

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE )  
ADMINISTRATION, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 11-4379  
 )  
GREENBRIAR NH, LLC d/b/a )  
GREENBRIAR REHABILITATION AND )  
NURSING CENTER, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on January 25, 2012, by video teleconference at sites in Sarasota and Tallahassee, Florida, before a designated Administrative Law Judge of the Division of Administrative Hearings (Division), Lynne A. Quimby-Pennock.

APPEARANCES

For Petitioner: Thomas J. Walsh, II, Esquire  
Agency for Health Care Administration  
Sebring Building, Suite 330G  
525 Mirror Lake Drive, North  
St. Petersburg, Florida 33701

For Respondent: Thomas W. Kaufman, Esquire  
Quintairos, Prieto, Wood  
and Boyer, P.A.  
4905 West Laurel Street  
Tampa, Florida 33607

STATEMENT OF THE ISSUES

Whether Respondent violated sections 408.809(1)(e), Florida Statutes (2010),<sup>1/</sup> and Florida Administrative Code Rule 59A-4.106(2) and (4)(x), as alleged in the Administrative Complaint (AC);<sup>2/</sup> and whether the violations, if found, warrant the imposition of a conditional licensure rating and a \$2,500.00 fine under section 400.23(7)(a) and (8)(b), Florida Statutes.

PRELIMINARY STATEMENT

On July 6, 2011, Petitioner, Agency for Health Care Administration (Petitioner), filed an AC against Respondent, Greenbriar NH, LLC, d/b/a Greenbriar Rehabilitation and Nursing Center (Respondent), alleging violations of section 408.809(1)(e) and rule 59A-4.106(2) and (4)(x). Pursuant to section 400.23(7)(a) and (8)(b), Petitioner imposed a \$2,500.00 fine and changed Respondent's licensure status from standard to conditional commencing April 5, 2011, and ending May 5, 2011.<sup>3/</sup>

On August 5, 2011, Respondent filed a Petition for Formal Administrative Hearing (Petition), disputing numerous portions of the AC and requesting an administrative hearing pursuant to sections 120.569 and 120.57(1), Florida Statutes, and Florida Administrative Code Rule 28-106.201(5). On August 25, 2011, the Petition was referred to the Division for the assignment of an Administrative Law Judge.

A Notice of Hearing was issued on September 7, 2011, scheduling the case for hearing on November 18, 2011. Following one uncontested motion for continuance, the hearing was rescheduled to January 25, 2012, and completed on that day.

At the final hearing, Petitioner presented the testimony of Marilyn C. Jones, Makissa Abner, and Laurence G. Branch, Ph.D. Petitioner offered its Exhibits A through E, which were admitted into evidence. Respondent offered the testimony of Eric Kingsley. Respondent's Exhibits 1 through 5 were admitted into evidence.

The one-volume Transcript was filed on February 17, 2012.<sup>4/</sup> By rule, the parties are allowed ten days from the date the Transcript is filed to submit proposed recommended orders (PROs). Respondent requested, and Petitioner did not object to the request, to file their PROs within 20 days of the filing of the Transcript. The request was granted. Each party timely submitted its PRO, and each has been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Petitioner is the regulatory authority responsible for the licensure of nursing homes and the enforcement of applicable federal regulations and state statutes and rules governing skilled nursing facilities pursuant to the Federal Omnibus Reconciliation Act of 1987, Title IV, Subtitle C (as amended);

chapters 400, Part II, and 408, Part II, Florida Statutes; and Florida Administrative Code Chapter 59A-4. Further, Petitioner evaluates nursing home facilities to determine their degree of compliance with established state regulations as a basis for making the required licensure assignment.

2. Marilyn Jones works for Petitioner as a health facility evaluator II. It is Ms. Jones's responsibility to ensure that healthcare facilities are in compliance with the rules and regulations concerning healthcare as it relates to nursing homes. Ms. Jones has passed the surveyor minimum qualification test (SMQT), which requires extensive training on how to conduct nursing home surveys. Based on her passing the SMQT, she is allowed to perform surveys or evaluate nursing homes by herself.

3. Laurence Branch, Ph.D., is a distinguished professor emeritus from the University of South Florida. Dr. Branch was proffered as an expert in the evaluation of risk to elders.

