STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

COMPASSIONATE CARE HOSPICE
OF THE GULF COAST, INC.,

Petitioner,

v.

STATE OF FLORIDA, AGENCY FOR
HEALTH CARE ADMINISTRATION,

Respondent,

and

TIDEWELL HOSPICE, INC.,

Intervenor.
_____/

CASE NO. 15-2005CON
AHCA NO. 2015002670
RENDITION NO.: AHCA-10037 -FOF-OLC

FINAL ORDER

This case was referred to the Division of Administrative Hearings (DOAH) where the assigned Administrative Law Judge (ALJ), James H. Peterson III, conducted a formal administrative hearing. At issue in this proceeding is whether the Agency for Health Care Administration ("AHCA" or "Agency") should approve the Certificate of Need ("CON") application filed by Compassionate Care Hospice of the Gulf Coast, Inc. ("CCH") to establish a new hospice program in Sarasota County, AHCA Service Area 8D. The Recommended Order entered on September 19, 2016 is attached to this final order and incorporated herein by reference.

RULINGS ON EXCEPTIONS

CCH filed exceptions to the Recommended Order, and Tidewell Hospice, Inc. ("Tidewell") filed a response to CCH's exceptions.

In determining how to rule upon CCH's exceptions and whether to adopt the ALJ's Recommended Order and SRO 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 CCH's exceptions:

In Exception No. 1, CCH takes exception to Paragraphs 35 and 131 of the Recommended Order, arguing: 1) Paragraph 35 is a conclusion of law that the Agency should not adopt because it should not view the fact that Tidewell is a regional monopoly in a vacuum but rather weigh it with the other evidence presented; 2) the ALJ ignored the Agency's rule provisions that establish the manner in which monopolies are discouraged; and 3) the ALJ is in error and there are

sufficient special and not normal circumstances to conclude that a CON should be awarded to CCH. The Agency rejects CCH arguments. First, Paragraph 35 of the Recommended Order is a finding of fact, not a conclusion of law as CCH argues; and it is based on competent, substantial record evidence. See Transcript, Volume 11, Pages 1388-1389. Thus, the Agency cannot reject or modify it. 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"). Second, the ALJ's finding did not ignore any Agency rule provisions, and his interpretation of the applicable laws and rules are not in error. Indeed, the ALJ's conclusions of law in Paragraph 131 of the Recommended Order are in accordance with prior Agency precedent. See Lifepath, Inc. d/b/a Lifepath Hospice v. Agency for Health Care Administration and Hernando Pasco Hospice, Inc., DOAH Case Nos. 00-3203CON and 00-3205CON (AHCA 2003). Thus, the Agency finds that, while it has substantive jurisdiction over the conclusions of law in Paragraph 131 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 Exception No. 1.

In Exception No. 2, CCH takes exception to Paragraph 42 of the Recommended Order, arguing the finding in the last sentence of the paragraph is not consistent with the Agency's rules regarding adequate network standards under the Medicaid Managed Care Plan. The finding of fact in the last sentence of Paragraph 42 of the Recommended Order is based on competent, substantial record evidence. See Petitioner's Exhibit 148 at Pages 24-25 and 42-43. Thus, the Agency is not at liberty to reject or modify it. See § 120.57(1)(*l*), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, the Agency denies Exception No. 2.

In Exception No. 3, CCH takes exception to Paragraphs 43 and 101 of the Recommended Order, arguing the ALJ "failed to acknowledge the unrefuted evidence of health care provider dissatisfaction" that it claims is due to the lack of competition in the service area. CCH's argument lacks merit because the ALJ's made statements in both paragraphs concerning the evidence that clearly demonstrate the ALJ not only acknowledged the so-called "unrefuted evidence" but also weighed it, and found it to be less credible than evidence provided by Tidewell. Furthermore, the findings of fact in both paragraphs are based on competent, substantial evidence. See Transcript, Volume 9, Pages 1244-1247; CCH Exhibits 137-147 and 149-151. Thus, the Agency cannot disturb them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, the Agency denies Exception No. 3.

In Exception No. 4, CCH takes exception to Paragraph 141 of the Recommended Order and the ALJ's Recommendation, arguing the ALJ erred in concluding that CCH failed to prove the existence of special circumstances that justified the granting of its CON application and recommending that CCH's CON application be denied. In essence, CCH is encouraging the Agency to re-weigh the evidence in order to reach a different result from that of the ALJ. However, the Agency is not permitted to do so. See Heifetz, 475 So. 2d at 1281. The Agency finds that, while it does have substantive jurisdiction over the conclusions of law in Paragraph 141 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 Exception No. 4.

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, CCH's CON application no. 10337 is hereby denied. The parties shall govern themselves accordingly.

DONE and **ORDERED** this 26th day of October, 2016, in Tallahassee, Florida.

JUSTIN M. SENIOR, INTERIM 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 26th day of October, 2016.

RICHARD J. SHOOP, Agency Clerk
Agency for Health Care Administration
2727 Mahan Drive, MS #3
Tallahassee, Florida 32308-5403
(850) 412-3630

COPIES FURNISHED TO:

Honorable James H. Peterson III
Administrative Law Judge
Division of Administrative Hearings
(via electronic filing)

Geoffrey D. Smith, Esquire
Susan C. Smith, Esquire
Smith & Associates
3301 Thomasville Road, Suite 201
Tallahassee, Florida 32303
(via electronic mail to geoff@smithlawtlh.com and
susan@smithlawtlh.com)

Robert D. Newell, Jr., Esquire
Newell, Terry & Douglas, P.A.
817 North Gadsden Street
Tallahassee, Florida 32303
(via electronic mail to rdnewell@newellandterry.com)

Richard J. Saliba, Esquire
Michael J. Hardy, Esquire
Assistant General Counsels
(via electronic mail to Richard.Saliba@ahca.myflorida.com and
Michael.Hardy@ahca.myflorida.com)

Marisol Fitch
Certificate of Need Unit
(via electronic mail to Marisol.Fitch@ahca.myflorida.com)

Jan Mills
Facilities Intake Unit
(via electronic mail to Janice.Mills@ahca.myflorida.com)