STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

HERNANDO-PASCO HOSPICE, INC.,

Petitioner,

v.

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent,

and

COMPASSIONATE CARE HOSPICE OF THE GULF COAST, INC. and WEST FLORIDA HEALTH, INC.,

Intervenors.
_____/

CASE NO. 14-5121CON
AHCA NO. 2014010607
RENDITION NO.: AHCA-15-0277-FOF-OLC

FINAL ORDER

This case was referred to the Division of Administrative Hearings (DOAH) where the assigned Administrative Law Judge (ALJ), Elizabeth W. McArthur, conducted a formal administrative hearing. At issue in this proceeding is whether the Agency erred in determining that there is a numeric need for one additional hospice program in service area 5A. The Recommended Order dated March 11, 2015 is attached to this final order and incorporated herein by reference.

RULINGS ON EXCEPTIONS

Respondent filed exceptions to the Recommended Order.

In determining how to rule upon Respondent's exceptions and whether to adopt the ALJ's Recommended Order in whole or in part, the Agency for Health Care Administration ("Agency" or "AHCA") must follow Section 120.57(1)(*l*), Florida Statutes, which provides in pertinent part:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. . . .

§ 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 Respondent's exceptions:

In Exception 1A, Respondent takes exception to the findings of fact in Paragraph 53 of the Recommended Order, arguing that the Agency's interpretation of its hospice need rule is based on the plain language of the rule itself. The findings of fact in Paragraph 53 of the Recommended Order are based on competent, substantial evidence. See Transcript, Pages 60, 70-71, 82, 83, 146-147 and 149. 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 Exception 1A.

In Exception 1B, Respondent takes exception to the conclusions of law in Paragraph 74 of the Recommended Order, arguing that it is the hospice need rule, not section 120.54, Florida Statutes, that requires the incorporation by reference of the data at issue. As the ALJ found in Paragraph 54 of the Recommended Order, the Agency believed that chapter 120 required it to incorporate the data by reference into its rule in order to use it. However, in Paragraph 74 of the Recommended Order, the ALJ concludes that the Administrative Procedures Act has no such requirement. The conclusions of law in Paragraph 74 of the Recommended Order involve an interpretation of the procedural aspects of rulemaking under chapter 120, Florida Statutes, which is outside of the Agency's substantive jurisdiction. Therefore, the Agency must deny Exception 1B.

In Exception 1C, Respondent takes exception to what it calls mixed findings of fact and conclusions of law in Paragraph 18 of the Recommended Order, arguing that the ALJ omitted the part of the rule that references incorporation. First, contrary to Respondent's argument, Paragraph 18 contains only factual findings. Second, Respondent's argument does not constitute a valid basis for rejecting or modifying findings of fact. The findings of fact in Paragraph 18 of the Recommended Order are based on competent, substantial evidence in the form of the rule itself and the case of Meridian v. Department of Health and Rehabilitative Services, 548 So. 2d 1169 (Fla. 1st DCA 1989). Thus, the Agency has no grounds for rejecting or modifying them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, the Agency denies Exception 1C.

In its Second Exception, Respondent takes exception to the ALJ's characterization of the materials incorporated into the hospice need rule as informational only that is found in Paragraphs 32, 35, 37, 38, 39, 82, 86, 94 and 96, arguing that the ALJ is wrong in her

characterization. The ALJ's characterization of the data as informational is both a factual finding, to the extent that it was derived from the evidence and testimony presented, and a legal conclusion based on the ALJ's interpretation of chapter 120, Florida Statutes. To the extent it is a factual finding, it is well-supported by competent, substantial evidence. See Transcript, Pages 31-34, 40, 49-50, 51-52, 54, 71-72, 85 and 149. To the extent that it is a legal conclusion, it involves an area of law that is outside of the Agency's substantive jurisdiction. Therefore, the Agency must deny Respondent's Second Exception.

