STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

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AVALON'S ASSISTED LIVING, LLC,
d/b/a AVALON'S ASSISTED LIVING,

Petitioner,

v.

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent.
_____/

DOAH CASE NO. 14-0610
AHCA CASE NO. 2013012638
FILE NO. 11966665
LICENSE NO. 10813
FACILITY TYPE: ASSISTED LIVING FACILITY
RENDITION NO.: AHCA-15-0138 -FOF-OLC

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Petitioner,

v.

AVALON'S ASSISTED LIVING, LLC
d/b/a AVALON'S ASSISTED LIVING
d/b/a AVALON'S ASSISTED LIVING
AT AVALON PARK,

Respondent.
_____/

DOAH CASE NO. 14-1339
AHCA NOS. 2013012601
2013012644

FINAL ORDER

These cases were referred to the Division of Administrative Hearings where the assigned Administrative Law Judge (ALJ), J. Lawrence Johnston, conducted a formal administrative hearing. At issue in these cases is whether the Agency for Health Care Administration ("Agency") should renew the assisted living facility ("ALF") and limited nursing services licenses held by Avalon's Assisted Living, LLC d/b/a Avalon's Assisted Living ("Avalon"), and whether the Agency should fine Avalon for alleged statutory and rule violations. The Recommended Order dated January 21, 2015, is attached to this Final Order and incorporated herein by reference, except where noted infra.

Filed March 4, 2015 3:29 PM Division of Administrative Hearings

RULING ON EXCEPTIONS

Both Avalon's Assisted Living, LLC ("Avalon") and the Agency filed exceptions to the Recommended Order.

In determining how to rule upon the parties' 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. . . .

§ 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. In accordance with these legal standards, the Agency makes the following rulings on the parties' exceptions:

Avalon's Exceptions

In Paragraph 1 of its exceptions, Avalon asserts that the proceedings on which the findings of fact are based did not comply with the essential requirements of law because the ALJ

either relied on hearsay or ignored the uncontroverted testimony of the witnesses. The Agency need not rule on this exception because it does not clearly identify the disputed portion of the Recommended Order by page number or paragraph. See § 120.57(1)(k), Fla. Stat.

In Paragraph 2 of its exceptions, Avalon takes exception to the findings of fact in Paragraph 4 of the Recommended Order, arguing that the findings of fact concerning the staples in D.D.'s head are not based on competent, substantial evidence and the ALJ relied on hearsay in making them. Contrary to Avalon's assertion, the findings of fact in Paragraph 4 of the Recommended Order are based on competent, substantial evidence. See Transcript, Volume I, Pages 126-127 and 162-163; Agency's Exhibits 5 and 6. Thus, the Agency is not permitted to reject or modify them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz v. Department of Business Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985) (holding that an agency "may not reject the hearing officer's finding [of fact] unless there is no competent, substantial evidence from which the finding could reasonably be inferred"). Therefore, the Agency denies Avalon's exception to Paragraph 4 of the Recommended Order.

In Paragraph 3 of its exceptions, Avalon takes exception to the findings of fact in Paragraph 7 of the Recommended Order, arguing that the ALJ's findings regarding R.M.'s history are based on hearsay. The findings of fact in Paragraph 7 of the Recommended Order are based on competent, substantial evidence. See Transcript, Volume I, Pages 78-93 and 106-107; Agency's Exhibits 2 and 8. Thus, the Agency cannot disturb them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, the Agency denies Avalon's exception to Paragraph 7 of the Recommended Order.

In Paragraph 4 of its exceptions, Avalon takes exception to the finding of fact in Paragraph 7 of the Recommended Order wherein the ALJ stated that, at the time Robert Walker

met with Mary Loftus and R.M. on July 19, 2013, he "had pending felony charges that disqualified him from working at the ALF or having direct contact with residents." Avalon argues this is a conclusion of law that directly conflicts with a rule (though Avalon did not identify which rule it was referring to) and is not based on competent, substantial evidence. Regardless of whether the sentence at issue is a finding of fact or conclusion of law, it is supported by the record evidence of this matter. See Transcript, Volume I, Pages 81-82; Transcript, Volume III, Pages 378-379; Transcript, Volume V, Pages 651-652; Agency's Exhibits 2 and 8. To the extent it is a finding of fact, the Agency cannot reject or modify it because it is based on competent, substantial evidence. See § 120.57(1)(*l*), Fla. Stat.; Heifetz, 475 So. 2d at 1281. To the extent it is a conclusion of law, the Agency finds that, while it has substantive jurisdiction over it, it cannot substitute a conclusion of law that is as or more reasonable than that of the ALJ. Therefore, the Agency denies Avalon's second exception to Paragraph 7 of the Recommended Order.

In Paragraph 5 of its exceptions, Avalon takes exception to the findings of fact in Paragraph 8 of the Recommended Order, arguing that the ALJ "ignored uncontroverted testimony concerning the level of care that R.M. might need in an assisted living facility (ALF)." The exception centers around the last sentence of Paragraph 8 of the Recommended Order, wherein the ALJ found that "[t]he form stated that R.M. could make phone calls independently and could prepare meals, shop, and handle personal and financial affairs with assistance." As Avalon notes, the form itself indicated R.M. could prepare meals, shop and handle personal and financial matters with supervision. See Agency Exhibit 3 at Page 3. Thus, the ALJ's finding is incorrect and is not based on competent, substantial evidence. Therefore, the Agency grants

Avalon's exception to Paragraph 8 of the Recommended Order and modifies the last sentence of Paragraph 8 of the Recommended Order to state:

> The form stated that R.M. could make phone calls independently and could prepare meals, shop, and handle personal and financial affairs with ~~assistance~~supervision.

