STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AVALON'S ASSISTED LIVING, LLC, d/b/a AVALON'S ASSISTED LIVING AND d/b/a AVALON'S ASSISTED LIVING AT AVALON PARK; AND AVALON'S ASSISTED LIVING II, LLC, d/b/a AVALON'S ASSISTED LIVING AT SOUTHMEADOW,

Petitioners,

vs. Case Nos. 13-1206F
13-1207F
AGENCY FOR HEALTH CARE ADMINISTRATION, 13-1208F

Respondent.
_____/

FINAL ORDER

On July 18, 2013, an administrative hearing was held in this case, using video teleconferencing with sites in Orlando and Tallahassee, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings (DOAH).

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STATEMENT OF THE ISSUE

The issue is whether the Respondent, Agency for Health Care Administration (AHCA), should pay the Petitioners attorney's fees and costs under section 57.111, Florida Statutes (2013),[1/] the Florida Equal Access to Justice Act, for initiating DOAH Cases 10-0528, 10-1672 and 10-1673.

PRELIMINARY STATEMENT

AHCA filed an administrative complaint against Avalon's Assisted Living, LLC, d/b/a Avalon's Assisted Living and d/b/a Avalon's Assisted Living at Avalon Park (Avalon) and gave notice of intent to deny license renewals to Avalon and Avalon's Assisted Living, II, LLC, d/b/a Avalon's Assisted Living at Southmeadow (Avalon II) on various grounds. They requested hearings, which resulted in DOAH Cases 10-0528, 10-1672 and 10-1673. A consolidated hearing was held, and Administrative Law Judge William F. Quattlebaum recommended that the licenses be revoked and not renewed. AHCA entered a final order adopting the recommendation. Avalon and Avalon II appealed, and the final order was reversed, essentially because the findings were based on hearsay that would not be admissible over objection in a civil action. See § 120.57(1)(c), Fla. Stat. Avalon and Avalon II

filed petitions for attorney's fees and costs under section 57.111 that initiated these proceedings.

Issues regarding entitlement to an award and the amount of the award were bifurcated. At the hearing on entitlement on July 18, 2013, the Petitioners called two witnesses and had 14 exhibits admitted. AHCA called no witnesses, but had 14 exhibits admitted in evidence. The parties filed proposed orders, which have been considered.

FINDINGS OF FACT

1. Avalon and Avalon II are licensed assisted living facilities (ALFs) in Orange County. In 2009, they were owned and operated by Robert Walker and Chiqquittia Carter-Walker. Each had no more than 25 employees and a net worth of not more than $2 million (making them small business parties under section 57.111).

2. On December 4, 2009, AHCA filed an administrative complaint against Avalon (DOAH Case 10-0528). The administrative complaint alleged that Avalon was guilty of three Class II deficiencies, which are deficiencies that directly threaten the physical or emotional health, safety, or security of a resident. Count I alleged that Avalon falsified employee training documentation (cited as Tag A029) to deliberately misrepresent the level of information and skill possessed by a staff member. Count II alleged that Avalon failed to provide appropriate

medication to a terminally ill resident (cited as Tag A427), resulting in unnecessary pain suffered by the resident. Count III alleged that Avalon failed to provide one resident with a prescribed nutritional supplement and two residents with appropriate pain-relieving medications, including the resident identified in Tag A427 (cited as Tag A700). Count IV alleged that the licenses of Avalon and Avalon II should be revoked under section 408.812(5), Florida Statutes (2009),[2/] because they or their owners and operators ("controlling interests" under section 408.803(7)) operated a third, unlicensed ALF and because of a demonstrated pattern of deficient performance at Avalon.

3. The first three counts of the administrative complaint were based on the results of an inspection (survey) of Avalon's facility completed on July 23, 2009.

4. As to Count I, it was discovered during the inspection that training certificates for one Avalon staff member were not accurate and falsely indicated that the employee received required training, which the employee denied. Avalon disputed the employee's statement, offered explanations for some of the anomalies in the training certificates, and pointed out that Avalon still had time to provide some of the required training, but the employment was terminated before the time would have run out. Avalon also pointed to various mistakes and confusion in the survey report to attack its overall credibility.

Nonetheless, the information in the survey report was a reasonable basis in fact to charge Avalon in Count I.

5. Section 429.19(2)(b) provided a reasonable basis in law to file an administrative complaint seeking to fine Avalon for the violation alleged in Count I.

