STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Petitioner,

v.

USA REHAB AND CHIROPRACTIC CENTER, INC.,

Respondent.
_____/

DOAH CASE NO. 14-3118
AHCA NO. 2014000874
RENDITION NO.: AHCA-15-0312-FOF-OLC

FINAL ORDER

This cause was referred to the Division of Administrative Hearings where the assigned Administrative Law Judge (ALJ), Linzie F. Bogan, conducted a formal administrative hearing. At issue in this case is whether Respondent should have a penalty and fine imposed against its license for alleged statutory and rule violations. The Recommended Order dated April 22, 2015, 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.[1]

In determining how to rule upon Petitioner'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

[1] It appears from the Division of Administrative Hearings' ("DOAH") website that counsel for Respondent filed exceptions with DOAH. However, both Rule 28-106.217, F.A.C., and the Recommended Order itself direct the parties to file exceptions with the Agency. Thus, because the exceptions are not properly before the Agency, the Agency will not address them.

> 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 Petitioner's exceptions:

In its first exception, Petitioner takes exception to the findings of fact in Paragraph 6 of the Recommended Order, arguing that the ALJ erred in finding that "Count I of the Administrative Complaint does allege, however, that Respondent failed to maintain a copy of the Level 2 background screening results in the personnel file for Employee 'C.'" Petitioner is correct. There is no such allegation in Count I of the Administrative Complaint. Thus, the ALJ's finding of fact quoted above is not based on competent, substantial evidence. Therefore, the Agency grants Petitioner's first exception and modifies Paragraph 6 of the Recommended Order as follows:

> 6. The Administrative Complaint does not allege that employee "C" had not passed a Level 2 background screening at the time of the survey conducted by Ms. Bulger. Count I of the Administrative Complaint does allege, however, that Respondent failed to ~~maintain~~produce a copy of the Level 2 background screening

results ~~in the personnel file~~ for employee "C~~.~~" when Ms. Bulger asked for them during the survey.

In its second exception, Petitioner takes exception to the findings of fact in Paragraph 7 of the Recommended Order, arguing that there is no allegation in the Administrative Complaint that Employee "C" was not licensed. Petitioner's argument does not constitute a valid basis upon which the Agency can reject or modify the findings of fact in Paragraph 7 of the Recommended Order. Since the findings of fact in Paragraph 7 are based on competent, substantial evidence (See Transcript, Pages 89, 93, 95, 107 and 109-111), the Agency cannot 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 must deny Petitioner's second exception.

In its third exception, Petitioner takes exception to the findings of fact in the third and fourth sentences of Paragraph 14 of the Recommended Order, arguing that the findings of fact are unrelated to the proven allegations and merely confuse the issue of the requirement that Respondent verify the licenses of its employees. Petitioner's argument is not a valid basis upon which the Agency can reject or modify a finding of fact. The findings of fact in the third and fourth sentences of Paragraph 14 of the Recommended Order are based on competent, substantial evidence. See Transcript, Pages 107 and 109. 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 Petitioner's third exception.

In its fourth exception, Petitioner takes exception to the conclusions of law in Paragraph 34 of the Recommended Order, arguing that the ALJ's conclusions of law are erroneous.

However, the ALJ's conclusions of law in Paragraph 34 are correct. None of the statutes or rules cited in the Agency's Administrative Complaint require Respondent to produce the results of its employees' background screenings during a survey. Instead, the statutes cited in the Administrative Complaint state that Respondent must comply with the background screening requirements of Chapter 435, Florida Statutes. There was no evidence in the record that Respondent failed to do so. Instead, the record evidence indicates Respondent complied with the background screening requirements of Chapter 435, Florida Statutes, in regard to Employee "C." See Transcript, Pages 89, 93, 95, 107 and 109-111. As the ALJ concluded in Paragraph 34 of the Recommended Order, the Administrative Complaint also cited Rule 59A-33.012(5)(h), Florida Administrative Code, which requires Respondent to have personnel files readily available for review at the time of the survey. There was no record evidence that Respondent violated this provision. In addition, there were no statutes or rules cited to in the Administrative Complaint that imposed a requirement that Respondent produce the results of its employees' background screening results during the survey. Had the Administrative Complaint alleged Respondent violated Rule 59A-33.012(5)(r), Florida Administrative Code, by failing to produce a log of the employees who had undergone Level 2 background screening, Petitioner would have proven a violation of that rule by clear and convincing evidence based on the evidence presented at hearing. See, e.g., Transcript, Pages 24-27. However, a licensee cannot be found guilty of violations that are not alleged in an administrative complaint. See Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996) ("Predicating disciplinary action against a licensee on conduct never alleged in an administrative complaint or some comparable pleading violates the Administrative Procedures Act."). Thus, while the Agency has substantive jurisdiction over the conclusions of law in Paragraph 34 of the Recommended Order, it cannot

substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency must deny Petitioner's fourth exception.

In its fifth exception, Petitioner takes exception to the conclusions of law in Paragraphs 44 and 45 of the Recommended Order, arguing that the conclusions of law are not supported by competent, substantial evidence and should be stricken. Specifically, Petitioner argues that the ALJ erred in requiring it to show the extent of Respondent's non-compliance with the requirements of section 400.9935(1)(a)-(g), Florida Statutes, in order to prove the violation alleged in Count III of the Administrative Complaint. Rule 59A-33.008(1), Florida Administrative Code, states that "[f]ailure of an appointed medical or clinic director to substantially comply with health care clinic responsibilities under Rule 59A-33.012, F.A.C. and Sections 400.9935(1)(a)-(i), F.S., shall be grounds for the revocation or suspension of the license and assessment of a fine pursuant to Section 400.995(1), F.S." (Emphasis added). Count III of the Administrative Complaint alleges Respondent had "no documentation demonstrating in writing compliance, when, and what action was taken by the Clinic Director to perform the functions, duties of all the clinic responsibilities," which is a violation of Rule 59A-33.012(5)(s), Florida Administrative Code. As the ALJ concluded, Petitioner proved this allegation at hearing. However, Count III of the Administrative Complaint fails to allege how Respondent's violation of Rule 59A-33.012(5)(s), Florida Administrative Code, was a failure by Respondent to "substantially comply with health care clinic responsibilities under Rule 59A-33.012, F.A.C. and Sections 400.9935(1)(a)-(i), F.S." as required by Rule 59A-33.008(1), Florida Administrative Code, which, in turn, would warrant the revocation of Respondent's license under the rule or under section 400.995(1), Florida Statutes.[2] Indeed, as the ALJ concluded in Paragraph 45 of the

[2] The ALJ's conclusion in Paragraph 44 of the Recommended Order that Petitioner proved a violation of Rule 59A-33.012(5)(s), Florida Administrative Code, stands in opposition to the ALJ's conclusion in Paragraph 49 of the

Recommended Order, Petitioner put forth no evidence explaining what, if any, of the factors listed in section 400.995(1), Florida Statutes, Petitioner considered when it imposed the penalties in the Administrative Complaint. Thus, while the Agency has substantive jurisdiction over the conclusions of law in Paragraphs 44 and 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 Petitioner's fifth exception.

In its sixth exception, Petitioner takes exception to the conclusions of law in Paragraphs 46 and 47 of the Recommended Order, arguing that the conclusions of law in these paragraphs are erroneous, and should be rejected by the Agency. The ALJ found in Paragraph 46 of the Recommended Order that Respondent had taken action to correct the deficiencies, which would mitigate the proposed penalty of revocation of Respondent's license under section 400.995(1)(b), Florida Statutes. This conclusion of law is supported by competent, substantial evidence. See Transcript, Pages 100-101; Petitioner's Exhibit 7. In Paragraph 47 of the Recommended Order, the ALJ found that the violation of Count II was a first offense, which Petitioner disputed in its exception. However, there is no allegation in the Administrative Complaint that Respondent committed this offense on a prior occasion, and no record evidence that contradicts the ALJ's conclusion of law, so the Agency cannot not reject or modify the ALJ's conclusion of law concerning Count II of the Administrative Complaint either. In essence, Petitioner is asking the Agency to increase the ALJ's recommended penalty. However, the Agency is only permitted to do so if it reviews the complete record of the case and states with particularity its reasons for increasing the recommended penalty by citing to the record. See Criminal Justice Standards and

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Recommended Order that Count III of the Administrative Complaint should be dismissed. The Agency can impose penalties on Respondent for such a violation under section 400.995(1), Florida Statutes. However, Petitioner failed to take exception to the conclusions of law in Paragraph 49 of the Recommended Order. Therefore, the Agency will not disturb them.

