**STATE OF FLORIDA**
**AGENCY FOR HEALTH CARE ADMINISTRATION**



LIFEPATH HOSPICE, INC.,

Petitioner,

v.

WEST FLORIDA HEALTH, INC. and STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondents.
_____/

DOAH CASE NO. 15-2001CON
AHCA CASE NO. 2015002668
RENDITION NO.: AHCA-16-0353 -FOF-CON

SEASONS HOSPICE & PALLIATIVE CARE OF TAMPA, LLC,

Petitioner,

v.

WEST FLORIDA HEALTH, INC. and STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondents.
_____/

DOAH CASE NO. 15-2003CON
AHCA CASE NO. 2015002667

WEST FLORIDA HEALTH, INC.,

Petitioner,

v.

GULFSIDE HOSPICE AND PASCO PALLIATIVE CARE, INC. ; SEASONS HOSPICE & PALLIATIVE CARE OF TAMPA, LLC ; and LIFEPATH HOSPICE, INC.,

Respondents.
_____/

DOAH CASE NO. 15-2007CON
AHCA CASE NO. 2015003352

GULFSIDE HOSPICE AND PASCO
PALLIATIVE CARE, INC.,

Petitioner,

DOAH CASE NO. 15-2008CON
AHCA CASE NO. 2015002666

v.

STATE OF FLORIDA, AGENCY FOR
HEALTH CARE ADMINISTRATION,

Respondent.
_____/

## FINAL ORDER

This case was referred to the Division of Administrative Hearings (DOAH) where the assigned Administrative Law Judge (ALJ), R, Bruce McKibben, conducted a formal administrative hearing. At issue in this proceeding is whether the Certificate of Need ("CON") applications filed by Seasons Hospice and Palliative Care, Inc. ("Seasons"); Gulfside Hospice and Pasco Palliative, Inc. ("Gulfside"); and West Florida Health, Inc. ("West Florida") for a new hospice program in Hillsborough County, Florida, Agency for Health Care Administration ("Agency") Service Area 6A, satisfy the statutory and rule criteria for approval, and, if so, which of the three applications best meets the applicable criteria, on balance, for approval. The Recommended Order entered on March 21, 2016 is attached to this final order and incorporated herein by reference.

## RULINGS ON EXCEPTIONS

Gulfside filed exceptions to the Recommended Order, and the Agency and Seasons filed responses to Gulfside's exceptions.

In determining how to rule upon Gulfside's exceptions and whether to adopt the ALJ's Recommended Order in whole or in part, the Agency 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 Gulfside's exceptions:

In its First and Second Exceptions, Gulfside takes exception to Paragraphs 119 and 122 of the Recommended Order, arguing that the ALJ's ultimate findings of fact in these two paragraphs conflict with the findings of fact in Paragraphs 88 through 92 of the Recommended Order, thus rendering Paragraphs 119 and 122 as illogical and therefore not based on competent, substantial evidence. The Agency disagrees with Gulfside's argument. Paragraphs 88 through 92 of the Recommended Order deal with Gulfside's ability to start offering services sooner than the other applicants, whereas Paragraphs 119 and 122 of the Recommended Order concern the number of patients Gulfside would serve. The two issues are separate and distinct. Thus,

Paragraphs 119 and 122 are not "illogical" as Gulfside argued. Furthermore, the findings of fact in Paragraphs 119 and 122 of the Recommended Order are based on competent, substantial evidence. See Transcript, Volume 10, Page 1413; and Transcript, Volume 14, Page 1929. Thus, the Agency is not at liberty 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 Gulfside's First and Second Exception.

In its Third Exception, Gulfside takes exception to the findings of fact in Paragraph 118 of the Recommended Order, arguing that "there was no showing, and no claim by any party, that Hispanic patients were underserved in Hillsborough County." Page 7 of Gulfside's Exceptions. Gulfside is incorrect. Gulfside's CON application make such an inference, and Gulfside reiterated that inference in its proposed recommended order. See Gulfside's Exhibit 1 at Volume I, Pages 3, 7, 14, 16, 17 41, 45 and 72; and Page 28 of Gulfside's Proposed Recommended Order. Moreover, the findings of fact in Paragraph 118 of the Recommended Order are based on competent, substantial evidence. See Transcript, Volume 11, Page 1538; Transcript, Volume 12, Pages 1776, 1780 and 1791. 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 Gulfside's Third Exception.

In its Fourth Exception, Gulfside takes exception to the ALJ's "failure to accord weight in statutory balancing of criteria." Page 8 of Gulfside's Exceptions. In this Exception, Gulfside references Paragraphs 88 through 92 and 122 of the Recommended Order, but it is not clear that the exception is directed to those specific paragraphs. If the exception is indeed directed to those

paragraphs, the Agency must deny the exception because Paragraphs 88 through 92 and 122 of the Recommended Order are based on competent, substantial evidence. See Transcript, Volume 11, Pages 1524-1525, 1532-1533, 1537, 1569-1570 and 1579-1584; Transcript, Volume 12, Pages 1783 and 1790-1791; and Gulfside's Exhibit 1. Thus, 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 Gulfside's Fourth Exception. If the exception is not directed to Paragraphs 88 through 92 and 122 of the Recommended Order, then the Agency need not rule on it because the exception fails to clearly identify the disputed portion of the Recommended Order by page number or paragraph. See § 120.57(1)(k), Fla. Stat.

In its Fifth Exception, Gulfside takes exception to the conclusions of law in Paragraph 132 of the Recommended Order, arguing the ALJ interposed the "undefined and novel concept" of meeting the need "more appropriately". Page 9 of Gulfside's Exceptions. Gulfside's argument is nothing more than semantics. It is clear from the ALJ's conclusions of law in Paragraphs 127, 128, 129, 130 and 133 (to which Gulfside did not take exception) that the ALJ correctly followed the law in reaching his recommendation. The ALJ's use of the term "more appropriately" is in no way inconsistent with any prior Agency precedent, nor is it contrary to the statutes or rules that govern the CON process in Florida. Thus, the Agency finds that, while it has substantive jurisdiction over the conclusions of law in Paragraph 132 of the Recommended Order, it cannot substitute a conclusion of law that is as or more reasonable than that of the ALJ. Therefore, the Agency denies Gulfside's Fifth 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, Season's CON Application No. 10298 is hereby approved, and Gulfside's CON Application No. 10294 and West Florida's CON Application No. 10302 are hereby denied. The parties shall govern themselves accordingly.

**DONE** and **ORDERED** this 16 day of May, 2016, in Tallahassee, Florida.

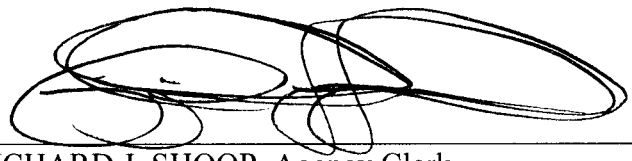
ELIZABETH DUDEK, SECRETARY
AGENCY FOR HEALTH CARE ADMINISTRATION

## 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 17th day of May, 2016.



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