6. As to Count II, the inspection revealed that a terminally ill resident, who no longer met the criteria for continued ALF residency, was allowed to remain in the ALF subject to the coordination of hospice care, the provision of additional medical services, and the development and implementation of an interdisciplinary care plan that adequately designated responsibility for the various kinds of care required by the resident. The inspection revealed that the resident did not receive medication for pain management, which had been authorized by the resident's physician, and suffered pain unnecessarily during the early morning hours of July 13, 2009. The inspection concluded that Avalon was responsible.

7. Avalon disputed some of the findings in the survey report regarding this resident. Specifically, Avalon disputed statements in the survey report to the effect that there was no interdisciplinary plan in place and being implemented at the time. Avalon also contended that the allegations in Count II were based on inadequate investigation by unqualified personnel (i.e., not medical professionals), which resulted in a

misunderstanding by the inspectors regarding how a hospice patient is treated in an ALF.

8. The crux of the findings in the survey report and of the allegations in Count II was that Ms. Carter-Walker, who is a nurse and was the only ALF staff member authorized to administer medications to residents, as well as the administrator in charge of the ALF, had the facility's medication cart locked and made herself unavailable to authorize that it be opened during the evening hours of July 12 and early morning hours of July 13, 2009, resulting in the inability of anyone to administer the resident's pain medication for five hours when it was needed by the resident, as ordered by the resident's physician. This was a reasonable basis in fact to charge Avalon in Count II of the administrative complaint (even if there may not have been a reasonable basis for each and every allegation in Count II).

9. Section 429.19(2)(b) provided a reasonable basis in law to file an administrative complaint seeking to fine Avalon for the violation alleged in Count II.

10. Count III of the administrative complaint repeated the allegation in Count II and added allegations regarding two other residents.

11. One of the other two residents was alleged to have had a history of weight loss and been prescribed a daily can of "Ensure" nutritional supplement, but did not receive the

supplement, as ordered, because the facility had not obtained or provided it to the resident.

12. Avalon contended that there were no medical records, facility records, or any other documentation submitted to substantiate the claim about the Ensure. It is true that the survey report did not include such supporting documentation, and no such supporting documentation was introduced in evidence in this case. However, the survey report indicates that AHCA staff reviewed Avalon's records on July 14, 2009, and that there was a health care provider order dated June 16, 2009, on file for one can of Ensure a day, and a Medication Observation Record showing none was provided to the resident in June or July. The report also indicates that Ms. Carter-Walker confirmed that no Ensure had been provided to the resident and telephoned the pharmacy to see if the pharmacy had received the order. This was a reasonable basis in fact to charge Avalon regarding the Ensure in Count III of the administrative complaint.

13. The other resident mentioned in Count III was alleged to have had a history of hypertension and hypothyroid issues and to have been prescribed a daily Ibuprofen (400mg) for pain, but Avalon's medication records allegedly indicated that the medication had been provided to the resident twice on some days and not at all on other days. Avalon points out the vagueness of some of the evidence AHCA had to support this charge (namely, the

statement of a former employee about an unknown date in June 2009 when the resident did not receive any pain medication), the confused and inconsistent testimony of AHCA's inspector and her supervisor as to the basis in fact for this allegation, and the absence of the medical records for this resident from the evidence introduced in this case. Nonetheless, the statements in the survey report reflecting that Avalon's records were reviewed by the AHCA inspectors were a reasonable basis in fact to include these allegations in Count III of the administrative complaint.

14. Avalon complains that Count III repeated the allegations in Count II in order to combine with and elevate the other two deficiencies in Count III from Class III deficiencies to Class II deficiencies. While there may be no specific statutory or rule authority for doing so, Avalon does not point to any rule or statute prohibiting doing so, and AHCA had a reasonable basis in fact to take the position that the three alleged deficiencies, combined, were Class II.

15. Section 429.19(2)(b) provided a reasonable basis in law to file an administrative complaint seeking to fine Avalon for the violations alleged in Count III.

16. The allegation in Count IV of the administrative complaint that at an unlicensed facility was being operated by the owners and operators of Avalon and Avalon II on August 5,

2009, was supported by the report of an inspection (survey) of the facility on that day.

