidence. The findings of fact in Paragraph 35 of the ROFR are based on competent, substantial evidence. See Transcript, Volume I, Pages 107-109, 110 and 112-114. Thus, the Agency is not permitted to reject or modify them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz v. Dep't of Bus. Reg., 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Therefore, the Agency denies Petitioner's exception to Paragraph 35 of the ROFR.

In Paragraph 17 of Petitioner's Exceptions to the ROFR, Petitioner takes exception to the conclusions of law in Paragraph 81 of the ROFR, arguing that the cited statute has no applicability to this proceeding as well as the "payor of last resort" concept, and that the burial costs could not be disallowed for these reasons. The conclusions of law in Paragraph 81 of the ROFR are within the Agency's substantive jurisdiction because they involve the Agency's governance of the Medicaid program. Petitioner's argument misses the point of Paragraph 81. The ALJ concluded that the Agency should not have to pay the burial costs at issue because there were other methods by which those costs should have been covered. This is in agreement with the testimony that was presented on this issue. See, e.g., Transcript, Volume I, Pages 171-172; and Transcript, Volume IV, Pages 507-508. Thus, the Agency finds that, while it does have substantive jurisdiction over the conclusions of law in Paragraph 81 of the ROFR, it could not substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency denies Petitioner's exception to Paragraph 81 of the ROFR.

In Paragraph 18 of Petitioner's Exceptions to the ROFR, Petitioner takes exception to the ROFR in general, arguing that the statute regarding unclaimed bodies has no applicability to it. Paragraph 18 is not a valid exception because Petitioner failed to cite to which part of the ROFR it was taking exception to by page number or paragraph as required by § 120.57(1)(k), Fla. Stat. (2010). Therefore the Agency need not rule on it.

In Paragraph 19 of Petitioner's Exceptions to the ROFR, Petitioner takes exception to the conclusions of law in the last sentence of Paragraph 84 of the ROFR based upon its previous exceptions. Using the reasoning set forth in the ruling on Paragraphs 15 and 17 of Petitioner's Exceptions to ROFR supra, the Agency finds that, while it does have substantive jurisdiction over the conclusions of law in the last sentence of Paragraph 84 of the ROFR, it could not substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency's denies Petitioner's exception to Paragraph 84 of the ROFR.

In Paragraph 20 of Petitioner's Exceptions to ROFR, the Petitioner takes exception to Paragraph 99 of the Recommended Order, arguing that the ALJ incorrectly labeled the purpose of the costs discussed in that paragraph. Paragraph 99 of the Recommended Order appears to be findings of fact. Those findings of fact are not based on competent, substantial evidence. As indicated by the testimony of Stanley Swindling, Jr. in Transcript, Volume I, Pages 112-114 and Petitioner's Exhibit 1, the state overhead costs were for oversight and administration of the facilities, not therapy. Therefore, Petitioner's exception to Paragraph 99 of the ROFR is granted and Paragraph 99 of the Recommended Order is changed to state:

> 99. This is an expense involving the oversight and administration of the facilities that, if incurred by Petitioner, is clearly an allowable cost. The problem here is that the expense was incurred by the State of Florida, not Petitioner. State-employees providing oversight and administration of some of Petitioner's facilities did so at no charge, direct or indirect, to Petitioner.

In Paragraph 21 of Petitioner's Exceptions to ROFR, Petitioner takes exception "to findings/conclusions of the ALJ that the cluster facility costs of the State of Florida which was the provider of Record at each of these clusters during the cost reporting period at issue are not to be reported on the cost report or are not allowable costs" as being directly contrary to statutes, regulations and case law. The Agency does not need to rule on Petitioner's exception because it does not cite to the portion of the ROFR Petitioner is taking exception to by page number or paragraph. See § 120.57(1)(k), Fla. Stat. (2010).

