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STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

STATE OF FLORIDA, AGENCY FOR
HEALTH CARE ADMINISTRATION,

Petitioner,

v.

GREENBRIAR NH, LLC d/b/a
GREENBRIAR REHABILITATION AND
NURSING CENTER,

Respondent.
_______________________________/

DOAH CASE NO. 11-4379
AHCA NOS. 2011005639
2011005640
RENDITION NO.: AHCA-12-0423-FOF-OLC

FINAL ORDER

This cause was referred to the Division of Administrative Hearings where the assigned Administrative Law Judge (ALJ), Lynne A. Quimby-Pennock, conducted a formal administrative hearing. At issue in this case is whether Respondent committed the violations alleged in the Administrative Complaint, and, if so, what penalty should be imposed. The Recommended Order dated April 3, 2012, is attached to this Final Order and incorporated herein by reference, except where noted infra.

RULING ON EXCEPTIONS

Petitioner filed exceptions to the Recommended Order.

In its first exception, Petitioner takes exception to Paragraph 10 of the Recommended Order, arguing that Footnote 7, referenced in that paragraph, mischaracterizes the competent, substantial evidence introduced at trial, is inconsistent with the undisputed evidence and implies a conflict with the strict background screening requirements of law. Footnote 7 is nothing more than the ALJ's opinion of the matter. It is not based on any competent, substantial evidence. As the Agency will explain in more detail below, the ALJ's opinion is also incorrect. See the ruling

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on Petitioner's third exception infra. Therefore, the Agency grants Petitioner's first exception to the extent that Footnote 7 is hereby stricken in its entirety.

In its second exception, Petitioner takes exception to the finding of fact in the last sentence of Paragraph 17 of the Recommended Order. Petitioner argues that the finding omits the fact that Ms. Davis had been determined to be ineligible for employment on December 17, 2010. However, what a finding of fact may or may not have omitted is not a valid ground for the Agency to reject or modify it. As long as the finding of fact is based on competent, substantial evidence, the Agency cannot reject or modify it. 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 must deny Petitioner's second exception.

In its third exception, Petitioner takes exception to the last sentence of Paragraph 18 of the Recommended Order, arguing that it is in clear conflict with the record evidence. This sentence is actually a mixture of a finding of fact coupled with a conclusion of law that involves an incorrect interpretation of § 400.215(2), Fla. Stat. A thorough review of the record of this matter reveals that the ALJ's finding of fact in the first part of the sentence that "Ms. Abner did not receive any notification from Petitioner that Ms. Davis had a disqualifying offense" is accurate, but irrelevant. The ALJ goes on in the sentence to incorrectly conclude that the Agency "should have been forthcoming, if, in fact, there was a disqualifying offense." To the contrary, the law pertinent to this matter requires Respondent be responsible for ensuring that its employee did not have a disqualifying offense. See § 400.215(2), Fla. Stat. (2009) ("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."

Emphasis added.). Ms. Abner was aware of the Agency's computer system that held the background screening results and she had registered to use such system when it came online in August of 2010. See Transcript, Pages 74 through 75 and 96. She failed to make a request to the Agency for the results of the employee's Level II background screening until prompted by the Agency's surveyor on April 5, 2011. See Transcript, Pages 74 through 75. The ALJ's erroneous conclusion of law is within the Agency's substantive jurisdiction because the Agency is charged with regulating nursing homes pursuant to Chapter 400, Part II, Florida Statutes. See § 400.021(2), Fla. Stat. (2009) ("Agency" means the Agency for Health Care Administration, which is the licensing agency under this part.). Furthermore, the Agency can substitute a conclusion of law that is as or more reasonable than that of the ALJ. Therefore, the Agency grants Petitioner's third exception to the extent that Paragraph 18 of the Recommended Order is amended to state:

> 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. While Ms. Abner did not receive any notification from Petitioner that Ms. Davis had a disqualifying offense, it was Ms. Abner's responsibility to make sure that Ms. Davis did not have a disqualifying offense by requesting the results of Ms. Davis' Level 2 background screening through the Agency's computer system. See Transcript, Page 44; § 400.215(2)(c), Fla. Stat. (2009).

In its fourth exception, Petitioner takes exception to Paragraphs 19, 22 and 23 of the Recommended Order. According to Petitioner, the Agency should reject the findings of fact present in these paragraphs because: (1) the employee's disqualification determination was not at issue in this matter and could not be challenged by Respondent; (2) the ALJ's findings on whether the employee's criminal offense was actually a disqualifying offense were not based on

competent, substantial evidence; (3) the ALJ's findings of fact presume facts not in evidence, both explicitly and implicitly; and (4) the ALJ's findings of fact are in direct conflict with competent, substantial evidence. In these paragraphs, the ALJ delved into the issue of whether Ms. Davis' criminal offense was a disqualifying offense. By doing so, the ALJ departed from the essential requirements of law. As pointed out by Petitioner in its fourth exception, only Ms. Davis could challenge the Agency's determination that the criminal offense was a disqualifying offense. See Sledge v. Dep't of Child. & Fam., 861 So.2d 1189, 1191 (Fla. 4th DCA 2004). Additionally, the sole basis for challenging such a determination would be mistaken identity. See § 435.06, Fla. Stat. A review of the record shows that, not only did Ms. Davis not challenge the Agency's determination, she sought and received an exemption from disqualification from the Agency. The ALJ had no basis for addressing this issue, especially since neither party raised it. Furthermore, the Agency has reviewed the entire record of the case and can find no competent, substantial evidence to support the ALJ's findings in these paragraphs that Ms. Davis did not have a disqualifying offense, nor was the Agency required to prove that such was the case. Again, as pointed out above, Ms. Davis was the only person who could challenge the Agency's determination that her criminal offense was a disqualifying offense. Ms. Davis did not do so; thus, the Agency's determination must stand. Additionally, to the extent that the ALJ's findings of fact in Paragraphs 19, 22 and 23 of the Recommended Order could also be construed as conclusions of law because the ALJ is interpreting law that the Agency is required to enforce, the Agency finds that it has substantive jurisdiction over the conclusions of law in these paragraphs and that it could substitute conclusions of law that are as or more reasonable than those of the ALJ. For these reasons, the Agency must grant Petitioner's fourth exception. As a result, the Agency modifies Paragraph 19 of the Recommended Order to state:

> 19. It is clear that Respondent did not follow up on Ms. Davis's Level 2 background screening.