Training Commission v. Bradley, 596 So. 2d 661, 664 (Fla. 1992). Petitioner in its exceptions offers no specific record citations that warrant increasing the ALJ's recommended penalty, and the Agency cannot find any record evidence that would support such an increase. Thus, the Agency finds that, while it does have substantive jurisdiction over the conclusions of law in Paragraphs 46 and 47 of the Recommended Order, it cannot substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency must deny Petitioner's sixth exception.

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. 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 hereby suspends Respondent's health care clinic license for a period of 10 business days from the date of rendition of this Order, and imposes a $3,500 fine on Respondent for violations of Counts I and II of the Administrative Complaint. The Agency hereby dismisses Count III of the Administrative Complaint. The parties shall govern themselves accordingly.

Unless payment has already been made, payment in the amount of $3,500 is now due from the Respondent 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. Central Systems Management Unit, 2727 Mahan Drive, Mail Stop 61, Tallahassee, Florida 32308.

DONE and ORDERED this 27 day of May, 2015, in Tallahassee, Florida.

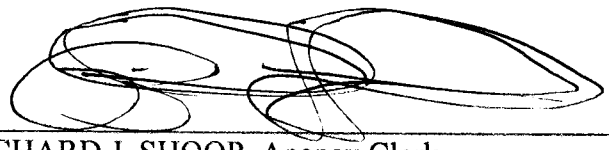
ELIZABETH DUDEK, SECRETARY
AGENCY FOR HEALTH CARE ADMINISTRATION

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 the designated method to the persons named below on this 27th day of May, 2015.



RICHARD J. SHOOP, Agency Clerk
Agency for Health Care Administration
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE ADMINISTRATION,

Petitioner,

vs. Case No. 14-3118

USA REHAB AND CHIROPRACTIC CENTER, INC.,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held by video teleconference between sites in Orlando and Tallahassee, Florida, on December 11, 2014, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Warren J. Bird, Esquire
Agency for Health Care Administration
Building 3, Mail Stop 3
2727 Mahan Drive
Tallahassee, Florida 32308

For Respondent: Richard D. Sierra, Esquire
Kosto and Rotells, P.A.
Post Office Box 113
Orlando, Florida 32802

STATEMENT OF THE ISSUE

Whether Respondent, USA Rehab and Chiropractic Center, Inc., should have a penalty and fine imposed against its license for alleged statutory and rule violations.

PRELIMINARY STATEMENT

On January 29, 2014, the Agency for Health Care Administration (Petitioner or Agency), filed a three-count Administrative Complaint against USA Rehab and Chiropractic Center, Inc. (Respondent).

The Administrative Complaint alleges violations of sections 400.991, 400.9935, 408.809, 408.810, Florida Statutes,[1/] and Florida Administrative Code Rules 59A-33.008 (2006) and 59A-33.012 (2006). Respondent disputed the allegations in the Administrative Complaint and requested a hearing pursuant to section 120.57(1), Florida Statutes. On July 8, 2014, the matter was referred to the Division of Administrative Hearings (DOAH) for the assignment of an administrative law judge to conduct the final administrative hearing.

At the hearing, Vanessia Bulger, who is employed by Petitioner as a health facility evaluator II, testified on behalf of Petitioner. Petitioner's Exhibits 1 through 10 were received in evidence. Petitioner's Exhibit 7 was received in evidence for the limited purpose of demonstrating that Respondent submitted a

correction plan to address any alleged deficiencies and not for the purpose of proving the alleged deficiencies.