In its Third Exception, Respondent takes exception to the conclusions of law in Paragraphs 32, 68, 73, 87, 95, 96 and 98 of the Recommended Order, arguing the ALJ's interpretation of the hospice need rule in these paragraphs is erroneous and should be rejected. Contrary to Respondent's argument, the plain language of Rule 59C-1.0355(4)(a), Florida Administrative Code, supports the ALJ's conclusions of law. The rule does state that it is incorporating specific reports by reference, yet offers no explanation as to why the reports are being incorporated. Further, the rule requires the Agency to use data that is available at least three months prior to publication of the fixed need pool. What the rule requires by its plain language, and what reports it incorporates are clearly not the same, as the evidence of this matter shows. See the ruling on Respondent's Second Exception supra. If the rule stated that the Agency could only use the data available in the reports that are incorporated by reference then Respondent's argument would make sense, but the rule by its plain language places no such limitation on the Agency. While the Agency has substantive jurisdiction over these conclusions of law since they involve one of its rules, it cannot substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency must deny Respondent's Third Exception.

Respondent next takes exception to the findings of fact in Paragraph 27 of the Recommended Order, arguing that the ALJ's findings are in error. The findings of fact in Paragraph 27 of the Recommended Order are based on competent, substantial evidence. See Transcript, Pages 55-56. 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 Respondent's exception to Paragraph 27 of the Recommended Order.

Respondent next takes exception to the conclusions of law in Paragraph 72 of the Recommended Order, arguing that the ALJ's interpretation of the rule is erroneous and should be rejected. Based on the reasoning set forth in the ruling on Respondent's Third Exception supra, which is hereby incorporated by reference, the Agency finds that it cannot substitute a conclusion of law that is as or more reasonable than that of the ALJ. Therefore, the Agency must deny Respondent's exception to Paragraph 72 of the Recommended Order.

Respondent next takes exception to the ALJ's conclusions of law in Paragraph 73 of the Recommended Order, arguing that the ALJ's conclusions of law are erroneous and should be stricken. Based on the reasoning set forth in the ruling on Respondent's Third Exception supra, which is hereby incorporated by reference, the Agency finds that it cannot substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency denies Respondent's exception to Paragraph 73 of the Recommended Order.

Respondent next takes exception to the conclusions of law in Paragraph 97 of the Recommended Order, arguing that the ALJ's conclusions of law are erroneous and rely on the ALJ's interpretation of the rule. Contrary to Respondent's argument, the conclusions of law in Paragraph 97 of the Recommended Order are based directly on the record evidence of this matter, specifically the testimony of the Agency's representative. See, e.g., Transcript, Pages 31-

34, 49-52, 54 and 71-72. The Agency cannot substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency must deny Respondent's exception to Paragraph 97 of the Recommended Order.

In its Fourth Exception, Respondent takes exception to Paragraph 64 of the Recommended Order, arguing that the ALJ departed from the essential requirements of law by failing to relinquish jurisdiction. The conclusions of law in Paragraph 64 of the Recommended Order involve a procedural issue under chapter 120, Florida Statutes, that involves the ALJ's determination of whether there are material facts in dispute. Thus, they are outside of the Agency's substantive jurisdiction. Therefore, the Agency must deny Respondent's Fourth Exception.

In its Fifth Exception, Respondent takes exception to Paragraph 30 of the Recommended Order, arguing that it is not supported by the evidence of this matter; and Paragraph 69 of the Recommended Order, arguing that it is erroneous. Based on the reasoning set forth in the rulings on Respondent's Second and Third Exceptions supra, which are hereby incorporated by reference, the Agency denies Respondent's Fifth Exception.

In its Sixth Exception, Respondent takes exception to Paragraphs 26, 42 and 50 of the Recommended Order, arguing that there is no evidence to support the ALJ's findings and conclusions in these paragraphs. Contrary to Respondent's argument, the findings of fact in Paragraphs 26, 42 and 50 of the Recommended Order are based on competent, substantial evidence. See Transcript, Pages 32-34, 42-46, 52, 96 and 104. Thus, the Agency is not at liberty to reject or modify the findings of fact in these paragraphs. See § 120.57(1)(*l*), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, the Agency denies Respondent's Sixth Exception.

