STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

WATER'S EDGE EXTENDED CARE,

Petitioner,

v.

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

DOAH CASE NO. 12-2188
AHCA NO. 2012006390
RENDITION NO.: AHCA-13- 762-FOF-OLC

FINAL ORDER

This cause was referred to the Division of Administrative Hearings where the assigned Administrative Law Judge (ALJ), Jessica E. Varn, conducted a formal administrative hearing. At issue in this case is whether the Petitioner violated § 400.0255, Fla. Stat., by discharging or transferring a resident such that Respondent correctly issued a Statement of Deficiencies against the Petitioner. The Recommended Order dated June 24, 2013, is attached to this Final Order and incorporated herein by reference.

RULING ON EXCEPTIONS

The Respondent filed exceptions to the Recommended Order, and the Petitioner filed a response to Respondent's exceptions.

In determining how to rule upon Respondent's 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:

> 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. . . .

Fla. Stat. § 120.57(1)(*l*). 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. In accordance with these legal standards, the Agency makes the following rulings on Respondent's exceptions:

In its first exception, Respondent takes exception to what it characterizes as findings of fact in Paragraph 35 of the Recommended Order. Respondent, however, offers no legal basis for its exception. Additionally, Paragraph 35 of the Recommended Order contains conclusions of law that are based on the ALJ's findings of fact in Paragraphs 17-22, which, in turn, are based on competent, substantial record evidence. See Transcript, Volume I at Pages 37 and 40-41; Transcript, Volume II at Pages 173 and 175; and Petitioner's Exhibit 1 at Pages 48-49. The Agency is not permitted to re-weigh that evidence in order to make findings and conclusions that differ from those of the ALJ. Therefore, the Agency denies Respondent's first exception.

In its second exception, Respondent takes exception to the portion of Paragraph 22 of the Recommended Order wherein the ALJ findings that "any omissions on the [Baker Act] form were harmless." Respondent argues this portion of the finding is not based on competent,

substantial evidence. The finding in question is the result of the ALJ weighing the testimony of Dr. Cambronne against the testimony of Martha Lenderman, and giving more weight to Dr. Cambronne's testimony. 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); Schrimsher v. Sch. Bd. Of Palm Beach County, 694 So.2d 856, 860 (Fla. 4th DCA 1997); 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). Therefore, the Agency must deny Respondent's second exception.

In its third exception, Respondent takes exception to the conclusion of law in Paragraph 37 of the Recommended Order wherein the ALJ concludes that "[t]he form meets all the statutory requirements." Based on the reasoning set forth in the ruling on Respondent's second exception supra, the Agency must also deny Respondent's third exception.

In its fourth exception, Respondent takes exception to the conclusions of law in Paragraph 35 of the Recommended Order, arguing that the evidence clearly demonstrates that Petitioner, not Dr. Carbonne, initiated the transfer of M.M. Based on the ruling on Petitioner's

first exception, the Agency denies Petitioner's fourth exception. In doing so, the Agency notes that the record of this case raises legitimate concerns about whether Dr. Cambronne properly Baker Acted M.M. However, the Agency does not have jurisdiction over Dr. Cambronne since she is licensed by the Department of Health. In regard to Petitioner, the statement of deficiencies only references violations of §§ 400.0255(8) and (11), Fla. Stat., neither of which are applicable based on the record evidence, which demonstrates that Dr. Cambronne, not Petitioner, initiated the Baker Act transfer of M.M. Indeed, § 400.0255(17), Fla. Stat., states that the provisions of § 400.0255, Fla. Stat., are not applicable to transfers or discharges initiated by the resident's physician.

In its fifth exception, Respondent takes exception to the conclusions of law in Paragraph 32 and 33 of the Recommended Order, arguing that the ALJ used the wrong burden of proof in this matter. The Agency agrees. The ALJ concluded that the Respondent bore the burden of proof by clear and convincing evidence, yet she offered no explanation for such conclusion. Further, she styled the case in a manner wholly contradictory to her conclusions of law in Paragraphs 32 and 33, adding more confusion to the matter. In an enforcement and disciplinary action, the agency bears the burden of proof since it is the one initiating the action through the issuance of an administrative complaint. See Rule 28-106.2015, Florida Administrative Code. Here, the Agency issued a document known as a statement of deficiencies. It imposed no penalty on the Petitioner. Nor did it alter Petitioner's licensure status in any way. Thus, it did not meet the definition of an administrative complaint found in Rule 28-106.2015(1), Florida Administrative Code. Therefore, Petitioner should have born the burden of proof by a preponderance of the evidence. However, the conclusions of law in Paragraph 32 and 33 of the Recommended Order are not within the Agency's substantive jurisdiction since they address an

evidentiary issue. See Barfield v. Department of Health, 805 So.2d 1008 (Fla. 1st DCA 2001). The Agency can only point out the ALJ's error in the hope that she will rule correctly on this issue in the future. Therefore, the Agency must deny Respondent's fifth exception. In so doing, the Agency notes that even if the ALJ had used the correct burden of proof, the outcome of this case would be no different. The record of this case demonstrates that Petitioner proved by a preponderance of the evidence that it did not violate the statutory provisions cited in the statement of deficiencies.

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. These conclusions of law are limited to the specific facts of this case and should not be used as general precedent.

ORDER

Based upon the foregoing, the Agency's statement of deficiencies that was issued as a result of its May 14, 2012 survey of Petitioner is hereby withdrawn. The parties shall govern themselves accordingly.

DONE and ORDERED this 2 day of August, 2013, in Tallahassee, Florida.

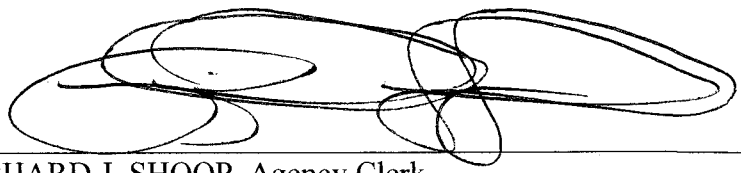
ELIZABETH DUDEK, SECRETARY
AGENCY FOR HEALTH CARE ADMINISTRATION

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 5th day of August, 2013.



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