Alternatively, to the extent that Petitioner's exception could be construed as an exception to the findings of fact in Paragraphs 33 through 35 of the ROFR and the conclusions of law in Paragraphs 99 through 104 of the ROFR, the Agency would first state that the findings of fact in Paragraphs 33 through 35 of the ROFR are based on competent, substantial evidence. See, e.g., Transcript, Volume I, Pages 107-109, 110 and 112-114. Thus, the Agency is not permitted to reject or modify them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz v. Dep't of Bus. Reg., 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). Second, Agency finds that, while it does have substantive jurisdiction over the conclusions of law in Paragraphs 99 through 104 of the ROFR, it could not substitute conclusions of law that are as or more reasonable than those of the ALJ, with the exception of Paragraph 99 of the ROFR as stated in the Agency's ruling on Paragraph 20 of Petitioner's Exceptions to the ROFR supra. The key distinction between this case and the case of Ann Stork Ctr., Inc. v. Dep't of Health & Rehab. Srvs, DOAH Case No. 92-5479 (AHCA 1993) is that the Ann Stork case dealt with the depreciation of capital assets such as buildings and land, whereas this case deals with the salaries of state employees who worked at Petitioner's facilities. These salaries were paid by the State of Florida. Thus, it would be illogical to let Petitioner claim these salaries as expenses on its cost reports. The ALJ accurately observed this

distinction as well, and was correct in disallowing them from Petitioner's cost reports. Therefore, the Agency denies Paragraph 21 of Petitioner's Exceptions to the ROFR.

In Paragraph 22 of Petitioner's Exceptions to ROFR, Petitioner takes exception to the ALJ's Recommendation on Pages 52 and 53 of the ROFR as it relates to the burial costs and state costs. Using the same reasoning set forth in the ruling on Paragraphs 16, 17 and 21 of Petitioner's Exceptions to ROFR supra, the Agency denies Petitioner's exception to the ALJ's Recommendation.

In Paragraph 23 of Petitioner's Exceptions to ROFR, Petitioner takes exception to the ALJ making findings against Petitioner on the issues of whether burial costs and state costs are allowable expenses. The Agency need not rule on this exception because Petitioner failed to cite to the portion of the ROFR to which it was taking exception by page number or paragraph. See § 120.57(1)(k), Fla. Stat. (2010).

Respondent's Exceptions to Recommended Order

In Exception No. 1, Respondent takes exception to the finding of fact in Paragraph 16 of the Recommended Order, which is also in Paragraph 16 of the ROFR, arguing that the finding of fact was in directly conflict with the only record evidence on the issue. The finding of fact in Paragraph 16 of the ROFR is not completely accurate. The competent, substantial record evidence does not support the ALJ's finding that "the family contacted Petitioner and informed it that they desired a burial, not a cremation, but could not afford to pay for any services." Instead, Marcella Henry's testimony reflects that Petitioner never asked the resident's family if they could pay for a funeral. See Transcript, Volume III at Page 308. Therefore, Exception No. 1 is granted to the extent that the Agency modifies Paragraph 16 of the ROFR to state:

> 16. After the death of an indigent resident at Petitioner's Ambrose Center, the family contacted Petitioner and informed it that they

> desired a burial, not a cremation. Petitioner did not ask the family if they could afford to pay for any services.

In Exception No. 2, Respondent takes exception to the findings of fact in Paragraph 20 of the Recommended Order, which also appear in Paragraph 20 of the ROFR, arguing that they are mixed findings of fact and conclusions of law that are contrary to Medicaid policy. Paragraph 20 only contains findings of fact that are based on competent, substantial evidence. See Transcript, Volume I, Pages 88-89. Thus, the Agency cannot reject or modify them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, the Agency denies Exception No. 2.

In Exception No. 3 (and Exception No. 2 to the ROFR), Respondent takes exception to the findings of fact in Paragraph 21 of the Recommended Order, which also appear in Paragraph 21 of the ROFR, using the same argument it made in Exception No. 2. However, unlike Paragraph 20 of the ROFR, Paragraph 21 of the ROFR concerns matters of policy over which the Agency has special insight in the form of conclusions of law regarding the issue of whether the out-of period costs should be allowed under the materiality test. The materiality test should not be applied to determine whether the costs are allowable. As explained in the ruling on Respondent's Exception No. 12 infra, CMS Pub. 15-1, § 2302.1 governs the issue. Thus, the Agency finds that it has substantive jurisdiction over the conclusions of law in Paragraph 21 of the Recommended Order because it is the single state agency responsible for the administration and oversight of Florida's Medicaid program, and that it could substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency grants Exception No. 3 (and by extension Exception No. 2 to the ROFR) and rejects Paragraph 21 of ROFR in its entirety.