4. At all times material, Respondent was a licensed nursing facility under the licensing authority of Petitioner, operating a licensed 60-bed nursing facility in Bradenton, Florida. Respondent was required to comply with all applicable statutes and rules.

5. Makissa Abner has been Respondent's human resource (HR) director since February 2009. It is her responsibility to ensure that background checks are completed on all the new

hires. Respondent's administrator may also be involved with HR issues including criminal history checks.

6. Eric Kingsley became Respondent's nursing home administrator in December 2010. As such, Mr. Kingsley oversaw the day-to-day operations of Respondent's facility. He participated in the survey conducted at Respondent's facility in April 2011, but was not involved with the hiring of employees prior to his arrival in December 2010.

7. As part of her job, Ms. Abner was aware of Respondent's "Clinical Division Standards & Guideline" (Guideline), a three-page document issued in 2004, with a revision date of November 2009, regarding "Background Checks" for employees of Respondent. This Guideline sets forth Respondent's screening requirements for new employees as of May 2010. Those requirements included in part:

STANDARD:

All potential employees will have a background check completed prior to start of employment to ensure the safety and welfare of residents and staff. Criminal history screening is required for employees whose responsibilities require them to:

- Provide personal care or services to residents;
- Have access to resident living areas; or
- Have access to resident funds or other personal property

GUIDELINES:

No employee will begin work without a completed background check. . . . Administrators must assure that there are internal systems in the facility to maintain compliance.

- Pre-screening Job Applicants and assuring all employees have
  - a. Background screening
  - b. Drug screening
  - c. Reference checks (2) completed
  - d. Active & current license and or certification.
  - e. Information must be obtained prior to allowing applicant/employee to care for our residents.
- Employee must complete application while onsite in facility.
- Consent for background will be obtained in writing.
- Information will be entered into a Background Screening system by HR or designee.
- Results will be obtained, reviewed by HR or designee for a disqualifying conviction, and kept in sealed envelope in human resource file, marked confidential. Any infractions identified on the report will be discussed with the prospective employee, documented on the background screening form and placed in the file.
- Any flags on report must be reviewed and approved by administrator and RDO.
- All out of state and those residing in state less than 5 years will have Level 2 background check completed.

- For those having met exemption status from prior offenses then final hiring decision must be decided by administrator and RDO.

#### SCREENING REQUIREMENTS

- Level 1<sup>[5/]</sup> screening standards.--All employees required by law to be screened shall be required to undergo background screening as a condition of employment and continued employment . . . level 1 screenings shall include, but not be limited to, employment history checks and statewide criminal correspondence checks through the Florida Department of Law Enforcement, and may include local criminal records checks through local law enforcement agencies.
- Every person employed in a position for which employment screening is required must, within 5 working days after starting to work, submit to the employer a complete set of information necessary to conduct the screening.
- Employees who have not maintained continuous residency within the state for the five (5) years must complete a Level 2.<sup>[6/]</sup>
- Employees requiring a Level 2 screening may work in a conditional status for 180 days pending the screening results.

\* \* \*

Standards must also ensure that the person:

(a) For employees and employers licensed or registered pursuant to chapter 400, . . . meets the requirements of this chapter.

(b) Has not committed an act that constitutes domestic violence as defined in s. 741.28.

#### EXEMPTION PROCESS:

- Individuals found guilty of, regardless of adjudication, or entered a plea of nolo contendere or guilty to, any offense prohibited for Level 1 screening and for Level 2 screening are disqualified for employment as a nursing home employee in one of the three areas specified or serving as owner, administrator, or financial officer.
- The employee has the option to apply for an exemption from disqualification which, if granted, would allow him/her to provide personal services to residents or to serve as owner, administrator, or financial officer.

8. In May 2010, Diane Davis expressed an interest in working for Respondent. Ms. Abner asked for and received from Ms. Davis an application and a completed fingerprint card. The fingerprint card was submitted to the appropriate agency. A short time later, Ms. Davis provided to Ms. Abner a "Background Report for Davis, Diane" with a print date of May 17, 2010, showing a "Report Summary" for "FL State Criminal Report" as "Clear" (background report). No one disputed this background report.

9. Ms. Davis started working as a dietary assistant for Respondent's dietary section around June 1, 2010. At the time Ms. Davis was hired, the law allowed an employee who required a Level 2 background screening to begin work while the employer awaited the results of that additional background screening.