Respondent offered testimony from Emmanuel L. Nau, M.D., who is the medical/clinic director for the facility, and Lavaud Fevry, who is the owner and chief administrator for the facility. Respondent's Exhibit 1 (stamped S28) was received in evidence. Respondent proffered Exhibit 2 after it was not admitted into evidence.

The Transcript of the final hearing was filed on January 22, 2015. Respondent moved for an extension of time for the submission of its proposed recommended order, which was granted. Each party timely filed a Proposed Recommended Order which received due consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

1. On August 23, 2013, Respondent submitted to Petitioner a Health Care Licensing Application (Application) using AHCA Recommended Form 3110-0013, August 2013. The Application was submitted for the purpose of renewing Respondent's license to operate as a health care clinic.

A. Personnel File and Background Screening Results

2. Section nine of the Application seeks a listing of Respondent's "licensed health care practitioners and all personnel who provide personal care services to clients or with

access to client funds." Employees that fall within this classification are required to submit to, and successfully pass, a Level 2 background screening. Respondent identified on the Application four individuals that fell within the designated category.

3. Florida Administrative Code Rule 59A-33.012(1) directs that a "survey" will be conducted for "[a]pplications for renewal licenses." This rule also provides that the survey process "is an onsite inspection and review of the health care clinic facility or administrative office, by authorized Agency employees to determine the health care clinic's compliance with the minimum standards established by the Act, its statutory references and rules regulating the operation and licensure of health care clinics." Vanessia Bulger was assigned to conduct the survey related to Respondent's Application.

4. On November 25, 2013, Ms. Bulger visited Respondent's facility for the purpose of conducting the required survey. Ms. Bulger met with the owner of the facility, Mr. Lavaud Fevry. While meeting with Ms. Bulger, Mr. Fevry disclosed that after submitting his Application to the Agency, the health care clinic hired two additional employees who provided personal care services to the clinic's clients.

5. Ms. Bulger wrote the names of the two new employees on her copy of section nine of the Application and further

identified these employees with the letters "C" and "D." Employee "C" is Eugene Grazette and employee "D" is Dexter K. John. For employee "C," Ms. Bulger wrote "Eugene Grazette - 8-31-15 - NO BG" and for employee "D" she wrote "Dexter K. John 10-17-09 BG." Ms. Bulger testified that "NO BG" stands for "no background screening results."

6. The Administrative Complaint does not allege that employee "C" had not passed a Level 2 background screening at the time of the survey conducted by Ms. Bulger. Count I of the Administrative Complaint does allege, however, that Respondent failed to maintain a copy of the Level 2 background screening results in the personnel file for employee "C."

7. It is undisputed that employee "C," during all times relevant hereto, possessed a valid health provider license that authorized him to deliver personal care services to Respondent's clients. Additionally, the evidence also establishes that on September 18, 2013, approximately two months before the survey, Respondent, via electronic submission, requested a Level 2 background screening for employee "C."

8. Ms. Bulger, as part of the survey process, completed a "Heath [sic] Care Clinic Surveyor Worksheet & Facility Questionnaire." Item nine of the questionnaire asks, "[i]s there a log of all natural persons required to be screened and who have been screened under Level 2 criteria?" In response to this

question, Ms. Bulger wrote "NO - New Chiropractor - massage therapist not listed." The questionnaire does not ask on any of its 10 pages whether a copy of the Level 2 background screening results is maintained in the personnel files of the employees of the clinic. At the time of the survey, employee "C's" personnel file did not contain a copy of the results from his Level 2 background screening.

B. Attestation Regarding Background Screening

9. Section 10 of the Application is labeled "Affidavit." Mr. Fevry provided the following attestation in support of the Application:

> I, Lavaud Fevry, hereby swear or affirm that the statements in this application are true and correct. As administrator or authorized representative of the above named provider/facility, I hereby attest that all employees required by law to undergo Level 2 background screening have met the minimum standards of sections 435.04, and 408.809(5), Florida Statutes (F.S.) or are awaiting screening results.