In Exception No. 4, Respondent takes exception to the findings of fact in Paragraphs 31 and 32 of the Recommended Order, which also appear in Paragraphs 31 and 32 of the ROFR,

arguing that they are a mixture of conclusions of law and unripe causes of action and are contrary to the record evidence. The findings of fact in Paragraphs 31 and 32 of the Recommended Order address the issue of the employee cash awards paid by Respondent to its employees with at least 20 years of service. Respondent argues that the cash awards are "gifts" under CMS Pub. 15-1, which are disallowed, and states that the record supports this argument. However, contrary to Respondent's argument, the record evidence does not support its argument. Instead, the ALJ's findings correctly reflect the record evidence on this issue. See Transcript, Volume II, Pages 133-134; Transcript, Volume III, Pages 310-315; and Transcript, Volume IV, Pages 483-484. Thus, the Agency is prohibited from rejecting or modifying them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, the Agency denies Exception No. 4.

In Exception No. 5, Respondent takes exception to the ALJ's finding in Paragraph 41 of the Recommended Order that the Agency included Petitioner's unallowable expenses as overpayments in an examination report. Since the ALJ corrected this mistake in Paragraph 39 of the ROFR, Exception No. 5 is now moot and thus does not need to be addressed by the Agency.

In Exception Nos. 6 through 9, Respondent takes exception to the ALJ's conclusions of law in Paragraphs 71, 72, 74 and 75 of the Recommended Order. Since the ALJ altered these conclusions of law in his ROFR, these exceptions have been rendered moot and do not have to be addressed by the Agency.

In Exception No. 10 (and Exception No. 16 to the ROFR), Respondent takes exception to the conclusions of law in Paragraph 85 of the Recommended Order, which appears in Paragraph 88 of the ROFR, arguing that the ALJ's statement that "none of these cost items is not large enough to affect in any meaningful way the determination of Petitioner's per diem rate for the subject cost-reporting year or an adjoining cost-reporting year" is not based on any competent,

substantial evidence. Indeed, there is no record evidence whatsoever concerning the impact of any of the cost adjustments on Petitioner's per diem rate. Such impact cannot be determined until this matter has been resolved and the Agency has calculated the Petitioner's per diem rate. While the ALJ may personally feel that these adjustments will not have a meaningful affect on the Petitioner's per diem rates, his personal feelings have no place in a recommended order. Thus, the Agency finds that the statement at issue in Paragraph 88 of the ROFR is a finding of fact, not a conclusion of law, and is not based on competent, substantial evidence. Therefore, the Agency grants Exception No. 10 (and by extension Exception No. 16 to the ROFR) and modifies Paragraph 88 of the ROFR to state:

> 88. All but one of the cost items at issue here raise the question of the integrity of the cost-reporting year for an accrual-basis provider.

In Exception No. 11, Respondent takes exception to the conclusion of law in Paragraph 88 of the Recommended Order, which also appears in Paragraph 91 of the ROFR, as it relates to materiality. Using the reasoning set forth in the ruling on Respondent's Exception No. 3 supra, the Agency finds that it has substantive jurisdiction over the conclusions of law in Paragraph 91 of the ROFR and that it could substitute a conclusion of law as or more reasonable than that of the ALJ. Therefore, Respondent's Exception No. 11 is granted and the Agency modifies Paragraph 91 of the ROFR to state:

> 91. The message here is that an accrual-basis provider must make a reasonable effort to accrue accurate estimates of the cost in the cost-reporting year in which it was incurred, even if this cost cannot be identified with precision.

In Exception No. 12 (and Exception No. 18 to the ROFR), Respondent takes exception to the conclusions of law in Paragraph 89 of the Recommended Order, which also appear in Paragraph 92 of the ROFR, arguing that they are contrary to the ALJ's own findings of fact and