10. The following excerpts from Respondent's dietary assistant job description provide the expectations for dietary assistants such as Ms. Davis:

GENERAL PURPOSE:

Provide assistance in food preparation and dining services in accordance to menus, diets and facility guidelines. Maintain clean and sanitary conditions in the kitchen and dining areas under the supervision of the Dietary Manager or Cook.

QUALIFICATIONS:

\* \* \*

Must be able to relate professionally and positively to resident and families and to work cooperatively with others.

\* \* \*

ESSENTIAL JOB FUNCTIONS:

A. FOOD PREPARATION AND SERVING

Duties: Assist in the preparation and serving of meals and snacks; use portion control procedures. Assist in checking trays for menu and diet preferences and accuracy; ensure proper storage of foods and supplies.

\* \* \*

F. RESIDENTS' RIGHTS AND POSITIVE RELATIONSHIPS FUNCTIONS

Duties: Understand, comply with and promote all rules regarding residents' rights; promote positive relationships with residents, visitors and regulators, to include a professional appearance and attitude. (emphasis added).

None of Ms. Davis's job duties called for her to take care of resident's property, resident's funds, or required her to go into a resident's room.<sup>7/</sup>

11. The job duties that Ms. Davis was expected to perform included preparing food, or help in preparing food for the residents, and making sure the dishes were clean, the kitchen was sanitary, the drinks were covered, and the food in the freezers was placed appropriately. None of the job duties or descriptions specify that a dietary assistant: will provide personal care or services to or interact with residents; will have access to resident living areas; or will have access to resident funds or other personal property. To have a qualification that, you "must be able to relate . . . positively with residents . . ." does not state that you will relate to residents, only that you have the ability to do so. Additionally, assisting in the "preparation and serving of meals and snacks" and "checking trays" does not state that a dietary assistant will be in direct contact with residents.

12. In mid to late June 2010, Ms. Davis received a letter dated June 16, 2010, from Petitioner (Petitioner's Letter), with a subject line of "RE: 07/27/1974 Simple Assault, Portsmouth, Va Pd."<sup>8/</sup> Ms. Davis brought Petitioner's Letter to Ms. Abner who placed it in Ms. Davis's personnel file. Petitioner's Letter acknowledged receipt of Ms. Davis's fingerprint card and advised

Ms. Davis that her criminal history report regarding her "arrest and court case history was missing some information."

Petitioner's Letter requested additional information regarding Ms. Davis's arrest report and the court disposition. It advised that Ms. Davis had to provide the requested information within 30 days (of June 16th) in order for Petitioner to determine whether Ms. Davis was eligible to work for a healthcare provider. In the event Ms. Davis did not meet this 30-day deadline, the entity that had requested the screening (Respondent) would be notified that Ms. Davis was not eligible for employment. Petitioner's Letter did not notify Ms. Davis that she was disqualified from employment at that time.

13. Ms. Abner made a copy of Ms. Davis's unsigned, non-notarized response statement dated July 1, 2010 (Response Statement), and placed it in Ms. Davis's personnel file. After she notarized the Response Statement, Ms. Abner mailed it and believed that Ms. Davis (and Respondent) had complied with Petitioner's Letter. Ms. Abner did not receive any further communication from Petitioner with respect to this Response Statement.<sup>9/</sup>

14. Prior to August 1, 2010, Ms. Abner thought she was conducting her duties with respect to the background screening requirements in compliance with the law that was in effect at the time. Ms. Abner was well-aware that on August 1, 2010, the

Florida law regarding personnel screening requirements changed to require Level 2 background screening for all personnel as required in section 408.809(1) and (2).

15. Mr. Kingsley was unaware of any possible issue with Ms. Davis's employment; however, he was not the administrator at the time Ms. Davis was initially hired.

16. On April 5, 2011, Ms. Jones conducted a survey of Respondent's facility.<sup>10/</sup> During this survey, Ms. Jones reviewed Respondent's personnel records. When she reviewed Ms. Davis's personnel record, Ms. Jones saw just four items: Petitioner's Letter, the Level 1 criminal history (background report), Ms. Davis's completed June 3rd fingerprint card, and her Response Statement.