In Paragraph 6 of its exceptions, Avalon takes exception to the finding of fact in the last sentence of Paragraph 9 of the Recommended Order, arguing that it is based solely on hearsay. The finding of fact in the last sentence of Paragraph 9 of the Recommended Order is based on competent, substantial evidence. See Agency's Exhibit 8. Thus, the Agency is prohibited from rejecting or modifying it. See § 120.57(1)(*l*), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, the Agency denies Avalon's exception to the last sentence of Paragraph 9 of the Recommended Order.

In Paragraph 7 of its exceptions, Avalon takes exception to the finding of fact in Paragraph 14 of the Recommended Order wherein the ALJ found that "R.M. had no cell phone, wallet, or personal or ALF identification because Mrs. Carter-Walker did not trust him not to lose them." Avalon argues the finding of fact is not based on competent, substantial evidence. Contrary to Avalon's argument, the finding of fact in Paragraph 14 of the Recommended Order is based on competent, substantial evidence. See Transcript, Volume II, Pages 238-239 and 246-247. Thus, the Agency cannot disturb it. See § 120.57(1)(*l*), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, the Agency denies Avalon's exception to Paragraph 14 of the Recommended Order.

In Paragraph 8 of its exceptions, Avalon takes exception to the findings of fact in Paragraph 15 of the Recommended Order, arguing that the ALJ's findings of fact in that paragraph are based on hearsay. The findings of fact in Paragraph 15 of the Recommended

Order are based on competent, substantial evidence. See Transcript, Volume II, Pages 207-209, 236 and 260; Transcript, Volume III, Pages 313-314, 332-333 and 377. Thus, the Agency cannot reject or modify them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, the Agency denies Avalon's exception to Paragraph 15 of the Recommended Order.

In Paragraph 9 of its exceptions, Avalon takes exception to the finding of fact in Paragraph 16 of the Recommended Order, arguing that it is not based on competent, substantial evidence. The finding of fact in Paragraph 16 of the Recommended Order is based on competent, substantial evidence. See, e.g., Transcript, Volume I, Pages 83, 84, 92-93 and 103; Transcript, Volume III, Page 361; Agency Exhibits 2 and 8. Thus, the Agency is not permitted to reject or modify it. See § 120.57(1)(*l*), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, the Agency denies Avalon's exception to Paragraph 16 of the Recommended Order.

In Paragraph 10 of its exceptions, Avalon takes exception to the finding of fact in Paragraph 17 of the Recommended Order, arguing that it is a conclusion of law and is not based on competent, substantial evidence. Paragraph 17 is an ultimate finding of fact[1] based on the

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[1]"Ultimate findings of fact"

> are those "necessary to determine issues in [a] case" or the "final facts" derived from the "evidentiary facts supporting them." Tedder v. Unemp. App. Comm'n, 697 So. 2d 900, 902 (Fla. 2d DCA 1997) (citing Black's Law Dictionary 1522 (6th ed. 1990)). Ultimate facts are also regularly described as "mixed questions" of law and fact, see, e.g., Antonucci v. Unemp. App. Comm'n, 793 So. 2d 1116, 1117 (Fla. 4th DCA 2001), and must generally be made by the fact finder in an administrative proceeding because they are "necessary for proper review of administrative orders." Tedder, 697 So. 2d at 902; see also San Roman v. Unemp. App. Comm'n, 711 So. 2d 93 (Fla. 4th DCA 1998) (finding that whether "good cause" exists for unemployment compensation claimant to voluntarily leave work frequently involves mixed question of law and fact, and is an ultimate fact best left to the fact-finder); Heifetz v. Dep't of Bus. Reg., Div. of Alcoholic Beverages & Tobacco, 475 So. 2d 1277 (Fla. 1st DCA 1985) (finding that "negligent supervision and lack of diligence are essentially ultimate findings of fact clearly within the realm of the hearing officer's fact-finding discretion.") (citations omitted).

Costin v. Fla. A&M Univ. Bd. of Trustees, 972 So. 2d 1084, 1086-1087 (Fla. 5th DCA 2008).

ALJ's weighing of competent, substantial evidence. The Agency is not permitted to re-weigh such evidence in order to reach a contrary finding. See Heifetz, 471 So. 2d at 1281. Therefore, the Agency denies Avalon's exception to Paragraph 17 of the Recommended Order.

In Paragraph 11 of its exceptions, Avalon takes exception to the findings of fact in Paragraph 20 of the Recommended Order, arguing that they are not based on competent, substantial evidence. The findings of fact in Paragraph 20 are based on competent, substantial evidence. See Transcript, Volume I, Page 177. Thus, the Agency cannot reject or modify them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, the Agency denies Avalon's exception to Paragraph 20 of the Recommended Order.

In Paragraph 12 of its exceptions, Avalon takes exception to the finding of facts in Paragraph 21 of the Recommended Order, arguing that they ignore testimony from the final hearing and place an impossible duty on Avalon. Avalon's arguments do not constitute legitimate reasons for the Agency to reject or modify the findings of fact in Paragraph 21 of the Recommended Order. In addition, the findings of fact in Paragraph 21 of the Recommended Order are based on competent, substantial evidence. See Transcript, Volume I, Pages 38-39, 134-135, 138-139 and 177. Thus, there is no legal basis for the Agency to reject or modify them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, the Agency denies Avalon's exception to Paragraph 21 of the Recommended Order.