10. Count I of the Administrative Complaint also alleges that when Mr. Fevry met with Ms. Bulger during the survey he informed her that:

> he had no affidavit or documentation that the employees, including the Medical Director, had . . . attest[ed] to meeting the requirements for qualifying for employment pursuant to Florida law and agreeing to inform the employer immediately if arrested for any of the disqualifying offenses while

employed by the employer per chapter 435, Florida Statutes.

The evidence establishes that Respondent's employees had not completed the required attestations until after the survey.

11. In December 2013 Respondent submitted a plan of correction to address problems related to employee attestations.

12. Exactly 21 months prior to the survey that provides the basis for the instant dispute, Petitioner, on February 23, 2012, conducted a survey of Respondent's clinic. As a part of this earlier survey, Respondent was also cited for failing to ensure that required staff completed attestations, subject to penalty of perjury, wherein they acknowledged meeting the requirements for employment and agreeing to immediately inform Respondent if arrested for a disqualifying offense.

C. Verifying Florida Licenses

13. Emmanuel Nau, M.D. has served as Respondent's medical/clinic director since August 2009. Dr. Nau, at all times relevant hereto, held Florida Department of Health medical license number ME48249. Dr. Nau, as medical director for Respondent's clinic, acknowledges that he has legal responsibility for the clinic as specified in section 400.9935, Florida Statutes.

14. On the day of the license renewal survey, Ms. Bulger inquired of Dr. Nau as to whether, in his capacity as medical

director, he was verifying that all practitioners at the clinic who were providing health care services or supplies to clinic patients had active, unencumbered Florida licenses. Dr. Nau, in response to the inquiry, admitted to Ms. Bulger that he had not verified the license status of the clinic's practitioners. There was, however, no evidence indicating that Respondent's practitioners did not actually possess active, unencumbered Florida licenses during the period in question. Additionally, no evidence was offered that Respondent had previously been cited for committing violations of this nature.

15. In December 2013 Respondent submitted a plan of correction that was designed to shore up its system of verifying that its employees have active, unencumbered Florida licenses.

D. Failure to Document "When" and "What"

16. Ms. Bulger testified that during the survey, Respondent failed to produce, upon request, confirmation that Dr. Nau documented, for the two years prior to the survey, compliance of when and what action was taken relative to several of the functions, duties and clinic responsibilities enumerated in section 400.9935(1)(a)-(g), Florida Statutes.

17. When Ms. Bulger, on the day of the survey, questioned Dr. Nau about the omissions, he admitted that he failed to document and to maintain for the previous two years, records demonstrating "compliance, when and what action" he took in

regards to the performance of his functions, duties, and responsibilities as medical director for the clinic.

18. Dr. Nau also admitted during the final hearing that he had not been listing in his reports all information related to the performance of his duties as medical director of Respondent's clinic. No evidence was offered that Respondent had previously been cited for committing violations of this nature.

19. In December 2013 Respondent submitted a plan of correction designed to ensure that clinic reports adequately address those matters required by statute and rule.

CONCLUSIONS OF LAW

20. DOAH has jurisdiction over the subject matter of and the parties to this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2014).

21. This is a proceeding in which Petitioner seeks to suspend or revoke Respondent's license to operate as a health care clinic. Because disciplinary proceedings are considered to be penal in nature, Petitioner is required to prove the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

22. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to

the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). As stated by the Florida Supreme Court, the standard:

> entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994)(citing, with approval, Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); see also In re Henson, 913 So. 2d 579, 590 (Fla. 2005). "Although this standard of proof may be met where the evidence is in conflict, it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., 590 So. 2d 986, 989 (Fla. 1991).

23. Petitioner is limited to proving the charges and allegations pled in the Administrative Complaint. Cf. Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005); Aldrete v. Dep't of Health, Bd. of Med., 879 So. 2d 1244 (Fla. 1st DCA 2004); Ghani v. Dep't of Health, 714 So. 2d 1113 (Fla. 1st DCA 1998); Willner v. Dep't of Prof'l Reg., Bd. of Med., 563 So. 2d 805 (Fla. 1st DCA 1990).