17. Ms. Jones inquired about the status of the Level 2 background screening for Ms. Davis. Ms. Abner was initially unable to provide that information, but, following a computer check through Petitioner's website, Ms. Abner found that Ms. Davis received an exemption on March 14, 2011.

18. Ms. Davis continually worked at Respondent's facility from June 1, 2010, through March 14, 2011, and beyond. Ms. Davis was not terminated or placed on suspension when, at the 180 days from her initial employment, Respondent had not received notification of the Level 2 background screening. Ms. Abner did not receive any notification from Petitioner that

Ms. Davis had a disqualifying offense, which should have been forthcoming, if, in fact, there was a disqualifying offense.

19. It is clear that Respondent did not follow up on Ms. Davis's Level 2 background screening. However, the law in effect on her hire date did not equate a simple assault to a disqualifying offense. Ms. Davis had to undergo the Level 2 background screening solely because she had not lived in Florida continuously for the preceding five years.<sup>11/</sup>

20. Petitioner presented Dr. Branch as an expert in risk assessment for the elderly. Dr. Branch provided insight into the risk associated with persons who have failed a background screening. Petitioner provided Dr. Branch the following documents for his review: the AC, the response to the AC, Ms. Abner's deposition and its attachments, the controlling statutes regarding background screening for Florida nursing homes in effect up to and after August 2010, the deficiency classification system and definitions in part II of chapter 400, and Petitioner's "statistics relating to the number of persons applying for positions in the healthcare community and requiring criminal history background screening and how many of those screenings were positive."

21. Petitioner's statistics were for 250,000 people who applied for the criminal background screening clearance in Florida during a 14-month period. Of those applicants, nearly

10,000, or four percent failed the screening. Although an interesting study, the analysis did not measure whether the disqualifying offense (that caused the background screening failure) occurred one year ago, or 40 years ago or if there was more than one disqualifying offense involved.

22. In the instant case, there is mention of Ms. Davis's arrest in Petitioner's Letter, a simple assault that allegedly occurred in 1974. However, there was no documentation or testimony of any court action regarding that arrest. Thus, there is uncertainty that an actual disqualifying offense occurred.<sup>12/</sup> A simple assault does not qualify as a disqualifying offense, unless the victim was a minor.

23. Based on Ms. Davis's age in 2010, when her Response Statement was mailed in, and her explanation of the event, she was, at the time of the alleged 1974 simple assault, 25 years of age. The age of the alleged victim was never proven. As such, there is no proof that the alleged simple assault is the more serious disqualifying offense. A simple assault is not a disqualifying offense under either statute.

24. While recognized as an expert in his field and accepted as one in this case, the statistical analysis provided by Dr. Branch does not carry any significant weight. The statistical analysis fails to include all the relevant information. Further, in the instant case, there is no

disqualifying offense; thus, the statistics provided are not persuasive.

25. There was no testimony or evidence presented that any staff member re-applied for a Level 2 background check in December 2010. There was no testimony or evidence that any staff member first applied for an exemption in December 2010.<sup>13/</sup>

26. There was no testimony as to what "direct care" means. Further, there was no testimony as to what "personal care" means.

#### CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2011).

28. Petitioner has the burden of proving by clear and convincing evidence that Respondent committed the violations as alleged and the appropriateness of the penalty imposed. Dep't of Banking & Fin., v. Osborne, Stern & Co., 670 So. 2d 932 (Fla. 1996).

29. In Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the court held that:

Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the

mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

PERTINENT LAWS AND RULES IN EFFECT ON JUNE 1, 2010:

30. Section 400.215, Florida Statutes (2009), provided in pertinent part:

(1) The agency shall require background screening as provided in chapter 435 for all employees or prospective employees of facilities licensed under this part who are expected to, or whose responsibilities may require them to:

(a) Provide personal care or services to residents;

(b) Have access to resident living areas;  
or

(c) Have access to resident funds or other personal property.

(2) Employers and employees shall comply with the requirements of s. 435.05.

(a) Notwithstanding the provisions of s. 435.05(1), facilities must have in their possession evidence that level 1 screening has been completed before allowing an employee to begin working with patients as provided in subsection (1). All information necessary for conducting background screening using level 1 standards as specified in s. 435.03 shall be submitted by the nursing facility to the agency. Results of the background screening shall be provided by the agency to the requesting nursing facility.