In Paragraph 13 of its exceptions, Avalon takes exception to the findings of fact in Paragraph 23 of the Recommended Order, arguing the ALJ relied on hearsay in reaching the findings and that the findings are inconsistent with the evidence. The findings of fact in Paragraph 23 of the Recommended Order are based on competent, substantial evidence. See Transcript, Volume I, Pages 83-84, and 92-93; Transcript, Volume II, Pages 203, 207, 208-209,

237-238, 240-241 and 246-249; Transcript, Volume III, Pages 313-314, 323, 333, 336-337, 347, 359-366, 380-381, 395-397 and 424; Transcript, Volume IV, Pages 464-465; Agency Exhibits 3 and 8. Thus, the Agency is not permitted to reject or modify them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, the Agency denies Avalon's exception to Paragraph 23 of the Recommended Order.

In Paragraph 14 of its exceptions, Avalon takes exception to the findings of fact in Paragraph 24 of the Recommended Order, arguing that findings are not based on clear and convincing evidence and inconsistent with the record evidence. The findings of fact in Paragraph 24 of the Recommended Order are based on competent, substantial evidence. See Transcript, Volume I, Pages 38, 47-50, 126-127, 132-134 and 138-140; Agency Exhibits 5 and 6. Thus, the Agency has no valid basis for rejecting or modifying them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, the Agency denies Avalon's exception to Paragraph 24 of the Recommended Order.

In Paragraphs 15 and 16 of its exceptions, Avalon takes exception to the findings of fact in Paragraph 25 of the Recommended Order, arguing the ALJ created his own pattern of deficient performance and denied Avalon due process as a result. Avalon is mistaken in its argument. The September 26, 2013 and November 22, 2013 surveys referenced in Agency's December 12, 2013 Notice of Intent to Deny Renewal Application in DOAH Case No. 14-0610 are the same surveys referenced in the Agency's February 18, 2014 Administrative Complaint in DOAH Case No. 14-1339. The December 12, 2013 Notice of Intent to Deny Renewal Application listed a demonstrated pattern of deficient performance as a basis for denying Avalon's licensure renewal application. Thus, Avalon was on notice of this allegation, and had the opportunity to defend against it at hearing. Furthermore, the ultimate findings in Paragraph

25 of the Recommended Order are based on the findings of fact in Paragraphs 23 and 24 of the Recommended Order, which as stated in the rulings on Avalon's exceptions to those paragraphs supra, are based on competent, substantial evidence. See also Transcript, Volume V, Pages 671-673 and 726-727. The presence of contrary evidence does nothing to change that, for it is obvious that the ALJ weighed the evidence Avalon cites to in its exception and did not find it to be credible. The Agency is not permitted to re-weigh that evidence in order to reach findings of fact that contradict those of the ALJ. See Heifetz, 471 So. 2d at 1281. Therefore, the Agency denies Avalon's exception to Paragraph 25 of the Recommended Order.

In Paragraph 17 of its exceptions, Avalon takes exception to Paragraph 27 of the Recommended Order, arguing that the ALJ included a gratuitous statement concerning the Avalon III case and the burden of proof in that matter. Paragraph 27 of the Recommended Order is an accurate summary of the case of Avalon's Assisted Living III, LLC v. Agency for Health Care Administration, DOAH Case No. 09-6342 (AHCA 2013); per curiam aff'd 152 So. 3d 566 (Fla. 1st DCA 2014). Thus, Avalon's exception is not valid. Additionally, counsel's implication in Footnote 3 that the ALJ was biased against Avalon was already addressed by the ALJ in a May 9, 2014 Order on Avalon's motion to disqualify him and is unfounded. Avalon's poor track record before the ALJ might be more attributable to its own actions than any alleged bias on the part of the ALJ. Therefore, the Agency denies Avalon's exception to Paragraph 27 of the Recommended Order.

In Paragraph 18 of its exceptions, Avalon takes exception to the conclusions of law in Paragraph 31 of the Recommended Order, arguing that the ALJ failed to cite to all the significant findings in the case of Coke v. Department of Children and Family Services, 704 So. 2d 726 (Fla. 5th DCA 1998). Avalon's argument does not identify a valid legal basis for the Agency to

reject or modify the conclusions of law in Paragraph 31 of the Recommended Order. Therefore, the Agency denies Avalon's exception to Paragraph 31 of the Recommended Order.

In Paragraph 19 of its exceptions, Avalon takes exception to the conclusions of law in Paragraph 35 of the Recommended Order, arguing that the ALJ erroneously included the September and November 2013 surveys as part of the licensure renewal proceeding. As explained in the ruling on Avalon's exception to Paragraph 25 of the Recommended Order supra, Avalon's argument is not valid. Therefore, the Agency denies Avalon's exception to Paragraph 35 of the Recommended Order.

In Paragraph 20 of its exceptions, Avalon takes exception to the conclusions of law in Paragraph 36 of the Recommended Order, arguing that there is no evidence R.M. was ever admitted as a resident. As the Agency found in the ruling on Avalon's exception to Paragraph 16 of the Recommended Order supra, there is competent, substantial evidence demonstrating R.M. was a resident of Avalon. Thus, the Agency finds that, while it has substantive jurisdiction over the conclusions of law in Paragraph 36 of the Recommended Order, it cannot substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency denies Avalon's exception to Paragraph 36 of the Recommended Order.