The Agency rejects the findings of fact in Paragraphs 22 and 23 in their entirety.

In its fifth exception, Petitioner takes exception to the ALJ's finding of fact in the last sentence of Paragraph 24 of the Recommended Order based on the reasoning set forth in its fourth exception. Based on the ruling on Petitioner's fourth exception supra, the Agency also grants Petitioner's fifth exception and modifies Paragraph 24 of the Recommended Order to state:

> 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.

In its sixth exception, Petitioner takes exception to Paragraph 41 of the Recommended Order, arguing that the conclusions of law in the fourth, fifth and sixth sentences of the paragraph are erroneous as a matter of law. Based on the ruling on Petitioner's third exception supra, the Agency finds that it has substantive jurisdiction over the conclusions of law in Paragraph 41 of the Recommended Order, and that it can substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency grants Petitioner's sixth exception and modifies Paragraph 41 of the Recommended Order to state:

> 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 should have requested the results of Ms. Davis' Level II background screening from the Agency within 180 days of employing Ms. Davis. See Transcript, Page 44; § 400.215(2)(c), Fla. Stat. (2009).

In its seventh exception, Petitioner takes exception to the conclusions of law in Paragraph 42 of the Recommended Order, arguing that the ALJ's conclusions, while accurate, miss the point of Petitioner's allegations because it was not the hiring of Ms. Davis by Respondent that constituted the deficient practice, but rather the retention of Ms. Davis past December 1, 2010 without obtaining the results of Ms. Davis' Level II background screening. The conclusions of law in Paragraph 42 of the Recommended Order are indeed an accurate and correct interpretation of § 408.809(1)(e), Fla. Stat. (2010). While the Agency does have substantive jurisdiction over the conclusions of law in Paragraph 42 of the Recommended Order, it cannot substitute conclusions of law that are as or more reasonable than the ALJ. Therefore, even though Petitioner's arguments are valid, the Agency must deny Petitioner's seventh exception.

In its eighth exception, Petitioner takes exception to the conclusion of law in Paragraph 44 of the Recommended Order, based on its fourth exception. Using the same reasoning set forth in the ruling on Petitioner's fourth exception supra, the Agency finds that it has substantive jurisdiction over the conclusion of law in Paragraph 44 of the Recommended Order and that it can substitute a conclusion of law that is as or more reasonable than that of the ALJ. Therefore, the Agency grants Petitioner's eighth exception and rejects the conclusion of law in Paragraph 44 of the Recommended Order in its entirety.

In spite of the modifications the Agency has made to the findings of fact and conclusions of law of the ALJ's Recommended Order, the record evidence of this case does not prove by clear and convincing evidence that Respondent committed a Class II violation. It is clear that Respondent failed "to ensure that its staff who perform direct service for residents had been appropriately determined as clear of disqualifying criminal backgrounds, or otherwise exempted, in violation of Florida law and Respondent's policy and procedure" as alleged in Paragraph 27 of

the Administrative Complaint. See Transcript, Pages 44 through 47, 63 through 64 and 72 through 75; Petitioner's Exhibit B; § 400.215(2)(c), Fla. Stat. (2009). However, the competent, substantial evidence in this case does not establish that Respondent's deficient practice "compromised [a] resident's ability to maintain or reach his or her highest practicable physical, mental, and psychosocial well-being" so as to constitute a Class II deficiency. [1] Thus, the Agency has no grounds for rejecting or modifying the ALJ's proposed disposition of this matter.

FINDINGS OF FACT

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

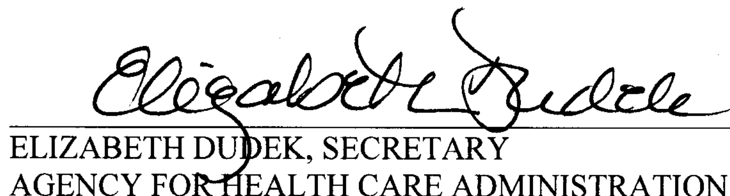
CONCLUSIONS OF LAW

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

ORDER

Based upon the foregoing, the Respondent failed to comply with the relevant law regarding background screenings as well as its own policies and procedures when it hired Ms. Davis. However, the Petitioner failed to prove that these failures constituted a Class II deficiency. Thus, the Agency must hereby dismiss its July 6, 2011 Administrative Complaint and replace the Conditional License with a Standard License for the time period of April 5, 2011 through May 5, 2011. The parties shall govern themselves accordingly.

DONE and ORDERED this 6 day of June, 2012, in Tallahassee, Florida.



ELIZABETH DUDEK, SECRETARY
AGENCY FOR HEALTH CARE ADMINISTRATION

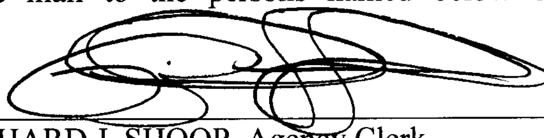
[1] That is not to say that such facts will never constitute a Class II deficiency.

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 7th day of June, 2012.



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