(b) Employees qualified under the provisions of paragraph (a) who have not maintained continuous residency within the



state for the 5 years immediately preceding the date of request for background screening must complete level 2 screening, as provided in chapter 435. Such employees may work in a conditional status up to 180 days pending the receipt of written findings evidencing the completion of level 2 screening. Level 2 screening shall not be required of employees or prospective employees who attest in writing under penalty of perjury that they meet the residency requirement. Completion of level 2 screening shall require the employee or prospective employee to furnish to the nursing facility a full set of fingerprints to enable a criminal background investigation to be conducted. The nursing facility shall submit the completed fingerprint card to the agency. The agency shall establish a record of the request in the database provided for in paragraph (c) and forward the request to the Department of Law Enforcement, which is authorized to submit the fingerprints to the Federal Bureau of Investigation for a national criminal history records check. The results of the national criminal history records check shall be returned to the agency, which shall maintain the results in the database provided for in paragraph (c). The agency shall notify the administrator of the requesting nursing facility or the administrator of any other facility licensed under chapter 393, chapter 394, chapter 395, chapter 397, chapter 429, or this chapter, as requested by such facility, as to whether or not the employee has qualified under level 1 or level 2 screening. An employee or prospective employee who has qualified under level 2 screening and has maintained such continuous residency within the state shall not be required to complete a subsequent level 2 screening as a condition of employment at another facility.

(c) The agency shall establish and maintain a database of background screening information which shall include the results

of both level 1 and level 2 screening. The Department of Law Enforcement shall timely provide to the agency, electronically, the results of each statewide screening for incorporation into the database. The agency shall, upon request from any facility, agency, or program required by or authorized by law to screen its employees or applicants, notify the administrator of the facility, agency, or program of the qualifying or disqualifying status of the employee or applicant named in the request.

(d) Applicants and employees shall be excluded from employment pursuant to s. 435.06. (emphasis added).

31. Section 435.05, Florida Statutes (2009), provides, in pertinent part:

Except as otherwise provided by law, the following requirements shall apply to covered employees:

(1) (a) Every person employed in a position for which employment screening is required must, within 5 working days after starting to work, submit to the employer a complete set of information necessary to conduct a screening under this section.

(b) For level 1 screening, the employer must submit the information necessary for screening to the Florida Department of Law Enforcement within 5 working days after receiving it. The Florida Department of Law Enforcement will conduct a search of its records and will respond to the employer agency. The employer will inform the employee whether screening has revealed any disqualifying information.

(c) For level 2 screening, the employer or licensing agency must submit the information necessary for screening to the Florida Department of Law Enforcement within

5 working days after receiving it. The Florida Department of Law Enforcement will conduct a search of its criminal and juvenile records and will request that the Federal Bureau of Investigation conduct a search of its records for each employee for whom the request is made. The Florida Department of Law Enforcement will respond to the employer or licensing agency, and the employer or licensing agency will inform the employee whether screening has revealed disqualifying information.

(d) The person whose background is being checked must supply any missing criminal or other necessary information to the employer within 30 days after the employer makes a request for the information or be subject to automatic disqualification.

(2) Unless otherwise prohibited by state or federal law, new employees may be placed on probationary status pending a determination of compliance with minimum standards set forth in this chapter. (emphasis added).

32. Section 435.06, Florida Statutes (2009), states, in pertinent part:

(1) When an employer or licensing agency has reasonable cause to believe that grounds exist for the denial or termination of employment of any employee as a result of background screening, it shall notify the employee in writing, stating the specific record which indicates noncompliance with the standards in this section. It shall be the responsibility of the affected employee to contest his or her disqualification or to request exemption from disqualification. The only basis for contesting the disqualification shall be proof of mistaken identity.

(2) The employer must either terminate the employment of any of its personnel found to

be in noncompliance with the minimum standards for good moral character contained in this section or place the employee in a position for which background screening is not required unless the employee is granted an exemption from disqualification pursuant to s. 435.07.

(3) Any person who is required to undergo employment screening and who refuses to cooperate in such screening or refuses to submit the information necessary to complete the screening, including fingerprints when required, shall be disqualified for employment in such position or, if employed, shall be dismissed. (emphasis added).