are contrary to CMS policy. Respondent's argument centers on the Agency's interpretation of CMS Pub. 15-1, § 2302.1, which states that "expenditures for expense and asset items are recorded in the period in which they are incurred, regardless of when they are paid." See Respondent's Exhibit 12g. The ALJ's quotation of CMS Pub. 15-1, § 804 in Paragraph 87 of the Recommended Order, which also appears in Paragraph 90 of the ROFR, is from a section of CMS Pub. 15-1 entitled Purchase Discounts; Allowances; Refunds of Expenses. In comparing the definitions of these items, the rental care expenses do not fall under any of the categories referenced in Chapter 8 of CMS Pub. 15-1; thus, CMS Pub. 15-1, § 804 has no applicability to this issue. In contrast, § 2302.1 is a general principle that applies to cost reporting and would apply to the rental car expenses. Petitioner did not comply with § 2302.1 because it did not report the rental car expenses in the year in which they were incurred. Whether material or not, these expenses should be disallowed because they were not correctly reported. The Agency finds that it has substantive jurisdiction over the conclusions of law in Paragraph 92 of the ROFR because it is the single state agency charged with administering Florida's Medicaid program, and that it could substitute conclusions of law as or more reasonable than those of the ALJ. Therefore, Petitioner's Exception No. 12 is granted (and by extension Respondent's Exception No. 18 to the ROFR) and Paragraph 92 of the ROFR is modified to state:

> 92. The $1,038 of rental-car fees is an out-of-period expenditure and should have been included on Petitioner's cost report for the 2001-02 cost-reporting year in order to be reimbursable pursuant to CMS Pub. 15-1, § 2302.1.

In Exception No. 13 (and Exception No. 19 to the ROFR), Respondent takes exception to the conclusions of law in Paragraph 90 of the Recommended Order, which also appear in Paragraph 93 of the ROFR, using the reasoning set forth in Exception No. 12. Using the same reasoning set forth in the ruling on Exception 12 supra, the Agency grants Exception No. 13 (and

by extension Respondent's Exception No. 19 to the ROFR) and modifies Paragraph 93 of the ROFR to state:

> 93. The $1,500 of computer consulting fees is an out of period expenditure. Since Petitioner did not properly report it on its cost report for the 2001-02 cost-reporting year it is disallowed pursuant to CMS Pub. 15-1, § 2302.1.

In Exception No. 14 (and Exception No. 20 to the ROFR), Respondent takes exception to the conclusions of law in Paragraph 91 of the Recommended Order, which also appear in Paragraph 94 of the ROFR, using the same arguments it put forth in Exception No. 12. However, unlike the rental car expenses and computer consulting fees, there is a question as to when the legal fees were incurred due to fact that the law firm first sent the bill to Petitioner's insurance company for payment, and then to Petitioner after the insurance company determined that Petitioner was responsible for paying the bill. See Transcript, Volume I, Pages 90-92. While the services were rendered before June 30, 2001, the bill was not sent to the insurance company until after July 1, 2001 and did not reach the Petitioner until a month or so later. Thus, the legal fees were technically incurred by the Petitioner after July 1, 2001 when the insurance company denied payment for them and forwarded the bill to the Petitioner, and Petitioner correctly reported the expense on its 2001-02 cost report. The Agency finds that, while it does have substantive jurisdiction over the conclusions of law in Paragraph 91 of the Recommended Order and Paragraph 94 of the ROFR, it could not substitute conclusions of law that are as or more reasonable than those of the ALJ. The Agency therefore denies Exception No. 14 (and by extension Respondent's Exception No. 20 to the ROFR).

In Exception No. 15, Respondent takes exception to the conclusion of law in Paragraph 92 of the Recommended Order. As this conclusion of law was altered in the ROFR,

Respondent's Exception No. 15 has been rendered moot and does not need to be addressed by the Agency.

In Exception No. 16 (and Exception No. 22 to the ROFR), Respondent takes exception to the conclusions of law in Paragraph 93 of the Recommended Order, which also appears in Paragraph 96 of the ROFR, arguing that the Agency's decision was not non-rule policy as concluded by the ALJ but instead was its interpretation of CMS Pub. 15-1, § 2102.1. However, the record evidence favors the ALJ's conclusion that the Agency's denial of the employee awards was based on non-rule policy. See Transcript, Volume III, Pages 311-315. Pursuant to § 120.57(1)(e)3., Fla. Stat., the Agency cannot reject the ALJ's conclusion of law on this issue unless it "first determines from a review of the complete record, and states with particularity in the order, that such determination is clearly erroneous or does not comply with essential requirements of law." The Agency cannot make such a determination in good faith on this particular issue, especially considering the testimony of its own witness cited above. Therefore, the Agency denies Exception No. 16 (and by extension Respondent's Exception No. 22 to the ROFR).

