STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Petitioner,

v.

BETH SHALOM CORP. d/b/a BETH SHALOM HOME CARE,

Respondent.
_____/

DOAH CASE NO. 11-2734
AHCA NO. 2011004055
RENDITION NO.: AHCA-12- 0191 -FOF-OLC

FINAL ORDER

This cause was referred to the Division of Administrative Hearings where the assigned Administrative Law Judge (ALJ), John D.C. Newton II, conducted a formal administrative hearing. At issue in this case is whether Respondent committed the violations alleged in Counts I through III[1] of the Administrative Complaint, and, if so, what sanctions should be imposed. The Recommended Order dated December 20, 2011[2], is attached to this Final Order and incorporated herein by reference.

RULING ON EXCEPTIONS

The Petitioner filed exceptions to the Recommended Order.

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

[1] Count III of the Administrative Complaint was dismissed by the Petitioner prior to the final hearing.

[2] The Recommended Order itself is dated November 20, 2011, but that is an obvious typographical error since both the Division of Administrative Hearings' website and the ALJ's cover letter indicate it was entered on December 20, 2011.

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

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

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

desired ultimate conclusion. See Prysi v. Dep't of Health, 823 So.2d 823, 825 (Fla. 1st DCA 2002); Strickland, 799 So.2d at 279; Schrimsher v. Sch. Bd. Of Palm Beach County, 694 So.2d 856, 860 (Fla. 4th DCA 1997); Heifetz, 475 So.2d at 1281; Wash & Dry Vending Co. v. Dep't of Bus. Reg., 429 So. 2d 790, 792 (Fla. 3d DCA 1983); D'Antoni v. Dept. of Envtl. Prot., 22 F.A.L.R. 2879, 2880 (DEP, May 4, 2000); Brown v. Criminal Justice Standards & Training Comm'n., 667 So.2d 977, 979 (Fla. 4th DCA 1996). Simply put, the Agency may not reject recommended findings of fact when the question turns on the weight or credibility of testimony by witnesses, when the factual issues are otherwise susceptible of ordinary methods of proof, or when the Agency may not claim special insight as to those facts, if the finding is otherwise supported by competent, substantial evidence. See McDonald v. Dep't of Banking & Fin., 346 So.2d 569, 579 (Fla. 1st DCA 1977); Gross, 819 So.2d at 1002; Schrimsher, 694 So.2d at 860; See also McGann v. Fla. Elections Comm'n, 803 So.2d 763, 764 (Fla. 1st DCA 2001) (concluding that an agency could not reject ALJ's finding of fact on ultimate issue of "willfulness" by recasting findings as a conclusion of law); Harac v. Dep't of Prof'l Reg., 484 So.2d 1333, 1337 (Fla. 3d DCA 1986) (stating that the agency was not permitted to substitute its findings for those of ALJ on issue of architect's "competency," even though the determination of design competency required specialized knowledge and experience, because it is not so unique as to defy ordinary methods of proof in formal adversarial proceedings).

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

In its exception to the findings of fact in Paragraphs 34 through 38 of the Recommended Order, Petitioner argues that, to the extent these paragraphs could be construed as findings of fact, they are not based on competent, substantial evidence; and, to the extent that these paragraphs could be construed to be conclusions of law, they incorrectly apply Sections 429.19

and 408.13, Florida Statutes. Petitioner, in essence, argues that the Agency determined the class of violation in this case based on the specific facts, and that prior Agency precedent should have no bearing on that determination. First, Paragraphs 34 through 38 of the Recommended Order are clearly factual findings by the ALJ based on competent, substantial evidence. See Transcript, Pages 79-81; Respondent's Exhibit 1299. Second, while Petitioner is correct in stating that "[t]he determination of each case must be done by applying the facts of that case to the statutory definition of the classification of a deficiency as found in section 408.813(2)(a)," past agency precedent must also guide that determination. See Plante v. Dep't of Bus. & Prof. Reg., 716 So.2d 790 (Fla. 4th DCA 1998); and Nordheim v. Dep't of Environmental Protection, 719 So.2d 1212 (Fla. 3d DCA 1998). When an agency departs from its prior precedent, it must give an explanation for the departure. See §120.68(7)(e)3., Florida Statutes. When asked why the Agency departed from its precedent of citing PEG violations as Class II violations, Petitioner's witness simply answered "lack of leadership." See Transcript, Page 80. The Agency's witness gave no further explanation for the departure from prior Agency precedent. Thus, the Agency's classification of the violations alleged in this case as Class I violations could not withstand judicial review. That is not to say that the Agency might have had a valid reason for departing from prior Agency precedent in this matter; it just failed to articulate it in the record of the case. Therefore, the Agency denies Petitioner's exception to Paragraphs 34 through 38 of the Recommended Order.