In its Seventh Exception, Respondent takes exception to the findings of fact in Paragraph 48 of the Recommended Order, arguing that the ALJ's conclusion that rulemaking was practicable or feasible is irrelevant. However, there is no such conclusion in Paragraph 48 of the Recommended Order. Further, the findings of fact in Paragraph 48 of the Recommended Order are based on competent, substantial evidence. See Transcript, Pages 42-46, 52 and 136-137. 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 Respondent's Seventh Exception.

In its Eighth Exception, Respondent takes exception to the findings of fact in Paragraph 46 of the Recommended Order, arguing that the ALJ's findings are irrelevant and unauthorized because this matter did not involve a rule challenge. Paragraph 46 of the Recommended Order contains ultimate findings of fact based on the ALJ's weighing of competent, substantial evidence. See Transcript, Pages 42-46, 49-52, 53-54 and 71-72. Contrary to Respondent's allegations, the ALJ did not make any findings or conclusions that the Agency's decision concerning rulemaking was an unadopted rule. She only listed it as a possible explanation then made the ultimate finding that the Agency's decision meant that the reports it allegedly incorporated into its rule were inconsequential. That ultimate finding is also based on the ALJ's weighing of competent, substantial evidence referenced above. Thus, the Agency cannot re-weigh such evidence to make a contrary finding. See § 120.57(1)(*l*), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, the Agency denies Respondent's Eighth Exception.

In its Ninth Exception, Respondent takes exception to Paragraph 49 of the Recommended Order, arguing that the ALJ's findings and conclusions regarding "unadopted statements" are extraneous and irrelevant to this proceeding. Respondent's argument is not a valid basis for rejecting or modifying the findings of fact in Paragraph 49 of the Recommended Order.

Additionally, Respondent is incorrect in stating that Paragraph 49 of the Recommended Order contains a conclusion of law that constitutes a departure from the essential requirements of law. There are no conclusions of law present in the paragraph. Since the findings of fact in Paragraph 49 of the Recommended Order are based on competent, substantial evidence (See Transcript, Pages 41-46, 104-105 and 149-154), the Agency cannot reject or modify them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, the Agency must deny Respondent's Ninth Exception.

In its Tenth Exception, Respondent takes exception to the conclusions of law in Paragraph 98 of the Recommended Order, arguing that the ALJ's conclusions are based on an erroneous interpretation of the rule. The conclusions of law in Paragraph 98 of the Recommended Order are based on the ALJ's weighing of competent, substantial evidence. The Agency is not permitted to re-weigh the evidence in order to reach a contrary conclusion of law. Furthermore, even if the conclusions of law in Paragraph 98 of the Recommended Order did not involve the weighing of evidence, the Agency cannot substitute conclusions of law that are as or more reasonable than those of the ALJ. See the rulings on Respondent's previous exceptions supra, which are hereby incorporated by reference. Therefore, the Agency denies Respondent's Tenth Exception.

FINDINGS OF FACT

The Agency hereby adopts the findings of fact set forth in the Recommended Order.

CONCLUSIONS OF LAW

The Agency hereby adopts the conclusions of law set forth in the Recommended Order.

ORDER

Based upon the foregoing, the Agency's October 3, 2014 determination that there was a need for one new hospice program in Service Area 5A was erroneous. The Agency should have determined that there was no need for any new hospice programs in Service Area 5A as of October 3, 2014. The parties shall govern themselves accordingly.

DONE and **ORDERED** this 7 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 A JUDICIAL REVIEW WHICH SHALL BE INSTITUTED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A SECOND COPY ALONG WITH THE FILING FEE AS 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 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 method indicated to the persons named below on this 7th day of May, 2015.

for RICHARD J. SHOOP, Agency Clerk
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