In Exception No. 17 (and Exception No. 23 to the ROFR), Respondent takes exception to the conclusions of law in Paragraph 94 of the Recommended Order, which also appear in Paragraph 97 of the ROFR, using the arguments set forth in Exception No. 16. Using the same reasoning in the ruling on Exception No. 16 supra, the Agency denies Exception No. 17 (and by extension Respondent's Exception No. 23 to the ROFR).

In Exception No. 18, Respondent takes exception to the conclusions of law in Paragraph 95 of the Recommended Order. However, the conclusions of law in Paragraph 95 of the Recommended Order were altered in the ROFR. Therefore, the Agency will address the

arguments put forth in Exception No. 18 in its ruling on Respondent's Exception No. 24 to the ROFR infra.

In Exception No. 19, Respondent takes exception to the conclusions of law in Paragraph 109 of the Recommended Order. However, these conclusions of law do not appear in the ROFR. Therefore, Exception No. 19 is denied as moot.

In Exception No. 20, Respondent takes exception to the conclusions of law in Paragraph 110 of the Recommended Order. Since these conclusions of law were altered in Paragraph 107 of the ROFR, the Agency will address this issue in its ruling on Respondent's Exception No. 25 to the ROFR.

In Exception No. 21, Respondent takes exception to the conclusions of law in Paragraph 111 of the Recommended Order. As these conclusions of law were altered in Paragraph 108 of the ROFR, to which Respondent takes exception in Exception No. 26 of its exception to the ROFR, the Agency does not need to rule on Exception No. 21.

In Exception No. 22, Respondent takes exception to the conclusions of law in Paragraph 112 of the Recommended Order. However, these conclusions of law do not appear in the ROFR. Therefore, Exception No. 22 is now moot.

In Exception No. 23, Respondent takes exception to the conclusion of law in Paragraph 113 of the Recommended Order. As these conclusions of law were alter in Paragraph 109 of the ROFR, to which Respondent takes exception in Exception No. 27 of its exceptions to the ROFR, the Agency does not need to rule on Exception No. 23.

Respondent's Exceptions to ROFR

In Exception No. 1, Respondent takes exception findings of fact in Paragraph 20 of the ROFR. Using the reasoning set forth in the ruling on Respondent's Exception No. 2 to the Recommended Order supra, the Agency denies Exception No. 1.

In Exception No. 2, Respondent takes exception to the findings of fact in Paragraph 21 of the ROFR using the same arguments in Exception No. 1. The Agency has addressed this exception in its ruling on Respondent's Exception No. 3 to the Recommended Order supra.

In Exception No. 3, Respondent takes exception to the findings of fact in Paragraph 26 of the ROFR, arguing that they are conclusions of law. Just because Paragraph 26 of the ROFR is housed under the section "Findings of Fact" does not mean that it solely contains findings of fact. Paragraph 26 of the ROFR does not contain findings that involve "simply the weight or credibility of testimony by witnesses," or [are] determinable "by ordinary methods of proof," or are in a factual realm concerning which "the agency may not rightfully claim special insight." McDonald v. Dept. of Banking and Finance, 346 So.2d 569, 579 (Fla. 1st DCA 1977). Instead, they are "matters of opinion and opinions are increasingly infused by policy considerations for which the agency has special responsibility." Sch. Bd. of Leon County v. Hargis, 400 So.2d 103 (Fla. 1st DCA 1981). Thus, they are indeed conclusions of law within the Agency's substantive jurisdiction since they involve the Agency's determination of which costs are allowable on a cost report. The Agency finds that it has substantive jurisdiction over the conclusions of law in Paragraph 26 of the ROFR, and that it could substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency grants Exception No. 3 and modifies Paragraph 26 of the ROFR to state:

> 26. The car rental and computer expenses were out-of-period expenses, and Petitioner should have estimated these liabilities and

included them in the preceding cost-reporting year, as required by CMS Pub. 15-1, § 2302.1.

In Exception No. 4, Respondent takes exception to the findings of fact in Paragraphs 31 and 32 of the ROFR, arguing that they are a combination of conclusions of law and unripe causes of action. The Agency has already addressed these arguments in its ruling on Respondent's Exception No. 4 to the Recommended Order supra, and therefore incorporates its ruling on that exception as grounds for denying Exception No. 4.