In its exceptions to the conclusions of law in Paragraphs 41 and 45 through 48 of the Recommended Order, Petitioner argues the ALJ incorrectly interpreted Rule 58A-5.031(2)(d), Florida Administrative Code. While the Agency has substantive jurisdiction over the conclusions of law in these paragraphs, it cannot substitute conclusions of law that are as or more

reasonable than those of the ALJ. Therefore, the Agency must deny Petitioner's exceptions to the conclusions of law in Paragraphs 41 and 45 through 48 of the Recommended Order.

In its exceptions to the conclusions of law in Paragraph 57 of the Recommended Order, Petitioner argues that, based on its arguments in its exceptions to the findings of fact in Paragraphs 34 through 38 of the Recommended Order, the Agency should reject the ALJ's conclusions of law in Paragraph 57 of the Recommended Order. Based on the reasoning set forth in the ruling on Petitioner's exceptions to the findings of fact in Paragraphs 34 through 38 of the Recommended Order, Petitioner's arguments in favor of the Agency modifying the ALJ's recommended penalty for the violation in Count II of the Administrative Complaint to be a Class I violation are rejected. Additionally, in order for the Agency to be able to increase the recommended penalty imposed by the ALJ in this case, the Agency must conduct a review of the complete record and be able to state with particularity its reasons for do so by citing to the record as justification for the action. See §120.57(1)(*l*), Fla. Stat. However, the record of this case does not support increasing the recommended penalty from a Class III violation to a Class II violation. Specifically, there was conflicting evidence put forth as to whether Respondent's actions "directly threatened M.M.'s physical or emotional health, safety, or security." Compare Transcript, Pages 31-32 and 134 with Transcript, Pages 82 and 112. It is the responsibility of the ALJ, not the Agency, to resolve conflicts in evidence; the Agency cannot re-weigh the evidence to reach a different result. Therefore, the Agency must deny Petitioner's exceptions to the conclusions of law in Paragraph 57 of the Recommended Order and accept the ALJ's recommended penalty.

FINDINGS OF FACT

The Agency adopts the findings of fact set forth in the Recommended Order.

CONCLUSIONS OF LAW

The Agency adopts the conclusions of law set forth in the Recommended Order. However, the conclusions of law in the Recommended Order regarding whether the Respondent committed the violations alleged in the Administrative Complaint should be solely limited to the particular facts of this case and should not be given general applicability.

ORDER

Based upon the foregoing, the Administrative Complaint is hereby dismissed. The parties shall govern themselves accordingly.

DONE and ORDERED this 13 day of January, 2012, in Tallahassee, Florida.

Elizabeth Dudek

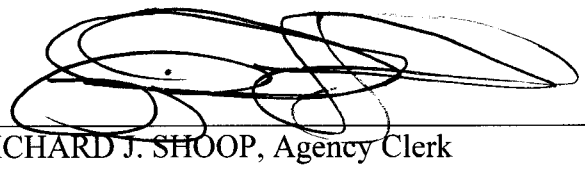
ELIZABETH DUDEK, SECRETARY
AGENCY FOR HEALTH CARE ADMINISTRATION

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 13th day of February, 2012.



RICHARD J. SHOOP, Agency Clerk
Agency for Health Care Administration
2727 Mahan Drive, MS #3
Tallahassee, FL 32308
(850) 412-3630

COPIES FURNISHED TO:

Honorable John D.C. Newton II
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060

Nelson E. Rodney, Esquire
Assistant General Counsel

Brian J. Perrault, Jr., Esquire
Jason B. Trauth, Esquire
Lydecker Diaz
1221 Brickell Avenue, 19th Floor
Miami, Florida 33131

Jan Mills
Facilities Intake Unit