STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLO-RONKE, INC.,

Petitioner,

vs. Case No. 15-0982

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Respondent.
_______________________________/

RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings conducted the final hearing in this matter on August 3, 2015, by video teleconference at locations in Tampa and Tallahassee, Florida.

APPEARANCES

For Petitioner: Rawsi Williams, Esquire
Rawsi Williams Law Group
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For Respondent: Lindsay Worsham Granger, Esquire
Agency for Health Care Administration
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STATEMENT OF THE ISSUES

Fact Issues

1. Did Petitioner, Flo-Ronke, Inc. (Flo-Ronke), fail to timely pay a fine imposed by Final Order of the Respondent, Agency for Health Care Administration (Agency)?

2. Did the Agency reject attempts by Flo-Ronke to timely pay the fine in full by a single payment without conditions?

3. Did Flo-Ronke attempt to pay the fine untimely in full by a single payment without conditions? If so, did the Agency reject the proffered payment?

4. Did Flo-Ronke employ an individual in a position that required background screening who had a disqualifying criminal conviction?

Law Issues

5. Which party bears the burden of proof?

6. What is the standard of proof?

7. Do the facts support denying re-licensure of Flo-Ronke?

8. Are untimely efforts to pay the fine in full with a single payment mitigating factors? If so, how should the factors be weighed?

PRELIMINARY STATEMENT

This proceeding began with a Notice of Intent to Deny for Renewal of the assisted living facility license of Flo-Ronke filed December 3, 2014. Flo-Ronke requested a formal hearing to

challenge the proposed action. The Agency referred the matter to the Division of Administrative Hearings (DOAH) to conduct the hearing. It was set for final hearing to be held April 28, 2015.

The Agency later issued a Second Amended Notice of Intent to Deny for Renewal, substituted for the original notice in this proceeding. Upon a Joint Motion for Continuance, the hearing was rescheduled for August 3, 2015.

The Agency twice moved to relinquish jurisdiction of the charge that Flo-Ronke had not paid a fine imposed by Final Order. Flo-Ronke repeatedly asserted in its responses to the motions that the Agency had refused to accept payment. Based upon these assertions, in papers filed and during a motion hearing, the motions to relinquish jurisdiction were denied.

On July 2, 2015, the undersigned issued an Order Requiring a Clear Statement of Defense. The Order directed Flo-Ronke to provide: "A plain, clear, and unequivocal statement of whether Flo-Ronke maintains that it tendered an immediate, single, full, and complete payment of the fine assessed by Final Order in AHCA Cases 2014002513 and 2014002514 and that the Agency refused to accept the tendered immediate, single, full, and complete payment of the fines." It also required Flo-Ronke to provide additional information such as a description of the evidence supporting the claim that payment had been tendered and refused. In a rambling six-page response to the Order, Flo-Ronke asserted that the

Agency had refused to accept full and complete payment of the fine when tendered. As with Flo-Ronke’s other pleadings, the response attacks the Agency and its counsel with unsupported accusations of maliciousness and dishonesty.

On July 24, 2015, the Agency filed an Unequivocal Statement of Agency Policy. The statement said that the Agency stood ready to accept full payment of the fine. The letter to Flo-Ronke’s attorney attached to the statement asked Flo-Ronke to tender immediate, full, and complete payment within 48 hours.

The hearing was conducted as scheduled. The Agency offered testimony from Sherry Ledbetter, Laura Manville, Lois Markham, Edwin David Selby, and Keisha Woods. Agency Exhibits A through J were admitted into evidence. Flo-Ronke offered testimony from Florence Akintola and Scott J. Flint. Flo-Ronke’s Exhibits 2, 4, 6, and 7 were admitted. The undersigned took official recognition of the docket in First District Court of Appeal Case No. 1D14-5427 and three orders entered in that proceeding. The orders are: (1) an Order rendered January 16, 2015, dismissing the appeal for Flo-Ronke's failure to respond to an Order requiring it to obtain counsel to represent it before the court; (2) an Order rendered April 17, 2015, denying Flo-Ronke's motion to re-open the case; (3) and an Order rendered May 5, 2015, denying Flo-Ronke's motion for reconsideration, clarification, written opinion, and for stay. Case No. 1D14-5427 is Flo-Ronke’s

appeal of the Agency's Final Order in DOAH Case No. 14-1939 (Agency cases 2014002513 and 2014002514). The undersigned also took official notice of the file in DOAH Case No. 14-1939.