33. Section 400.022(1), in pertinent part, states:

(1) All licensees of nursing home facilities shall adopt and make public a statement of the rights and responsibilities of the residents of such facilities and shall treat such residents in accordance with the provisions of that statement. The statement shall assure each resident the following:

\* \* \*

(o) The right to be free from mental and physical abuse, corporal punishment, extended involuntary seclusion, and from physical and chemical restraints, except those restraints authorized in writing by a physician for a specified and limited period of time or as are necessitated by an emergency. In case of an emergency, restraint may be applied only by a qualified licensed nurse who shall set forth in writing the circumstances requiring the use of restraint, and, in the case of use of a chemical restraint, a physician shall be consulted immediately thereafter. Restraints may not be used in lieu of staff supervision or merely for staff convenience,

for punishment, or for reasons other than resident protection or safety.

34. Rule 59A-4.106 provides, in pertinent part:

(2) Each nursing home facility shall adopt, implement, and maintain written policies and procedures governing all services provided in the facility.

35. Rule 59A-4.106(4)(x) provides as follows:

Each facility shall maintain policies and procedures in the following areas:

\* \* \*

(x) Resident's rights[.]

CHANGES IN LAWS EFFECTIVE AUGUST 1, 2010:

36. Section 400.215 was revised to read as follows:

(1) The agency shall require level 2 background screening for personnel as required in s. 408.809(1)(e) pursuant to chapter 435 and s. 408.809.

(2) The agency shall, as allowable, reimburse nursing facilities for the cost of conducting background screening as required by this section. This reimbursement is not subject to any rate ceilings or payment targets in the Medicaid Reimbursement plan.

The note following this statute is critical in understanding how the Legislature intended the new requirement to be implemented.

The note reads:

<sup>1</sup>Note.--Section 58, ch. 2010-114, provides that "[t]he changes made by this act are intended to be prospective in nature. It is not intended that persons who are employed or licensed on the effective date of this act be rescreened until such time as they

are otherwise required to be rescreened pursuant to law, at which time they must meet the requirements for screening as set forth in this act." (emphasis added).

37. Section 408.809, which added subsection (1)(e) with the 2010 legislation, in pertinent part, states:

(1) Level 2 background screening pursuant to chapter 435 must be conducted through the agency on each of the following persons, who are considered employees for the purposes of conducting screening under chapter 435:

\* \* \*

(e) Any person, as required by authorizing statutes, seeking employment with a licensee or provider who is expected to, or whose responsibilities may require him or her to, provide personal care or services directly to clients or have access to client funds, personal property, or living areas; and any person, as required by authorizing statutes, contracting with a licensee or provider whose responsibilities require him or her to provide personal care or personal services directly to clients. Evidence of contractor screening may be retained by the contractor's employer or the licensee.<sup>[15/]</sup> (emphasis added).

The legislative note found in paragraph 36 above also follows this statute.

38. Section 435.05, Florida Statutes, provides requirements for covered employees and employers as follows:

Except as otherwise provided by law, the following requirements apply to covered employees and employers:

(1)(a) Every person required by law to be screened pursuant to this chapter must

submit a complete set of information necessary to conduct a screening under this chapter.

(b) For level 1 screening, the employer must submit the information necessary for screening to the Department of Law Enforcement within 5 working days after receiving it. The Department of Law Enforcement shall conduct a search of its records and respond to the employer or agency. The employer must inform the employee whether screening has revealed any disqualifying information.

(c) For level 2 screening, the employer or agency must submit the information necessary for screening to the Department of Law Enforcement within 5 working days after receiving it. The Department of Law Enforcement shall perform a criminal history record check of its records and request that the Federal Bureau of Investigation perform a national criminal history record check of its records for each employee for whom the request is made. The Department of Law Enforcement shall respond to the employer or agency, and the employer or agency must inform the employee whether screening has revealed disqualifying information.

(d) The person whose background is being checked must supply any missing criminal or other necessary information upon request to the requesting employer or agency within 30 days after receiving the request for the information.

(2) Every employee must attest, subject to penalty of perjury, to meeting the requirements for qualifying for employment pursuant to this chapter and agreeing to inform the employer immediately if arrested for any of the disqualifying offenses while employed by the employer.

(3) Each employer licensed or registered with an agency must conduct level 2 background screening and must submit to the agency annually or at the time of license renewal, under penalty of perjury, a signed affidavit attesting to compliance with the provisions of this chapter.