In Paragraph 21 of its exceptions, Avalon takes exception to the conclusions of law in Paragraph 38 of the Recommended Order, again arguing there was no evidence R.M. was a resident and stating that the ALJ failed to explain how Avalon did not adequately supervise R.M. Avalon's arguments are soundly refuted by the competent, substantial evidence in this matter as demonstrated by the Agency's rulings on Avalon's exceptions to Paragraphs 16 and 23 of the Recommended Order supra. Thus, the Agency finds that, while it has substantive jurisdiction over the conclusions of law in Paragraph 38 of the Recommended Order, it cannot substitute

conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency denies Avalon's exception to Paragraph 38 of the Recommended Order.

In Paragraph 22 of its exceptions, Avalon takes exception to the findings of fact in Paragraph 39 of the Recommended Order, again raising the argument that R.M. was not a resident of Avalon and arguing that the ALJ denied Avalon due process by including the survey in the licensure renewal case. Based on the reasoning set forth in the Agency's rulings on Avalon's exceptions to Paragraphs 25 and 38 of the Recommended Order supra, the Agency denies Avalon's exception to Paragraph 39 of the Recommended Order.

In Paragraph 23 of its exceptions, Avalon takes exception to the conclusions of law in Paragraph 40 of the Recommended Order, arguing there is no evidence that Avalon had 7 residents. Contrary to Avalon's argument, the ALJ's conclusions of law in Paragraph 40 of the Recommended Order are based on competent, substantial evidence. See Transcript, Volume III, Pages 373-375 and 443-446; Transcript, Volume IV, Pages 457-458. The Agency is not at liberty to re-weigh the evidence in order to reach conclusions of law that differ from those of the ALJ.[2] See Heifetz, 471 So. 2d at 1281. Therefore, the Agency denies Avalon's exception to Paragraph 40 of the Recommended Order.

In Paragraph 24 of its exceptions, Avalon takes exception to the conclusions of law in Paragraphs 41 and 42 of the Recommended Order, again arguing R.M. was not a resident. As the Agency has ruled previously, competent, substantial evidence supports R.M.'s status as a resident of Avalon. See, e.g., the ruling on Avalon's exception to Paragraphs 16, 25, 38 and 39 of the Recommended Order supra. Thus, the ALJ's correctly reached the conclusions of law in Paragraphs 41 and 42 of the Recommended Order based on R.M.'s status as a resident.

[2] Except with regard to the burden of proof, which is addressed in the ruling on the Agency's exceptions.

Therefore, the Agency denies Avalon's exception to Paragraphs 41 and 42 of the Recommended Order.

In Paragraph 25 of its exceptions, Avalon takes exception to the conclusions of law in Paragraph 43 of the Recommended Order, arguing they are not supported by the evidence. Avalon's argument has been previously refuted in the Agency's ruling on Avalon's exception to Paragraph 15 of the Recommended Order supra. Therefore, using the reasoning set forth in that ruling, the Agency denies Avalon's exception to Paragraph 43 of the Recommended Order.

In Paragraph 26 of its exceptions, Avalon takes exception to the conclusions of law in Paragraph 44 of the Recommended Order, arguing there are insufficient factual findings establishing Robert Walker as an employee of Avalon. As noted in the ruling on Avalon's exception to Paragraph 7 of the Recommended Order supra, the evidence in this matter refutes Avalon's argument. Therefore, the Agency denies Avalon's exception to Paragraph 44 of the Recommended Order.

In Paragraph 27 of its exceptions, Avalon takes exception to the conclusions of law in Paragraph 45 of the Recommended Order, arguing that the ALJ's interpretation of the rule eviscerates it and makes it meaningless. The Agency disagrees with Avalon's argument and finds that, while it has substantive jurisdiction over the conclusions of law in Paragraph 45 of the Recommended Order, it cannot substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency denies Avalon's exception to Paragraph 45 of the Recommended Order.

In Paragraph 28 of its exceptions, Avalon takes exception to the conclusions of law in Paragraph 46 of the Recommended Order, arguing the ALJ's conclusion of law concerning an assisted living facility's responsibility to bring a resident to medical appointments for treatment

does not consider circumstances involving a resident having a health care surrogate or power of attorney. Avalon also argues the ALJ is trying to discipline it under a rule that was never cited to in the Administrative Complaint, thus depriving it of due process. In addition, Avalon argues that there is no evidence to support the ALJ's conclusion that it is a Class II violation. Avalon's arguments have no merit. There is competent, substantial evidence to support the ALJ's conclusion that Avalon's failure to seek the removal of D.D.'s staples is a Class II violation. See the ruling on Avalon's exception to Paragraph 24 of the Recommended Order supra. It is obvious the ALJ considered the fact that D.D. had a health care surrogate or power of attorney, but rejected it as an excuse for Avalon not providing the appropriate care to D.D. Finally, the ALJ is not charging Avalon with violating a rule not referenced in the Administrative Complaint. His reference to Rule 58A-5.025(1)(j), Florida Administrative Code, is merely to explain his reasoning for concluding that Avalon committed a Class II violation. The Agency finds that, while it does have substantive jurisdiction over the conclusions of law in Paragraph 46 of the Recommended Order, it cannot substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency denies Avalon's exception to Paragraph 46 of the Recommended Order.