The Agency timely filed its proposed recommended order. Flo-Ronke did not. On September 11, 2015, 11 days after the proposed recommended orders were due, Flo-Ronke filed a document titled "Petitioner's Notice of Intent to File (Proposed) Recommended Order." On September 15, 2015, Flo-Ronke filed its Proposed Recommended Order. The Agency moved to strike the Proposed Recommended Order. Flo-Ronke filed a paper titled "Objection to Respondent's Motion to Strike Petitioner's Recommended Order." On October 7, 2015, the undersigned rendered an Order Striking Petitioner's Proposed Recommended Order.

On August 28, 2015, the Agency filed Agency's Motion for Award of Attorney's Fees and Costs. Flo-Ronke filed a document titled "Petitioner's Motion to Strike/Objection to Respondent's Motion for Attorney's Fees and Costs" on September 4, 2015.

FINDINGS OF FACT

1. Flo-Ronke is an Assisted Living Facility (ALF). An ALF is a building, part of a building, or a residential facility that provides "housing, meals, and one or more personal services for a period exceeding 24 hours to one or more adults who are not relatives of the owner or administrator." § 429.02(5), Fla. Stat. (2015).[1/] The Agency licenses and regulates ALFs.

§§ 429.04 and 429.07, Fla. Stat. Flo-Ronke is subject to the Agency's licensure requirements and is licensed by it.

2. By Notice of Intent to Deny Renewal Application dated December 2, 2014, the Agency denied Flo-Ronke's application to renew its license on the grounds that Flo-Ronke "failed to comply with the criminal background screening requirements by employing a caretaker who was not eligible to work in the facility." On January 8, 2015, the Agency amended the Notice of Intent to Deny. On January 21, 2015, the Agency issued a Second Amended Notice of Intent to Intent to Deny for Renewal. This notice is the subject of this proceeding.

3. The second amended notice asserts two bases for denial. One is the originally asserted background screening violation. The other is Flo-Ronke's failure to pay an outstanding fine in AHCA Cases 2014002513 and 2014002514.

<u>Payment of the Fine</u>

4. In AHCA Cases 2014002513 and 2014002514, the Agency's Administrative Complaint charged Flo-Ronke with four deficiencies involving insects, cleanliness, medication administration, and inadequate staffing. Originally, Flo-Ronke requested an evidentiary hearing before DOAH (DOAH Case No. 14-1939). Later, Flo-Ronke, through its owner Ms. Akintola, agreed there were no disputed issues of facts and stipulated to returning the matter to the Agency for an informal hearing.

5. The Agency provided Flo-Ronke an opportunity for a hearing. No representative of Flo-Ronke appeared at the hearing. The Agency issued a Final Order on November 5, 2014, upholding the Administrative Complaint and imposing a $13,500 fine. The Agency's Final Order included instructions on how to make the payment, advised that the payment was due within 30 days of the Final Order, and cautioned that interest would be imposed on overdue amounts. The Final Order included a Notice of Right to Judicial Review.

6. On behalf of Flo-Ronke, Ms. Akintola appealed the Final Order pro se. The Florida Rules of Appellate Procedure do not provide for an automatic stay of a decision if it is appealed. Flo-Ronke did not seek a stay of the Final Order. Consequently, the obligation to pay the fine was effective as of the date of the Final Order.

7. The First District Court of Appeal rendered an Order requiring Flo-Ronke to obtain counsel for the appeal because a corporation cannot be represented by an employee or officer. Flo-Ronke did not obtain counsel or respond to the court's Order. On January 16, 2015, the court dismissed Flo-Ronke's appeal.

8. On April 9, 2015, Flo-Ronke, represented by the same counsel as in this proceeding, moved to re-open the appellate case. On April 17, 2015, the court denied the motion. It also

denied Flo-Ronke’s subsequent motion seeking reconsideration, clarification, a written opinion, and a stay.

9. From the date that the Agency entered the Final Order imposing the fine in DOAH Case No. 14-1939 (AHCA Cases 2014002513 and 2014002514) to the date of the final hearing, Flo-Ronke did not pay the fine.