In Exception No. 5, Respondent takes exception to the findings of fact in Paragraph 38 of the ROFR, arguing that the Agency had another option available to it that was not referenced by the ALJ. The findings of fact in Paragraph 38 of the Recommended Order were based on competent, substantial evidence. See Transcript, Volume II, Pages 254-255; and Transcript, Volume III, Pages 277-278. Thus, the Agency is not at liberty to reject or modify them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, the Agency must deny Exception No. 5.

In Exception No. 6, Respondent takes exception to the findings of fact in Paragraph 43 of the ROFR, arguing that the ALJ missed the mark by implying that the burden was on the Agency to secure the necessary information for the audit. However, Respondent's argument is not accurate. The findings of fact in Paragraph 43 of the ROFR deal with the flaws in the Agency's audit of Petitioner's cost reports and do not have anything to do with the allocation of the burden of proof. Furthermore, the findings of fact were supported by competent, substantial evidence. See Transcript, Volume III, Pages 275-285 and 338-346. Thus, the Agency cannot reject or modify them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, the Agency denies Exception No. 6.

In Exception No. 7, Respondent takes exception to the findings of fact in Paragraph 48 of the ROFR, arguing that there is no evidence to support the ALJ's finding that "these findings

alone do not establish that the use of the aircraft was unreasonable when compared to common carriers." The "findings" the ALJ refers to are the findings of fact in Paragraphs 36 through 47 of the ROFR, which were based on competent, substantial evidence. See, e.g., Transcript, Volume III, Pages 275-285 and 338-346; and Transcript, Volume IV, Pages 437-462 and 535-538. The finding Respondent contests in Paragraph 48 of the ROFR is the result of the ALJ's weighing of the competent, substantial evidence presented in this case. 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). Therefore, the Agency must deny Exception No. 7.

In Exception No. 8, Respondent takes exception to the conclusions of law in Paragraphs 60 and 61 of the ROFR, arguing that the substance of the case law and article quoted within these paragraphs deals with a different type of audit than the one at issue in this matter. As noted by the ALJ, § II. A. 3. of the Plan requires audits such as the one at issue in this matter to meet the requirements of generally accepted auditing standards ("GAAS"). Paragraphs 61 and 62 are nothing more than background information on GAAS and are in no way binding on the Agency. Therefore, the Agency denies Exception No. 8.

In Exception Nos. 9 through 15, the Respondent takes exception to the ALJ's conclusions of law in Paragraphs 68 through 73 and 78 through 79 of the Recommended Order, which concern the burden of proof in this matter. In the Recommended Order, the ALJ incorrectly laid out the burden of proof, obviously confusing this matter with a Medicaid overpayment case in which the Agency has the burden of proof until it meets its prima facie case, at which point the burden of proof shifts to the provider to rebut the Agency's case. Upon seeing this error, the Agency, after careful deliberation, decided that the best course of action would be to give the ALJ an opportunity to correct the error by remanding the case back to DOAH because placing the burden of proof on the wrong party is considered a departure from the essential requirements of law. See Southeast Grove Mgmt., Inc. v. McKiness, 578 So.2d 883 (Fla. 1st DCA 1991). It issued an Order of Remand that carefully and courteously explained why the ALJ was incorrect in assigning the burden of proof to the Respondent and included three prior DOAH cases that stated the correct burden of proof. However, the ALJ has chosen to remain steadfast in his belief that the Agency bears the burden of proof in this matter. The Agency respectfully disagrees with the ALJ's reasoning as being incorrect based on a long line of similar Medicaid cost report cases, including the three the Agency attached to its Order of Remand. Because the ALJ and the Agency have apparently reached an impasse, the Agency believes that it must have the final say on this issue despite the ALJ's belief that it is outside of the Agency's substantive jurisdiction (See Paragraph 75 of the ROFR) since it would cause confusion if the Agency allowed these conclusions of law to go untouched.