24. Disciplinary provisions such as the referenced sections must be strictly construed in favor of the licensee. Elamariah v. Dep't of Prof'l Reg., 574 So. 2d 164 (Fla. 1st DCA 1990);

Taylor v. Dep't of Prof'l Reg., 534 So. 2d 782, 784 (Fla. 1st DCA 1988). Disciplinary statutes must be construed in terms of their literal meaning, and words used by the Legislature may not be expanded to broaden their application. Latham v. Fla. Comm'n on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997); see also Beckett v. Dep't of Fin. Servs., 982 So. 2d 94, 100 (Fla. 1st DCA 2008); Dyer v. Dep't of Ins. & Treas., 585 So. 2d 1009, 1013 (Fla. 1st DCA 1991).

A. Count I(a) - Employee C's Personnel File

25. Section 400.991(5)(b), Florida Statutes, of the Health Care Clinic Act, provides that the Agency for Health Care Administration, as part of the licensing requirements for health care clinics such as that operated by Respondent, "shall require level 2 background screening for applicants and personnel as required in s. 408.809(1)(e) pursuant to chapter 435 and s. 408.809."

26. Section 408.809, Florida Statutes, provides, in part, that:

> (1) Level 2 background screening pursuant to chapter 435 must be conducted through the agency on each of the following persons, who are considered employees for the purposes of conducting screening under chapter 435[:]
>
> * * *
>
> (e) Any person, as required by authorizing statutes, seeking employment with a licensee or provider who is expected to, or whose

> responsibilities may require him or her to, provide personal care or services directly to clients or have access to client funds, personal property, or living areas . . . .

27. Section 435.06(2), Florida Statutes, provides, in part, that:

> (a) An employer may not hire, select, or otherwise allow an employee to have contact with any vulnerable person that would place the employee in a role that requires background screening until the screening process is completed and demonstrates the absence of any grounds for the denial or termination of employment. If the screening process shows any grounds for the denial or termination of employment, the employer may not hire, select, or otherwise allow the employee to have contact with any vulnerable person that would place the employee in a role that requires background screening unless the employee is granted an exemption for the disqualification by the agency as provided under s. 435.07.
>
> * * *
>
> (d) An employer may hire an employee to a position that requires background screening before the employee completes the screening process for training and orientation purposes. However, the employee may not have direct contact with vulnerable persons until the screening process is completed and the employee demonstrates that he or she exhibits no behaviors that warrant the denial or termination of employment.

28. Petitioner does not cite, nor has the undersigned found, any specific statute requiring that an applicant for health care clinic license renewal maintain a copy of Level 2 background screening results in an employee's personnel file.

29. Florida Administrative Code Rules 59A-33.002 (2006), 59A-33.060 (2006), and 59A-35.090 (2006) are the Agency's rules regarding the requirements for background screenings, and nothing in either of the rules directs that background screening results must be kept in an employee's personnel file.

30. Rule 59A-33.002(1)(e) provides, in part, that an applicant for license renewal shall include with the application:

> [a]ll information required . . . to enable the Agency to evaluate and determine compliance with the Act regarding background screening [and] [t]his information must include the identification of all individuals who must be the subject of Level 2 background screening under standards established in Chapter 435 and Section 400.991(7)(d), F.S., as required on AHCA Form 3110-0013, July 2006, Application for Health Care Clinic Licensure, adopted by reference.

31. Rule 59A-35.060(1)(w) provides that applicants for licensure must apply "using the program specific forms" and health care clinics must use "AHCA Form 3110-0013, Rev. July 2009."

32. There is nothing in the express provisions of either of these rules requiring that Level 2 background screening results be kept in an employee's personnel file. While it is possible that AHCA Form 3110-0013, July 2006, and AHCA Form 3110-0013, Rev. July 2009, require that Level 2 background screening results be maintained in an employee's personnel file, the undersigned is

unable to draw any conclusions as to what the referenced forms require, given that they are not a part of the record in this proceeding.