10. Starting around February 2015, attorney Scott Flint tried, on Flo-Ronke’s behalf, to arrange a payment plan for the fine. He discussed the proposal with Agency Attorney Edwin Selby. Mr. Flint linked the discussions to resolving a separate investigation of Flo-Ronke that the Agency was conducting. Mr. Flint never offered unconditional payment of the fine on behalf of Flo-Ronke.

11. Mr. Flint testified that at some point during conversations about the two cases, Mr. Selby said the Agency would not accept full payment if it was offered. Mr. Selby testified that he did not make this statement. Mr. Selby’s testimony is more credible in this instance, as it is in other instances when Mr. Selby’s testimony differed from Mr. Flint’s.

12. One reason Mr. Selby’s testimony is more credible is that on February 11, 2015, after the time Mr. Flint says Mr. Selby made the statement, Mr. Flint wrote Mr. Selby a letter proposing an installment plan for paying the fine. The letter did not mention the alleged statement that the Agency would not

accept payment. The proposal and the failure to mention the alleged refusal are inconsistent with the assertion that Mr. Selby said payment would not be accepted. Also, Mr. Flint hedged his testimony about the alleged refusals, noting that lawyers say many things during negotiations. Mr. Selby's testimony about conversations after the February 11 letter is also more credible.

13. Mr. Selby never said that the Agency would not accept full payment if it were tendered.

14. The clear and convincing evidence proves that from the date the Agency entered the Final Order to the date of the final hearing, Flo-Ronke never tendered full and complete payment of the fine to the Agency.

15. Flo-Ronke, despite its assertions during pre-hearing motion practice, did not offer any evidence that could be reasonably be interpreted as proving that Flo-Ronke tendered full payment of the fine or that the Agency refused the payment. Even Mr. Flint's testimony, if fully credited, is not evidence that Flo-Ronke tendered full payment or that the Agency refused full payment.

Background Screening

16. At all relevant times, Florida law required level two background screening of any person seeking employment with a provider whose responsibilities may require him to provide personal care or other services directly to clients or who will

have access to the client living area. § 408.809(1)(e), Fla. Stat. (2014). Individuals who have disqualifying offenses may not hold positions where they provide services to clients or will have access to client living areas. Florida law also requires re-screening every five years after employment. § 408.809(2), Fla. Stat. (2014).

17. Agency surveyor, Laura Manville, surveyed Flo-Ronke and its records on September 2, 2014. At that time, F.M. was employed there. Flo-Ronke employed F.M. since at least 2009. F.M.'s duties included caring for residents. In addition, even when performing non-caretaking duties, such as grounds-keeping and maintenance, F.M. had unsupervised access to the residents and their living area.

18. F.M. was adjudicated guilty of a disqualifying sex offense on October 28, 1999.

19. Flo-Ronke's records did not document the required level 2 background screening of F.M. when reviewed on September 2, 2014. At that time, Ms. Manville told Ms. Akintola of the deficiency and that F.M. was not eligible to work at the ALF. This was not the first time the Agency advised Ms. Akintola of the deficiency.

20. By letter dated October 2, 2009, the Agency advised that background screening of F.M. had revealed he had a disqualifying criminal offense. It advised Flo-Ronke that it

must either terminate the employment of F.M. or obtain an exemption from disqualification. Flo-Ronke did neither.

21. Ms. Manville conducted a follow-up survey on September 10, 2014. Despite the notice given on September 2, 2014, F.M. was still present at the facility performing grounds work and had access to client living areas.

22. Ms. Akintola presented testimony and a single document attempting to prove that F.M. passed background screening in 2010. The document appears to show a determination of no background screening violation in 2010. Why it differs from other documents from 2009 and after 2010 is not explained. The circumstances surrounding the document are somewhat mysterious. It does not appear in the Agency files. On September 2, 2014, Ms. Akintola did not mention it. On that day, she said she thought F.M. did not need to satisfy screening requirements because he had worked for so long at Flo-Ronke.

23. More importantly, the issue is whether F.M. was employed in 2014 in violation of the background screening requirements. The clear and convincing evidence, including evidence of the conviction in the background screening database, the continued employment of F.M. after September 2, 2014, and the letter of October 2, 2009, proves that in 2014 F.M. had a disqualifying offense and did not have an exemption from the disqualification.