In Paragraph 29 of its exceptions, Avalon takes exception to the conclusions of law in Paragraphs 49 and 50 of the Recommended Order, arguing the ALJ ignores the plain language of the statutes. Avalon also claims that the Agency does not have substantive jurisdiction over these conclusions of law, and that it is simply making the exception for purposes of preserving the issue for appeal. The Agency disagrees with Avalon on whether it has substantive jurisdiction over the conclusions of law in these paragraphs. The Agency is charged with enforcing the statutes cited to by the ALJ in these paragraphs, thus giving it substantive

jurisdiction over the conclusions of law. That being said, the Agency finds that it cannot substitute conclusions of law that are as or more reasonable than those of the ALJ.[3] Therefore, the Agency denies Avalon's exception to Paragraphs 49 and 50 of the Recommended Order.

In Paragraph 30 of its exceptions, Avalon takes exception to the conclusions of law in Paragraph 52 of the Recommended Order, arguing the ALJ created his own pattern of deficient performance based on two surveys that were outside of the biennial licensure period and thus deprived Avalon of due process. Based on the reasoning set forth in the ruling on Avalon's exceptions to Paragraph 25 of the Recommended Order supra, the Agency finds that, while it does have substantive jurisdiction over the conclusions of law in Paragraph 52 of the Recommended Order, it cannot substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency denies Avalon's exception to Paragraph 52 of the Recommended Order.

In Paragraph 31 of its exceptions, Avalon takes exception to the conclusions of law in Paragraphs 53, 54 and 55 of the Recommended Order, arguing that there is no clear and convincing evidence supporting the alleged deficiencies, and that the ALJ appears to group the allegations into a catch-all denial or revocation argument. The allegations referenced by the ALJ in these paragraphs are all supported by competent, substantial record evidence. See, e.g., Transcript, Volume V, Pages 652-674; and the rulings on Avalon's exceptions to Paragraphs 7, 23, 24 and 25 of the Recommended Order supra. The Agency finds that, while it does have substantive jurisdiction over the conclusions of law in Paragraphs 53, 54 and 55 of the Recommended Order, it cannot substitute conclusions of law that are as or more reasonable than

[3] Except with regard to the issue of the burden of proof in this matter, which is addressed in the ruling on the Agency's exceptions.

those of the ALJ[4]. Therefore, the Agency denies Avalon's exception to Paragraphs 53, 54 and 55 of the Recommended Order.

In Paragraph 32 of its exceptions, Avalon takes exception to Endnote[5] 2 of the Recommended Order. However, Endnote 2 of the Recommended Order is part of the Preliminary Statement and contains neither findings of fact or conclusions of law. Thus, Avalon's exception to it is not a valid exception, and the Agency need not address it.

In Paragraph 33 of its exceptions, Avalon takes exception to Endnote 5 of the Recommended Order, arguing the Agency cannot use a licensure renewal proceeding to seek revocation of a license. Avalon's arguments have already been addressed in the ruling on Avalon's exceptions to Paragraph 25 of the Recommended Order supra. Therefore, based on the reasoning set forth in that ruling, the Agency denies Avalon's exception to Endnote 5 of the Recommended Order.

In Paragraph 34 of its exceptions, Avalon takes exception to Endnote 6 of the Recommended Order, arguing the ALJ's legal argument is contrary to the rule governing these circumstances. Based on the reasoning set forth in the ruling on Avalon's exceptions to Paragraphs 7 and 45 of the Recommended Order supra, the Agency denies Avalon's exception to Endnote 6 of the Recommended Order.

Agency's Exceptions

The Agency takes exception to Paragraphs 14, 15, 17, 19, 20, 30, 31, 32, 34, 38-44, 46, 48, 49, 52, 55 and Endnote 8 of the Recommended Order, arguing that the ALJ applied the wrong burden of proof in these paragraphs and thus the proceedings on which the findings of fact

[4] With the exception of the ALJ's evidentiary ruling in Paragraph 55 of the Recommended Order, which is addressed in the ruling on the Agency's exceptions.

[5] Avalon incorrectly calls the endnotes footnotes.

and conclusions of law in these paragraphs are based did not comply with the essential requirements of law. Section 120.57(1)(*l*), Florida Statutes, requires an agency to "first determine from a review of the entire record, and state with particularity in the [final] order ... that the proceedings on which the findings [of fact] were based did not comply with essential requirements of law." Most of the paragraphs to which the Agency takes exception are factual findings, so this preliminary review is necessary. In addition, even though the phrase "did not comply with the essential requirements of law" is contained in the sentence regarding the rejection or modification of findings of fact, the Agency asserts failure to comply with the essential requirements of law is also a valid reason for the Agency to reject or modify the ALJ's incorrect determination of the burden of proof in a licensure case, which is a procedural issue that affects the findings of fact and proceedings as a whole, and is closely tied to the Agency's discretion to determine the fitness of licensure applications, pursuant to the Florida Supreme Court's reasoning in Department of Banking and Finance v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

As Section 429.01(3), Florida Statutes, states, an assisted living facility license is a public trust and a privilege, not an entitlement. Thus, Avalon ultimately bears the burden in proving that it meets all the requirements for re-licensure, and any conclusion of law to the contrary is clear legal error. This reasoning is well-supported by the case of Department of Banking and Finance v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996). The Osborne case, like the case at hand, involved both the denial of a license and the imposition of administrative fines. The statute under which the Department of Banking and Finance sought to deny Osborne's securities registration, Section 517.161, Florida Statutes, appeared to be penal in nature, much like Section 429.14, Florida Statutes. However, the Florida Supreme Court did not view the licensure denial

proceeding as such. The Court quoted at length from Judge Booth's opinion in Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987), wherein he reasoned that

> The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue ... Thus, the majority is correct in its observation that appellants had the burden of presenting evidence of their fitness for registration. The majority is also correct in its holding that the Department had the burden of presenting evidence that appellants had violated certain statutes and were unfit for registration. The majority's conclusion, however, that the Department had the burden of presenting its proof of appellants' unfitness by clear and convincing evidence is wholly unsupported by Florida law and inconsistent with the fundamental principle that an applicant for licensure bears the burden of ultimate persuasion at each and every step of the licensure proceedings, regardless of which party bears the burden of presenting certain evidence. This holding is also equally inconsistent with the principle that an agency has particularly broad discretion in determining the fitness of applicants who seek to engage in an occupation the conduct of which is a privilege rather than a right.