17. As stated in the survey report, Mrs. Carter-Walker arrived and identified herself to the AHCA inspectors as the administrator of the facility. She was known to them as the administrator of Avalon and Avalon II, as well. It also was reported that she identified herself as the administrator of the facility to other care providers, including a clinical social worker, a registered nurse providing contract health care services to facility residents, and administrators at other local ALFs. In addition, according to the statements of an employee at the facility, there had been residents at the facility since at least June 16, 2009, which was when the staff member began to work at the facility. The employee worked providing resident services five days a week. According to the employee, there were always at least three residents in the facility, and the same residents were present on a day-to-day basis. There was no indication that those residents were transported out of the facility during the evening for some reason or that they did not otherwise remain in the facility overnight.

18. A licensed practical nurse present at the facility on August 5, 2009, was the person who permitted the Agency's inspector to enter the facility. The nurse was there to provide

personal care assistance to a terminally ill resident receiving care through an agreement between Mrs. Carter-Walker, as the facility's administrator, and hospice. After Mrs. Carter-Walker arrived at the facility, she appeared to the inspector to be unhappy that the nurse had permitted the inspector to enter the facility and directed the nurse to leave the facility.

19. During the inspection on August 5, 2009, a "Notice of Unlicensed Activity/Order to Cease and Desist" was issued to Mrs. Carter-Walker and to Robert Walker, who arrived during the inspection and identified himself as an owner of the facility.

20. At no time during the inspection on August 5, 2009, did Mr. Walker, Mrs. Carter-Walker, or anyone else say that the residents in the facility did not spend the night at the facility, that the residents had a familial relation to the owners, or that the facility was exempt from or otherwise not required to comply with relevant ALF licensing requirements. To the contrary, on August 14, 2009, Mr. Walker and Mrs. Carter-Walker applied for an ALF license for the facility to cure the violation.

21. Avalon and Avalon II contend that there was no reasonable basis in fact and law for Count IV of the administrative complaint because Mr. Walker and Ms. Carter-Walker ceased and desisted as ordered by AHCA and applied for licensure. They cite to section 408.812(3) and (5), which they say subjected

them to penalties only if they failed to cease and desist. AHCA contends that section 408.812(5) did authorize revocation and other disciplinary actions. AHCA also contends that section 429.14(1)(k) authorized revocation or suspension and fines. AHCA's arguments are reasonable.

22. Avalon and Avalon II point to section 408.832, which provides that chapter 408 prevails over chapter 429 in the case of a conflict. However, it is reasonable for AHCA to argue that there is no irreconcilable conflict between section 408.812(3) and (5) and section 429.14(1)(k). AHCA's legal arguments persuaded Judge Quattlebaum, whose conclusions of law in that regard were not addressed by the appellate court in reversing the final order that adopted them. For these reasons, the survey report for the inspection on August 5, 2009, provided a reasonable basis in fact and law for this allegation in Count IV.

23. Count IV also alleged a demonstrated pattern of deficient performance by Avalon between 2007 and 2009, as reflected in the attached survey reports. These survey reports indicated that Avalon had numerous lesser deficiencies during that time period. As pointed out by Avalon, not everything listed in these surveys indicated an actual deficiency, and all the earlier deficiencies presumably were corrected. Nonetheless, the survey reports were a reasonable basis in fact to charge

Avalon with a continuing pattern of inadequate performance and a failure to meet relevant standards.

24. In addition, section 429.14(1)(e)2. authorized fines and revocation, suspension, or denial of a license for three or more Class II deficiencies and was a reasonable basis in law to charge Avalon in Count IV.

25. AHCA gave notice of intent to deny the license renewals for Avalon and Avalon II because of the unlicensed operation of an ALF and because their licenses were "under revocation." The first ground has been addressed. As to the latter, Avalon and Avalon II contend that there was no reasonable basis in fact and law because no final action revoking their licenses had been taken. However, the pending administrative complaint to revoke their licenses was a reasonable basis in fact and law to give notice of intent not to renew them.

CONCLUSIONS OF LAW

26. Section 57.111, the Florida Equal Access to Justice Act, authorizes the award of attorney's fees and costs to a small business party that prevails in an administrative proceeding seeking review of or defending against unreasonable government action by a state agency, i.e., when the state agency's actions are not substantially justified and no special circumstances exist that would make the award unjust. Section 57.111(3)(e)

defines substantial justification as a reasonable basis in fact and law.