The burden of proof in cases involving Agency audits of Medicaid cost reports is on the provider whose cost report is the subject of the audit. Even the Petitioner agreed with this fact. See Petitioners' Findings of Fact and Conclusions of Law at Page 28 ("Petitioner Sunrise has the

burden of establishing that the audit adjustments are improper."). Petitioner's statement was based on the case of Golfcrest Nursing Home v. State of Florida, Agency for Health Care Administration, 662 So.2d 1220 (Fla. 1st DCA 1995), and was also correctly laid out in the final orders the Agency attached to its Order of Remand, which concern matters similar to this one. See Avante at Jacksonville and Avante at St. Cloud v. AHCA, DOAH Case Nos. 07-3626, 07-5155 and 08-0220 (AHCA 2008) ("The general rule is that "the burden of proof, apart from statute, is on the party asserting the affirmative of an issue before an administrative tribunal."); Madison Pointe Rehabilitation and Health Center et. al v. AHCA, DOAH Case Nos. 08-1691 et.al (AHCA 2009) ("The burden of proof in this case is on Petitioners, as they are the parties asserting the affirmative of the issue."); and Apollo Health and Rehabilitation Center v. AHCA, DOAH Case No. 09-5214 (AHCA 2010) ("The Petitioner has the burden of establishing entitlement to the relief sought by a preponderance of the evidence."). Unlike an enforcement or disciplinary action, where the loss of property by way of a fine could occur (See Department of Banking and Finance v. Osborne Stern and Company, 670 So.2d 932, 935 (Fla. 1996)), there is no such threat in this type of case because Petitioner's participation in the Medicaid program is completely voluntary. See Diaz v. State, Agency for Health Care Administration, ---So.3d---, 2011 WL 2507287 (Fla. 3d DCA 2011). Instead, the Agency's action is used to determine the correct per diem rate Petitioner should be reimbursed for providing services to Medicaid recipients pursuant to its voluntary contract with the Agency. Thus, the burden of proof should be placed on the Petitioner because it is trying to show that the costs at issue should be allowed in order to calculate its per diem rate.

For the reasons set forth above, the Agency finds that the ALJ has departed from the essential requirements of law by continuing to erroneously assign the burden of proof to the

Respondent even after being notified of his error by the Agency in its Order of Remand. While this issue by itself has no effect on the outcome of this matter, the Agency believes it must still be corrected in order to prevent the error from being perpetuated in the future. Therefore, the Agency grants Respondent's Exceptions Nos. 9 through 15 and modifies Paragraph 68 of the ROFR to state:

> 68. The Petitioner has the burden of establishing entitlement to the relief sought by a preponderance of the evidence. Florida Department of Transportation v. J. W. C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981).

Furthermore, the Agency rejects the ALJ's conclusions of law in Paragraphs 69 through 73 and 75 of the ROFR in their entirety.

In Exception No. 16, the Respondent takes exception to the conclusions of law in Paragraph 88 of the ROFR, arguing that there is no evidence to support the ALJ's conclusion that "none of these cost items is not [sic] large enough to affect in any meaningful way the determination of any of Petitioner's per diem rates for the subject cost-reporting year or an adjoining cost-reporting year." The Agency has addressed this argument in its ruling on Respondent's Exception No. 10 to the Recommended Order supra.

In Exception No. 17, the Respondent takes exception to the conclusions of law in Paragraph 88 of the ROFR as they relate to materiality. The Agency has addressed this argument in its ruling on Respondent's Exception No. 10 to the Recommended Order supra.

In Exception No. 18, Respondent takes exception to the conclusions of law in Paragraph 92 of the ROFR based on the reasoning set forth in its Exception No. 12 to the Recommended Order. The Agency has addressed this argument in its ruling on Respondent's Exception No. 12 supra.

In Exception No. 19, Respondent takes exception to the conclusions of law in Paragraph 93 of the ROFR based on the reasoning set forth in its Exception No. 13 to the Recommended Order. The Agency has addressed this argument in its ruling on Respondent's Exception No. 13 supra.

In Exception No. 20, Respondent takes exception to the conclusions of law in Paragraph 94 of the ROFR based on the reasoning set forth in its Exception No. 14 to the Recommended Order. The Agency has addressed this argument in its ruling on Respondent's Exception No. 14 supra.