The Court went on to state that "[t]he denial of registration pursuant to section 517.161(6)(a), Florida Statutes (1989), is not a sanction for the applicant's violation of the statute, but rather the application of a regulatory measure," and that "[t]he clear and convincing evidence standard is also inconsistent with the discretionary authority granted by the Florida legislature to administrative agencies responsible for regulating professions under the State's police power." Id at 934. In contrast, the Court did agree that the higher burden of proof of clear and convincing evidence should apply when a fine is imposed because "an administrative fine deprives the person fined of substantial rights in property ... [and] are generally punitive in nature." Id at 935.

This same reasoning is also found in the case of Lauderhill Family Care Retirement Residence, Inc. d/b/a Lauderhill Family Care Retirement v. Agency for Health Care Administration, DOAH Case No. 14-0435 (AHCA 2014). In that case, the ALJ upheld the

Agency's denial of an assisted living facility's licensure renewal application based on the fact that the facility failed to have a satisfactory biennial licensure survey, and the fact that the controlling interest of the facility was the controlling interest of a facility that had an unpaid fine and its license revoked. The facility argued that the Agency should have to prove the allegations that formed the basis of its denial by clear and convincing evidence, but the ALJ rejected this argument stating "[t]his is not a disciplinary proceeding to revoke the license of Petitioner. Rather, this proceeding is to determine whether Petitioner demonstrated by a preponderance of the evidence that it met the criteria applicable for re-licensure." See Endnote 5 of the Recommended Order. The ALJ concluded that "[a]s an applicant for a license, Petitioner bears the burden of proof in this proceeding to demonstrate by a preponderance of the evidence that it satisfied all the requirements for licensure and was entitled to receive the license." See Paragraph 45 of the Recommended Order.

It is unclear why the ALJ chose to utilize the reasoning of Davis Family Care Home v. Department of Children and Family Services, 117 So. 3d 464 (Fla. 2d DCA 2013), in determining the burden of proof in this matter. The Florida Supreme Court's Osborne case is controlling case law. Further, as the ALJ recognized in Paragraph 31 of the Recommended Order, in Davis, the Department of Children and Family Services ("DCF") considered its proposed denial letter to be "an administrative complaint of [sic] the purposes of section 120.60(5), F.S.", thus clearly indicating that DCF considered its action to be penal. Id at 466. DCF's treatment of its proposed denial as an administrative complaint was the key factor in the Davis court's determination that DCF was required to prove the alleged violations by clear and convincing evidence, for the court said that "[w]e reiterate that the proceedings here were determined by DCF in its proposed denial, a self-proclaimed administrative complaint, to be

disciplinary in nature." Id at 469. Likewise, Coke v. Department of Children and Family Services, 704 So. 2d 726 (Fla. 5th DCA 1998), has no bearing on this matter because, in Coke, DCF "agree[d] that in this proceeding it had the burden of proving [Coke's] lack of entitlement to a renewal of her license and that the evidence needed to be clear and convincing." Here, the Agency did not call its December 12, 2013 Notice of Intent to Deny Renewal Application an "administrative complaint," nor did the Agency agree that it bore the burden of proving the violations alleged in the December 12, 2013 Notice of Intent to Deny Renewal Application by clear and convincing evidence.

In regard to the Agency's exceptions as they pertain to Paragraphs 14, 15, 17, 19, 20, 38, 39, 44, 46 and Endnote 8 of the Recommended Order, the violations referenced in those paragraphs were alleged in both the licensure renewal case and the fine case, and the ALJ made no distinction as to which one of the two cases he was addressing when he found that the Agency proved the violations by clear and convincing evidence. Thus, the Agency cannot, in good faith, reject or modify the ALJ findings of fact and conclusions of law concerning the burden of proof in Paragraphs 14, 15, 17, 19, 20, 38, 39, 44, 46 and Endnote 8 of the Recommended Order. Paragraph 52 of the Recommended Order recites what Avalon argued, not what the ALJ determined was the burden of proof in this case.

However, Paragraphs 30-32, 40-43, 48, 49 and 55 of the Recommended Order deal with the burden of proof issue as it pertains to the licensure renewal case only. In these paragraphs, the ALJ failed to follow the Florida Supreme Court's holding in Osborne and instead required the Agency to prove its allegations by clear and convincing evidence. Had the ALJ followed Osborne, the burden of proof would have remained with Avalon to prove it met all requirements to have its license renewed by a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

Though the outcome recommended by the ALJ will not change as a result, the Agency feels compelled to correct the ALJ's error in this regard in order to avoid confusion in future cases.