33. Rule 59A-35.090(3)(a) provides that "[p]ersons required to undergo Level 2 background screening in accordance with a licensure application, must submit the completed and signed fingerprint card and screening fee with an application for licensure to the appropriate Agency licensing unit." Like the other cited rules, this rule is also devoid of any requirement that Level 2 background results be maintained in an employee's personnel file.

34. Rule 59A-33.012(5)(r) provides that health care clinics, at the time of the survey, shall have readily available for review a "[l]og of all natural persons required and who have been screened under Level 2 criteria of Chapter 435 and Section 400.991, F.S." Ms. Bulger, in her survey report, notes that Respondent did not maintain a log showing that employee "C" was "required to be screened . . . [or was] screened under Level 2 criteria." Despite the fact that Ms. Bulger's survey finding corresponds precisely with rule 59A-33.012(5)(r), Petitioner, nevertheless, charged Respondent with violating rule 59A-33.012(5)(h), which directs applicants for licensure to make employee personnel files available to the surveyor. Rule 59A-33.012(5)(h) is silent as to what is required to be in an

employee's personnel file, and Petitioner has failed to prove by clear and convincing evidence that the cited rule includes Level 2 background screening results within its scope. Petitioner has failed to meet its burden of proof with respect to this allegation.

B. Count I(b) - Attestation Regarding Background Screening

35. Section 435.05(2) provides that every covered employee who is required by law to submit to a Level 2 background screening "must attest, subject to penalty of perjury, to meeting the requirements for qualifying for employment pursuant to this chapter and agreeing to inform the employer immediately if arrested for any of the disqualifying offenses while employed by the employer." Section 408.809 also directs that licensees must, under penalty of perjury, attest by affidavit compliance with the provisions of chapter 435. Petitioner proved by clear and convincing evidence that Respondent failed to comply with the attestation requirements.

C. Count II - Monitoring Florida Licenses

36. Section 400.9935, Florida Statutes, provides, in part, as follows:

> (1) Each clinic shall appoint a medical director or clinic director who shall agree in writing to accept legal responsibility for the following activities on behalf of the clinic. The medical director or the clinic director shall:

* * *

> (b) Ensure that all practitioners providing health care services or supplies to patients maintain a current active and unencumbered Florida license.

* * *

> (f) Ensure compliance with the recordkeeping, office surgery, and adverse incident reporting requirements of chapter 456, the respective practice acts, and rules adopted under this part and part II of chapter 408.

37. Florida Administrative Code Rule 59A-33.008(1) provides as follows:

> [a] licensed health care clinic may not operate or be maintained without the day-to-day supervision of a single medical or clinic director as defined in Section 400.9905(5), F.S. The health care clinic responsibilities under Sections 400.9935(1)(a)-(g), F.S., cannot be met without an active, appointed medical or clinic director. Failure of an appointed medical or clinic director to substantially comply with health care clinic responsibilities under Rule 59A-33.012, F.A.C. and Sections 400.9935(1)(a)-(g), F.S., shall be grounds for the revocation or suspension of the license and assessment of a fine pursuant to Section 400.995(1), F.S.

38. With regards to section 400.9935(1)(b), Florida Administrative Code Rule 59A-33.012(5) provides that in order to facilitate a license survey, the health care clinic shall have available for review at the time of survey "the professional license or facsimile of the license for the medical or clinic director" and "[c]opies of professional licenses issued by the

respective boards and the Department of Health under the several practice acts."

39. The clear and convincing evidence establishes that on the day of the license renewal survey, Dr. Nau, in his capacity as medical director, failed to demonstrate that he was systematically verifying that practitioners at the clinic, who provided health care services or supplies directly to clinic patients, had active, unencumbered Florida licenses.

D. Count III - Failure to Document "When" and "What"

40. With regards to section 400.9935(1)(f), Florida Administrative Code Rule 59A-33.008(1) provides, in part, that "[t]he health care clinic responsibilities under section 400.9935(1)(a)-(g), F.S., cannot be met without an active, appointed medical or clinic director." Furthermore, rule 59A-33.012(5)(s) directs that a health care clinic shall have available for review at the time of the survey "[d]ocumentation for the past two years or from the date of licensure, whichever is earlier, demonstrating in writing compliance, when, and what action was taken by the medical or clinic director to perform the functions, duties and clinic responsibilities under section 400.9935(1)(a)-(g), F.S."