27. The agency has the burden to prove substantial justification. AHCA v. MVP Health, Inc., 74 So. 3d 1141, 1143 (Fla. 1st DCA 2011); Helmy v. Dep't of Bus. and Prof'l Reg., 707 So. 2d 366, 368 (Fla. 1st DCA 1998).

28. It was held in AHCA v. MVP Health, Inc., supra, at 1143-44:

> [A] n agency cannot satisfy the "substantial justification" standard simply by showing an action was "not frivolous." This is because "while governmental action may not be so unfounded as to be frivolous, it may nonetheless be based on such an unsteady foundation factually and legally as not to be substantially justified." Dep't of Health & Rehab. Servs. v. S.G., 613 So. 2d 1380, 1386 (Fla. 1st DCA 1993). On the other hand, the standard is not so strict as to require the agency to demonstrate that its action was correct. Id., quoting McDonald v. Schweiker, 726 F.2d 311, 316 (7th Cir. 1983) (stating the government need not have a "necessarily correct basis [] for the position that it took"). The "substantial justification" standard lies between these two extremes. The closest approximation is that if a state agency can present an argument for its action "'that could satisfy a reasonable person[,]'" then that action should be considered "substantially justified." Helmy, 707 So. 2d at 368, quoting Pierce v. Underwood, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1998).
>
> An additional consideration when evaluating an agency's action under section 57.111 is that the inquiry is limited only to whether

> the agency had a "reasonable basis in law and fact at the time" it took the action. § 57.111(3)(e), Fla. Stat. (2010) (emphasis added). The reviewing body--whether DOAH or a court--may not consider any new evidence which arose at a fees hearing, but must focus exclusively upon the information available to the agency at the time that it acted. See Dep't of Health, Bd. of Physical Therapy Practice v. Cralle, 852 So. 2d 930, 932 (Fla. 1st DCA 2003) (criticizing an ALJ for being "influenced by consideration of evidence which was presented at [a fees] hearing rather than being focused solely on whether the [agency's underlying] decision had a reasonable basis in law and fact").

Using this legal standard, there was substantial justification for AHCA's actions in this case.

29. In the underlying cases, the appellate court held that AHCA failed to meet its burden of proof because its allegations were supported only by hearsay evidence that was not admissible over objection in a civil action. See § 120.57(1)(c). That rule of evidence does not apply to the initiation of an action by a state agency since hearsay is, by definition, "a statement, other than one made by the declarant while testifying at the trial or hearing . . . ." § 90.801(1)(c). The unavoidable hearsay character of the results of the inspections on August 5 and 23, 2009, did not undermine their ability to serve as a reasonable basis in fact to file the administrative complaint against Avalon in DOAH Case 10-0528 and the notices of intent to deny the

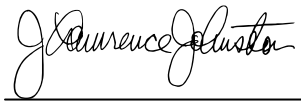
license renewal applications of Avalon and Avalon II in DOAH Cases 10-1672 and 10-1673.

30. There may not have been a reasonable basis for each and every factual allegation in Count II. However, that does not mean attorney's fees and costs should be awarded for that claim. While there appears to be no Florida law on the point, it is appropriate to look to the federal case law for guidance. Gentele v. Dep't of Prof'l Reg., 513 So. 2d 672, 673 (Fla. 1st DCA 1987) ("The [Florida Equal Access to Justice Act] is generally modeled after its federal counterpart, 5 U.S.C. Section 504 (the Federal Act). It is instructive to look to the decisions of federal courts, which have construed the meaning of the language of the Federal Act."). The federal law is that a claim-by-claim analysis is not appropriate for claims that are factually closely entwined. See Baeder v. Heckler, 826 F.2d 1345, 1347 (3d Cir. 1987); Haitian Refugee Ctr. v. Meese, 791 F.2d 1489, 1500 (11th Cir. 1986), vacated in part on other grounds, 804 F.2d 1573 (11th Cir. 1986). A fortiori, an allegation-by-allegation analysis within Count IV would not be appropriate where the arguably unsubstantiated allegations are closely entwined with the crux of the overarching substantive allegation of Count II.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, the petitions for attorney's fees and costs in these cases are denied.

DONE AND ORDERED this 17th day of September, 2013, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 17th day of September, 2013.

ENDNOTES

[1/] Unless otherwise indicated, references to section 57.111 are to the 2013 codification of the Florida Statutes, as are the references to chapters 120 and 90. The other statutory references are to the 2009 codification.

[2/] See footnote 1.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.