In Exception No. 21, Respondent takes exception to the conclusion of law in Paragraph 95 of the ROFR based on the arguments set forth in Exception Nos. 18 through 20. Based upon the rulings on Exception Nos. 18 through 20 (found in the rulings on Respondent's Exception Nos. 12 through 14 to the Recommended Order supra), the Agency finds that it has substantive jurisdiction over the conclusion of law in Paragraph 95 of the ROFR and that it could substitute a conclusion of law that is as or more reasonable than that of the ALJ. Therefore, the Agency grants Exception No. 21 and modifies Paragraph 95 of the ROFR to state:

> 95. The rental car fees and computer consulting fees are out-of-period costs that were not allowable costs on Petitioner's cost report for the 2001-2002 cost reporting period. The legal fees are not an out-of-period cost and were therefore correctly included on Petitioner's cost report for the 2001-2002 cost reporting period.

In Exception No. 22, Respondent takes exception to the conclusions of law in Paragraph 96 of the ROFR as they relate to the statement of non-rule policy. The Agency has addressed this exception in its ruling on Respondent's Exception No. 16 supra.

In Exception No. 23, Respondent takes exception to the conclusions of law in Paragraph 97 of the ROFR based on the reasoning set forth in Exception No. 22. The Agency has addressed this exception in its ruling on Respondent's Exception No. 17 supra.

In Exception No. 24, Respondent takes exception to the conclusions of law in Paragraph 98 of the ROFR, arguing that there is no evidence that the cash rewards were part of the employees' fair compensation reportable to the IRS and that the Agency has provided that cash prizes or gifts are not covered by the provider handbook or Medicaid policies. However, the conclusions of law in Paragraph 98 of the ROFR are based on the ALJ's weighing of competent, substantial evidence. See, e.g., Transcript, Volume II, Page 134. The Agency is not permitted to re-weigh the evidence in order to make conclusions that differ from those of the ALJ. See § 120.57(1)(*l*), Fla. Stat.; Heifetz. Therefore, the Agency must deny Exception No. 24.

In Exception No. 25, Respondent takes exception to the conclusions of law in Paragraph 107 of the ROFR, arguing that the conclusions of law in this paragraph are fatally flawed because the ALJ incorrectly placed the burden of proof on the Respondent. Using the same reasoning set forth in the ruling on Respondent's Exceptions 9 through 15 to the ROFR supra, the Agency grants Exception No. 25 to the extent that it modifies the conclusions of law in Paragraph 107 of the ROFR to state:

> 107. Petitioner proved that there were serious inadequacies in the Respondent's preparation of its cost report audit. GAAS requires the auditor "to obtain sufficient appropriate audit evidence . . . to afford a reasonable basis for an opinion . . .." If the "informative disclosures are not reasonably adequate," GAAS requires the auditor to disclose this fact.

See also the ruling on Respondent's Exception No. 8 to the ROFR supra.

In Exception No. 26, Respondent takes exception to the conclusions of law in Paragraph 108 of the ROFR, arguing that, while the ALJ correctly identifies some options the Agency may

deploy, he misses the mark on one important option, which is to disallow any costs not supported. The Agency finds that, while it does have substantive jurisdiction over the conclusions of law in Paragraph 108 of the ROFR, it could not substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency denies Exception No. 26.

In Exception No. 27, Respondent takes exception to the conclusion of law in Paragraph 109 of the ROFR, arguing that the ALJ cannot allow costs of which there is no evidence and which the ALJ has already confirmed insufficient evidence to make such a finding. Using the reasoning set forth in the ruling on Respondent's exceptions 9 through 15 to the ROFR, the Agency grants Exception No. 27 to the extent that the Agency modifies Paragraph 109 of the ROFR to state:

> 109. The transportation expenses and the aircraft expenses are therefore allowable costs.

FINDINGS OF FACT

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

CONCLUSIONS OF LAW

The Agency adopts the conclusions of law set forth in the ROFR, except where noted supra.

ORDER

Based upon the foregoing, the Agency shall calculate the Petitioner's per diem rates based upon the Agency's adjustments (or lack thereof) it made to Petitioner's 2001-2002 cost reports as well as the stipulations made by the parties during the course of this matter with the following exceptions: the rental car fees and computer expenses are hereby disallowed; the legal fees are hereby allowed; the state operating costs are hereby disallowed; the burial expenses are

hereby disallowed; the employee cash awards are hereby allowed; and the transportation and airplane costs are hereby allowed. The parties shall govern themselves accordingly.

DONE and ORDERED this 24 day of August, 2011, in Tallahassee, Florida.

ELIZABETH DUDEK, 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 25th day of August, 2011.

RICHARD J. SHOOP, Agency Clerk
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