41. The clear and convincing evidence establishes that Dr. Nau failed to document and maintain for the two-year period preceding the survey, records demonstrating "compliance, when and

what action" he took in regards to the performance of his functions, duties, and responsibilities as medical director for the clinic.

E. Penalty and Administrative Fine

42. Section 400.995, Florida Statutes, provides, in part, as follows:

> (1) In addition to the requirements of part II of chapter 408, the agency may deny the application for a license renewal, revoke and suspend the license, and impose administrative fines of up to $5,000 per violation for violations of the requirements of this part or rules of the agency. In determining if a penalty is to be imposed and in fixing the amount of the fine, the agency shall consider the following factors:
>
> (a) The gravity of the violation, including the probability that death or serious physical or emotional harm to a patient will result or has resulted, the severity of the action or potential harm, and the extent to which the provisions of the applicable laws or rules were violated.
>
> (b) Actions taken by the owner, medical director, or clinic director to correct violations.
>
> (c) Any previous violations.
>
> (d) The financial benefit to the clinic of committing or continuing the violation.

43. Rule 59A-33.008(1) provides, in part, that the "[f]ailure of an appointed medical or clinic director to substantially comply with health care clinic responsibilities under Rule 59A-33.012, F.A.C. and [s]ection 400.9935(1)(a)-(g),

F.S., shall be grounds for the revocation or suspension of the license and assessment of a fine pursuant to [s]ection 400.995(1), F.S."

44. As to Counts I and II of the Administrative Complaint, the clear and convincing evidence establishes that Respondent substantially failed to comply with the provisions of the governing statutes and rules. While it is true, with respect to Count III, that Petitioner proved that Respondent failed to document "when" and "what" in some of his reports, the undersigned is unable to determine the extent of Respondent's non-compliance as there was no analysis of the reports offered into evidence by Petitioner. The requirement of substantiality cannot be met by simply offering the deficient reports into evidence "en masse" without any supporting analysis.

45. In considering the factors enumerated in section 400.995(1), there was no evidence establishing the gravity of the violations. This lack of evidence weighs against license revocation.

46. The evidence establishes that Respondent has taken action (e.g., submitting appropriate employee attestations) aimed at correcting the various deficiencies. This positive step by Respondent weighs against license revocation.

47. A second offense for failing to secure employee attestations does not in itself weigh in favor of license

revocation. However, the fact that Count I is the same as the violation committed by Respondent some 21 months prior justifies the imposition of a substantial monetary fine. Count II of the Administrative Complaint is a first offense occurrence and this weighs against license revocation.

48. Finally, there was no credible evidence offered establishing that Respondent derived a financial benefit as a consequence of or incentive for committing the enumerated violations. The absence of such evidence weighs against license revocation.

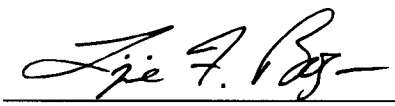
49. In considering the totality of the circumstances, Respondent's license should be suspended for 10 business days (five days each for Counts I and II), and a fine imposed in the amount of $1,500 for Count I and $2,000 for Count II. Count III of the Administrative Complaint should be dismissed because Petitioner failed to meet its burden of proving by clear and convincing evidence that Respondent failed to substantially comply with its health care clinic record keeping responsibilities.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Agency for Health Care Administration enter a Final Order finding that USA Rehab and Chiropractic Center, Inc., violated sections 400.991, 400.9935,

408.809, and 435.05(2), Florida Statutes. It is also recommended that the Agency suspend Respondent's health care clinic license for 10 business days and impose against Respondent a fine in the amount of $3,500. Finally, it is recommended that Count III of the Administrative Complaint be dismissed.

DONE AND ENTERED this 22nd day of April, 2015, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 22nd day of April, 2015.

ENDNOTE

[1/] Unless otherwise indicated, statutory references are to the version in effect at the time of the transactions that form the bases of the charges.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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