The legislative note found in paragraph 36 above also follows this statute.

39. Section 435.06(2) (a) and (c) provides as follows:

(2) (a) An employer may not hire, select, or otherwise allow an employee to have contact with any vulnerable person that would place the employee in a role that requires background screening until the screening process is completed and demonstrates the absence of any grounds for the denial or termination of employment. If the screening process shows any grounds for the denial or termination of employment, the employer may not hire, select, or otherwise allow the employee to have contact with any vulnerable person that would place the employee in a role that requires background screening unless the employee is granted an exemption for the disqualification by the agency as provided under s. 435.07.

\* \* \*

(c) The employer must terminate the employment of any of its personnel found to be in noncompliance with the minimum standards of this chapter or place the employee in a position for which background screening is not required unless the employee is granted an exemption from disqualification pursuant to s. 435.07.

Again, the legislative note found in paragraph 36 above also follows this statute.



40. It is vital to understand the tension between the statute that was in play when Ms. Davis was employed by Respondent in June 2010 and the change that occurred to the applicable statutes on August 1, 2010.

41. On June 1, 2010, Respondent obtained the Level 1 background screening for Ms. Davis, its dietary assistant. Respondent timely obtained the fingerprint card from Ms. Davis and provided it to the appropriate agency. This is proven by Petitioner's Letter. Following receipt of Petitioner's Letter, Respondent's HR director, Ms. Abner, assisted Ms. Davis in completing the requisite response within the 30-day period. After submitting the Response Statement on behalf of Ms. Davis, Respondent had complied with its statutory requirement. Respondent did not receive any notification from Petitioner (or any other state authority) advising Respondent that Ms. Davis had to be terminated from her position based on a failure to:

- (1) either provide the requested/required information or
- (2) that she had a disqualifying offense that precluded her from such employment.

Respondent concluded that it was in compliance with the Level 2 criminal history background screening requirement.

42. The AC alleges that Respondent violated section 408.809(1)(e). At the time Respondent hired Ms. Davis, there was no section 408.809(1)(e). When the Legislature

enacted section 408.809(1)(e), effective August 1, 2010, it specifically inserted the legislative intent that the changes were to be "prospective in nature." Hence, Respondent's hiring of Ms. Davis could not have violated the statute.

43. Respondent and Ms. Davis were in compliance with section 400.215(1) and (2)(d), in that they provided the requisite information to obtain the appropriate background screening as provided in chapter 435 at the time Ms. Davis was hired.

44. Even if Respondent had not provided the requisite fingerprint card or explanation to the simple assault allegation, there was no proof that a disqualifying offense under either the 2009 or 2010 statute occurred.

45. Section 400.23(7) provides, in pertinent part:

(7) The agency shall, at least every 15 months, evaluate all nursing home facilities and make a determination as to the degree of compliance by each licensee with the established rules adopted under this part as a basis for assigning a licensure status to that facility. The agency shall base its evaluation on the most recent inspection report, taking into consideration findings from other official reports, surveys, interviews, investigations, and inspections. In addition to license categories authorized under part II of chapter 408, the agency shall assign a licensure status of standard or conditional to each nursing home.

(a) A standard licensure status means that a facility has no class I or class II deficiencies and has corrected all class III

deficiencies within the time established by the agency.

(b) A conditional licensure status means that a facility, due to the presence of one or more class I or class II deficiencies, or class III deficiencies not corrected within the time established by the agency, is not in substantial compliance at the time of the survey with criteria established under this part or with rules adopted by the agency. If the facility has no class I, class II, or class III deficiencies at the time of the follow-up survey, a standard licensure status may be assigned. (emphasis added).

46. Section 400.23(8) provides, in pertinent part:

(b) A class II deficiency is a deficiency that the agency determines has compromised the resident's ability to maintain or reach his or her highest practicable physical, mental, and psychosocial well-being, as defined by an accurate and comprehensive resident assessment, plan of care, and provision of services. A class II deficiency is subject to a civil penalty of \$2,500 for an isolated deficiency, \$5,000 for a patterned deficiency, and \$7,500 for a widespread deficiency. The fine amount shall be doubled for each deficiency if the facility was previously cited for one or more class I or class II deficiencies during the last licensure inspection or any inspection or complaint investigation since the last licensure inspection. A fine shall be levied notwithstanding the correction of the deficiency.