CONCLUSIONS OF LAW

24. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

Burden and Standard of Proof

25. In this proceeding, the Agency seeks to deny renewal of Flo-Ronke's license to operate an ALF. It does this to impose a penalty for two violations by Flo-Ronke. The Agency seems to accept that it bears the burden of presenting evidence of the violations. This is correct, although the applicant has the ultimate burden of persuasion, when an agency is denying initial licensure because of violations of statutes. See Dept. Banking and Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 934 (Fla. 1996) ("[T]he Department had the burden of presenting evidence that appellants had violated certain statutes and were thus unfit for registration."). See also, Davis v. Dep't of Child. & Fam. Servs., 160 So. 3d 854, 857 (Fla. 2015).

26. The Agency contends that proof by a preponderance of the evidence is the standard of proof. It relies on Davis which held that, in cases where an agency denies initial licensure to an applicant because the applicant is unfit, the agency must prove its reasons by only a preponderance of the evidence.

27. This case is a license renewal case, not an initial licensure case as in Davis. It involves allegations of wrongdoing by the licensed facility and termination of Flo-Ronke's ability to operate an ALF. Although the context is license renewal, the action is to impose a penalty for violation of the law. Consequently, the proper burden of proof is clear and convincing evidence. Coke v. Dep't of Child. & Fam. Servs., 704 So. 2d 726 (Fla. 5th DCA 1998). Applying the standard for initial licensure when an agency denies renewal because of alleged wrongdoing would allow an agency to manipulate the system to avoid the clear and convincing standard by denying renewal rather than instituting a disciplinary action. See Posey v. Fla. Game & Fresh Water Fish Comm., Case No. 89-4700 (Fla. DOAH, January 3, 1990, P. 12), ("Once a determination is made by the Department that Petitioner's licenses can be revoked based upon the trial court's disposition of the misdemeanor, the Department must treat its decision not to renew the licenses as a revocation proceeding.").

28. The burden of proof for ALF licensure is not established by statute or an issue committed to the Agency by the Legislature. It is a procedural matter governed by case law, not one over which the Legislature has given the Agency substantive jurisdiction. G.E.L. Corp. v. Dep't of Envtl. Prot., 875 So. 2d 1257 (Fla. 5th DCA 2004). In this case, since the Agency proved

its allegations by clear and convincing evidence, the result is the same regardless of which standard of proof is applied.

Violations

29. Section 408.831(1)(a), Florida Statutes, authorizes the Agency to deny an application for renewal when an applicant has not paid all outstanding fines imposed by an agency final order that is not subject to further appeal. The clear and convincing evidence proved that Flo-Ronke did not pay the $13,500 fine imposed by final order of the Agency. The evidence of this offense and governing law support denying Flo-Ronke's application for renewal.

30. Section 429.14(1) authorizes the Agency to deny a license application for failure to comply with background screening standards of section 408.809(1). The Agency proved by clear and convincing evidence that Flo-Ronke failed to comply with background screening requirements. The evidence and the governing law support denying Flo-Ronke's renewal application for this failure.

Fees and Costs

31. The Agency moves under sections 57.105 and 120.595, Florida Statutes, for an award of attorney's fees and costs. Section 57.105 provides for an award of fees and costs to a prevailing party and imposition of sanctions against a party for raising and advancing unsupported claims or defenses.

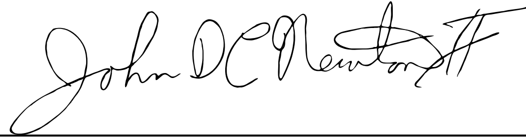
32. Section 120.595 provides for award of attorney's fees and costs to a prevailing party in a proceeding before DOAH if the Administrative Law Judge determines that the non-prevailing party participated in a proceeding for an improper purpose.

33. At this point in the proceedings, a final order has not been issued. Therefore, there is not yet a prevailing party. Ruling upon the Motion for Award of Attorney's Fees and Costs would be premature. Consequently, jurisdiction over the motion is being retained.

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 denying the application of Flo-Ronke, Inc., for renewal of its ALF license. Jurisdiction over the Motion for Fees and Costs is retained for further appropriate proceedings once the prevailing party has been determined.

DONE AND ENTERED this 30th day of October, 2015, in Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of October, 2015.

ENDNOTE

[1/] All citations to the Florida Statutes are to the 2015 codification.

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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.