Thus, upon review of the entire record and the Osborne case, the Agency finds that the ALJ did not comply with the essential requirements of law when he used the incorrect burden of proof in Paragraphs 30-32, 40-43, 48, 49 and 55 of the Recommended Order. The Agency further finds that it has substantive jurisdiction over the conclusions of law in these paragraphs because it is the single state agency responsible for the licensure and regulation of assisted living facilities in Florida, and that it can substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency grants its exceptions to the extent that Paragraphs 30-31 of the Recommended Order are rejected in their entirety and Paragraphs 32, 40-43, 48, 49 and 55 of the Recommended Order are modified as follows:

> 32. ~~The best way to reconcile and harmonize the conflicting decisions on the burden and standard of proof is to place the burden on~~ In accordance with the principles set forth in Department of Banking and Finance v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996) AHCA ~~to~~ must prove the alleged violations in the Administrative Complaint by clear and convincing evidence and~~, if it does, allow~~ Avalon must ultimately prove by a preponderance of the evidence that its license should be renewed, notwithstanding ~~any violations that are proven~~the reasons AHCA gave for denying Avalon's licensure renewal.
>
> 40. Rule 58A-5.019(4) sets out staffing standards that required 212 staff hours for the seven Avalon residents (including R.M.) in September 2013 and also required a written work schedule reflecting Avalon's 24-hour staffing pattern. The preponderance of the evidence ~~was clear and convincing~~ showed that Avalon was not in compliance with this rule, resulting in Tag A079 (Staffing Standards - Levels), a Class III violation under section 408.813(2).
>
> 41. Rule 58A-5.024 requires that an ALF maintain and make available for inspection certain resident records, including an up-to-date admission and discharge log. The preponderance of the evidence ~~was clear and convincing~~ showed that Avalon was not in compliance with this rule because the log did not reflect R.M.

having been admitted, which resulted in Tag A0160 (Records - Facility), a Class III violation under section 408.813(2).

42. Section 429.24 and rule 58A-5.025 require that ALFs enter into resident contracts. The preponderance of the evidence ~~was clear and convincing~~ showed that Avalon was not in compliance with this statute and rule because it had no resident contract with R.M., which resulted in Tag A0167 (Resident Contracts), a Class III violation under section 408.813(2).

43. Rule 58A-5.033 requires that ALF staff cooperate with AHCA personnel during surveys, complaint investigations, monitoring visits, implementation of correction plans, license application and renewal procedures, and other activities necessary to ensure compliance. AHCA personnel are required to interview staff privately to determine compliance with resident care standards. Id. at (1). The preponderance of the evidence ~~was clear and convincing~~ showed that Avalon was not in compliance with this rule because Mrs. Carter-Walker instructed staff not to answer surveyor questions that might lead to findings of deficiencies, except through her, and staff followed those instructions by not cooperating with AHCA personnel during the R.M. complaint investigation, which resulted in Tag A0190 (Administrative Enforcement), a Class III violation under section 408.813(2).

48. The deficiencies tagged as a result of the July 2013 re-licensure survey ~~were proven by clear and convincing evidence. All those deficiencies~~ were either Class III or Class IV deficiencies that were promptly corrected and were cleared by AHCA, and Avalon cannot be fined or disciplined for them. They can be considered in determining whether AHCA proved by a preponderance of the evidence there was a pattern of deficient performance that would warrant licenseure ~~discipline~~denial under section 408.815(1)(d), Florida Statutes. But see Conclusion of Law 52, infra.

49. Under section 429.14(3), AHCA "may deny a license to any applicant or controlling interest as defined in part II of chapter 408 which has or had a 25-percent or greater financial or ownership interest in any other facility licensed under this part, or in any entity licensed by this state or another state to provide health or residential care, which facility or entity during the 5 years prior to the application for a license closed due to financial inability to operate; had a receiver appointed or a license denied, suspended, or revoked; was subject to a moratorium; or had an injunctive proceeding initiated against it." The preponderance of the evidence showed~~was clear and convincing~~ that this ground for

denial of Avalon's re-licensure exists by virtue of the Amended Final Order entered in DOAH Case 09-6342, which was affirmed on appeal.

55. The preponderance of the ~~clear and convincing~~ evidence also proved these charges and grounds (although they add nothing to the other proven charges and grounds).

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

1. In regard to DOAH Case No. 14-0610, Avalon's licensure renewal application is hereby denied. In regard to DOAH Case No. 14-1339, a $5,500 fine is hereby imposed on Avalon. The parties shall govern themselves accordingly.

2. In order to ensure the health, safety, and welfare of Avalon's clients, the denial of Avalon's licensure renewal application is stayed for 30 days from the filing date of this Final Order for the sole purpose of allowing the safe and orderly discharge of clients. § 408.815(6), Fla. Stat. Avalon is prohibited from accepting any new admissions during this period and must immediately notify the clients that they will soon be discharged. Avalon must comply with all other applicable federal and state laws. At the conclusion of the stay, or upon the discontinuance of operations, whichever is first, Avalon shall promptly return the license certificate which is the subject of this agency action to the appropriate licensure unit in Tallahassee, Florida. Fla. Admin. Code R. 59A-35.040(5).

3. In accordance with Florida law, Avalon is responsible for retaining and appropriately distributing all client records within the timeframes prescribed in the authorizing statutes and applicable administrative code provisions. Avalon is advised of Section 408.810, Florida Statutes.