(c) A class III deficiency is a deficiency that the agency determines will result in no more than minimal physical, mental, or psychosocial discomfort to the resident or has the potential to compromise the resident's ability to maintain or reach his or her highest practical physical, mental, or psychosocial well-being, as defined by an

accurate and comprehensive resident assessment, plan of care, and provision of services. A class III deficiency is subject to a civil penalty of \$1,000 for an isolated deficiency, \$2,000 for a patterned deficiency, and \$3,000 for a widespread deficiency. The fine amount shall be doubled for each deficiency if the facility was previously cited for one or more class I or class II deficiencies during the last licensure inspection or any inspection or complaint investigation since the last licensure inspection. A citation for a class III deficiency must specify the time within which the deficiency is required to be corrected. If a class III deficiency is corrected within the time specified, a civil penalty may not be imposed.

#### 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 finding that Respondent is not guilty of a Class II violation and re-issuing the license to reflect a standard license for the period previously issued as conditional.

DONE AND ENTERED this 3rd day of April, 2012, in  
Tallahassee, Leon County, Florida.



---

LYNNE A. QUIMBY-PENNOCK  
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 3rd day of April, 2012.

ENDNOTES

<sup>1/</sup> Unless otherwise noted, all references to Florida Statutes are to the 2010 version.

<sup>2/</sup> The AC contains incorrect dates as to when events or actions occurred. It also includes incomplete statutory cites. Petitioner's Proposed Recommended Order has the same errors.

<sup>3/</sup> The undersigned was advised that, if it was determined that a "conditional" license isn't or wasn't appropriate, Petitioner will issue the appropriate license for the applicable period.

<sup>4/</sup> The Administrative Law Judge was located at The Desoto Building, 1230 Apalachee Parkway, Tallahassee, Florida, in Hearing Room 7 during the entire hearing. The Transcript indicates otherwise. Additionally, the undersigned's name is correctly reflected in this Recommended Order.

<sup>5/</sup> In simplistic terms, a Level 1 screening pertains to a criminal background check solely from the State of Florida.

<sup>6/</sup> In simplistic terms, a Level 2 screening pertains to a criminal background check nationwide.

7/ Petitioner's counsel made the point that, in an emergency, all employees are used to assist Respondent's residents. One can appreciate this position; however, that was not the crux of this case.

8/ Simple assault is not a disqualifying offense, unless the victim was a minor. See §§ 435.04(2)(h) and 435.03(2)(h), Fla. Stat. (2009).

9/ The letter also directed that, if the arrest involved a theft, Ms. Davis had to provide what was stolen and the total value of it. Theft was not involved.

10/ Petitioner commenced a survey of Respondent based on a complaint. The complaint investigation did not form the basis for this AC.

11/ It was established that Ms. Davis had lived in Florida in December 2007, as she had an exemption letter from the Agency for Persons with Disabilities. It appears she may have lived in Florida prior to that time, but it was not a continuous five-year period before her June 1, 2010, hire date. Pursuant to section 435.07(5), Florida Statutes (2009 and 2010), an exemption from disqualification from one agency shall be considered, but it is not binding on a subsequent licensing agency.

12/ In order to be a disqualifying offense, a plea or conviction (regardless of adjudication) had to be documented. None was provided in this case.

13/ Ms. Davis did not testify; so, it is unknown when she applied for the exemption.

14/ This subsection was not in effect when Ms. Davis was hired in June 2010.

COPIES FURNISHED:

Thomas J. Walsh, II, Esquire  
Agency for Health Care Administration  
Sebring Building, Suite 330G  
525 Mirror Lake Drive, North  
St. Petersburg, Florida 33701

Thomas W. Caufman, Esquire  
Quintairos, Prieto, Wood  
and Boyer, P.A.  
4905 West Laurel Street  
Tampa, Florida 33607

Elizabeth Dudek, Secretary  
Agency for Health Care Administration  
2727 Mahan Drive, Mail Stop 1  
Tallahassee, Florida 32308

William H. Roberts, Acting General Counsel  
Agency for Health Care Administration  
2727 Mahan Drive, Mail Stop 3  
Tallahassee, Florida 32308

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

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.