4. In accordance with Florida law, Avalon is responsible for any refunds that may have to be made to the clients.

5. Avalon is given notice of Florida law regarding unlicensed activity. Avalon is advised of Section 408.804 and Section 408.812, Florida Statutes. Avalon should also consult the applicable authorizing statutes and administrative code provisions. Avalon is notified that the denial of its licensure renewal application may have ramifications potentially affecting accrediting, third party billing including but not limited to the Florida Medicaid program, and private contracts.

6. Unless payment has already been made, payment in the amount of $5,500 is now due from Avalon as a result of the agency action. Such payment shall be made in full within 30 days of the filing of this Final Order unless other payment arrangements have been made. The payment shall be made by check payable to Agency for Health Care Administration, and shall be mailed to the Agency for Health Care Administration, Attn. Revenue Management Unit, Office of Finance and Accounting, 2727 Mahan Drive, Mail Stop 14, Tallahassee, FL 32308.

DONE AND ORDERED in Tallahassee, Florida, on this 3 day of March, 2015.

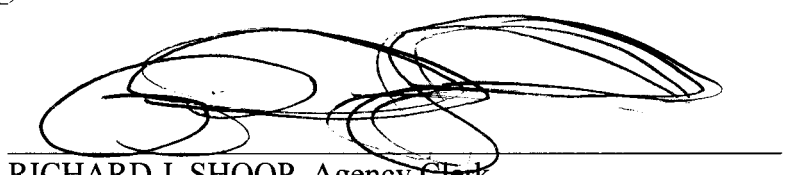
ELIZABETH DUDEK, Secretary
AGENCY FOR HEALTH CARE ADMINISTRATION

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 CERTIFY that a true and correct copy of this Final Order was served on the below-named persons by the method designated on this 30 day of March, 2015.



RICHARD J. SHOOP, Agency Clerk
AGENCY FOR HEALTH CARE ADMINISTRATION
2727 Mahan Drive, MS #3
Tallahassee, Florida 32308
Telephone: (850) 412-3630

Copies furnished to:

Jan Mills Facilities Intake Unit Agency for Health Care Administration (Electronic Mail)	Catherine Anne Avery, Unit Manager Assisted Living Unit Agency for Health Care Administration (Electronic Mail)

Finance & Accounting Revenue Management Unit Agency for Health Care Administration (Electronic Mail)	Theresa DeCanio, Field Office Manager Area 7 Field Office (Electronic Mail)
Katrina Derico-Harris Medicaid Accounts Receivable Agency for Health Care Administration (Electronic Mail)	Chiquittia S.E. Carter-Walker, Administrator Avalon's Assisted Living 1250 Willow Branch Drive Orlando, Florida 32828 (U.S. Mail)
Shawn McCauley Medicaid Contract Management Agency for Health Care Administration (Electronic Mail)	John E. Terrel, Esquire John E. Terrel, P.A. 1700 North Monroe Street, Suite 11-116 Tallahassee, Florida 32303 (U.S. Mail)
Honorable J. Lawrence Johnston Administrative Law Judge Division of Administrative Hearings 1230 Apalachee Parkway Tallahassee, Florida 32399-3060 (electronic filing)	

NOTICE OF FLORIDA LAW

408.804 License required; display.--

(1) It is unlawful to provide services that require licensure, or operate or maintain a provider that offers or provides services that require licensure, without first obtaining from the agency a license authorizing the provision of such services or the operation or maintenance of such provider.

(2) A license must be displayed in a conspicuous place readily visible to clients who enter at the address that appears on the license and is valid only in the hands of the licensee to whom it is issued and may not be sold, assigned, or otherwise transferred, voluntarily or involuntarily. The license is valid only for the licensee, provider, and location for which the license is issued.

408.812 Unlicensed activity. --

(1) A person or entity may not offer or advertise services that require licensure as defined by this part, authorizing statutes, or applicable rules to the public without obtaining a valid license from the agency. A licenseholder may not advertise or hold out to the public that he or she holds a license for other than that for which he or she actually holds the license.

(2) The operation or maintenance of an unlicensed provider or the performance of any services that require licensure without proper licensure is a violation of this part and authorizing statutes. Unlicensed activity constitutes harm that materially affects the health, safety, and welfare of clients. The agency or any state attorney may, in addition to other remedies provided in this part, bring an action for an injunction to restrain such violation, or to enjoin the future operation or maintenance of the unlicensed provider or the performance of any services in violation of this part and authorizing statutes, until compliance with this part, authorizing statutes, and agency rules has been demonstrated to the satisfaction of the agency.

(3) It is unlawful for any person or entity to own, operate, or maintain an unlicensed provider. If after receiving notification from the agency, such person or entity fails to cease operation and apply for a license under this part and authorizing statutes, the person or entity shall be subject to penalties as prescribed by authorizing statutes and applicable rules. Each day of continued operation is a separate offense.

(4) Any person or entity that fails to cease operation after agency notification may be fined $1,000 for each day of noncompliance.

(5) When a controlling interest or licensee has an interest in more than one provider and fails to

license a provider rendering services that require licensure, the agency may revoke all licenses and impose actions under s. 408.814 and a fine of $1,000 per day, unless otherwise specified by authorizing statutes, against each licensee until such time as the appropriate license is obtained for the unlicensed operation.

(6) In addition to granting injunctive relief pursuant to subsection (2), if the agency determines that a person or entity is operating or maintaining a provider without obtaining a license and determines that a condition exists that poses a threat to the health, safety, or welfare of a client of the provider, the person or entity is subject to the same actions and fines imposed against a licensee as specified in this part, authorizing statutes, and agency rules.

(7) Any person aware of the operation of an unlicensed provider must report that provider to the agency.