STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Petitioner,

v.

TR AND SNF, INC. d/b/a THE NURSING CENTER AT UNIVERSITY VILLAGE,

Respondent,

and

DREW M. DILLWORTH,

Intervenor.
_____/

DOAH CASE NO. 15-2128
AHCA NO. 2015002123
FILE NO. 62934
LICENSE NO. 15690961
FACILITY TYPE: NURSING HOME
RENDITION NO.: AHCA-16-0568 -FOF-OLC

FINAL ORDER

This cause was referred to the Division of Administrative Hearings where the assigned Administrative Law Judge (ALJ), John D.C. Newton II, conducted a formal administrative hearing. At issue in this case is whether Respondent committed the violations in the Agency for Health Care Administration's ("Agency") March 11, 2015 Administrative Complaint, and, if so, what penalty should be imposed. The Recommended Order dated May 31, 2016, is attached to this Final Order and incorporated herein by reference, except where noted infra.

RULING ON EXCEPTIONS

Respondent filed exceptions to the Recommended Order, and Petitioner filed a response to Respondent's exceptions.

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 must follow section 120.57(1)(l), Florida Statutes, which provides:

> 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. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action.

§ 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 its first exception, Respondent takes exception to the findings of fact in Paragraphs 19 and 20 of the Recommended Order, arguing the findings of fact are not supported by competent, substantial evidence. Respondent's argument is incorrect. The findings of fact in Paragraphs 19 and 20 of the Recommended Order are based on competent, substantial evidence. See Transcript, Pages 21 through 25; Petitioner's Exhibits B and C. Thus, 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"). In addition, as is made clear from Paragraph 20 of the Recommended Order, the ALJ made these findings of fact based on his weighing of the evidence presented at hearing. The Agency is not permitted to re-weigh the evidence in order to make contrary findings of fact. See Heifetz; 475 So. 2d at 1281. Therefore, the Agency denies Respondent's first exception.

In its second exception, Respondent takes exception to the conclusion of law in Paragraph 42 of the Recommended Order, arguing the ALJ erroneously found Petitioner met its burden of proof and referenced its argument that the findings of fact in Paragraphs 19 and 20 of the Recommended Order were not based on competent, substantial evidence because the non-final suspension order is hearsay. Respondent is essentially arguing the ALJ erred in regard to an evidentiary issue. However, such issues fall outside of the substantive jurisdiction of the Agency. See Barfield v. Department of Health, 805 So. 2d 1008 (Fla. 1st DCA 2002). Therefore, the Agency must deny Respondent's second exception.

In its third exception, Respondent takes exception to the conclusions of law in Paragraph 44 of the Recommended Order, arguing that they are unsupported and contrary to the findings of fact in Paragraph 34 of the Recommended Order. The first sentence of Paragraph 44 of the Recommended Order is an incorrect statement that is not supported by competent, substantial evidence. As the parties stipulated on Page 6 of their Joint Pre-Hearing Stipulation, "Respondent submitted a proof of financial ability to operate on or about April 10, 2015." However, the remaining sentences of Paragraph 44 of the Recommended Order are based on the competent, substantial evidence presented in this matter. See, e.g., Transcript, Pages 24-30. Thus, the

Agency cannot reject or modify them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz; 475 So. 2d at 1281. Therefore, the Agency grants Respondent's third exception only to extent that Paragraph 44 of the Recommended Order is modified as follows:

> 44. TRF & SNF did not timely provide the requested proof. It did not request an extension of time. It did not take the request or the Agency's authority to make it seriously until after the Agency filed the Administrative Complaint.

In its fourth exception, Respondent takes exception to the conclusions of law in Paragraph 45, arguing the ALJ erroneously placed the burden of proof on it to demonstrate compliance. Respondent's argument is incorrect. Rather, in Paragraph 45 of the Recommended Order, the ALJ concluded that Respondent did not successfully rebut the Agency's evidence. Thus, these conclusions of law are based on the ALJ's weighing of the evidence presented in this matter. See, e.g., Transcript, Pages 24-26. The Agency cannot re-weigh such evidence in order to make contrary conclusions of law that are more favorable to Respondent. See Heifetz; 475 So. 2d at 1281. Therefore, the Agency denies Respondent's fourth exception.

In its fifth exception, Respondent takes exception to the conclusions of law in Paragraph 48 of the Recommended Order, arguing they are unsupported by the findings of fact, impose a fine in excess of the statutory maximum and what the Agency had sought to impose in the Administrative Complaint, and impose penalties that are improper and unreasonable. In regard to Respondent's arguments concerning the recommended penalty, the Agency can normally only increase or decrease a recommended penalty if it first reviews the complete record of the case and states with particularity its reasons for increasing or decreasing the recommended penalty by citing to the record. See § 120.57(1)(*l*), Fla. Stat.; Criminal Justice Standards and Training Commission v. Bradley, 596 So. 2d 661, 664 (Fla. 1992). However, the requirements of section 120.57(1)(*l*) do not apply to this matter because the fine imposed by the ALJ exceeds the

statutory maximum. As the ALJ found in Paragraph 34, Respondent did not provide any proof of financial ability prior to April 9, 2015, 29 days after the Agency's deadline. 29 days times $500 per day would equal $14,500. However, section 400.121(2), Florida Statutes (2014), states that "a $500 fine shall be imposed for each violation. Each day a violation of this part or part II of chapter 408 occurs constitutes a separate violation and is subject to a separate fine, but in no event may any fine aggregate more than $5,000." (Emphasis added). The ALJ found that Petitioner proved the violation concerning the proof of financial ability to operate as alleged in Count I of the Administrative Complaint, but did not prove the violation alleged in Count II of the Administrative Complaint. Thus, the ALJ's recommended fine amount of $10,000 is nothing more than a simple error on his part. By changing the amount of the fine, the Agency is merely correcting a scrivener's error instead of reducing a recommended penalty. As far as the ALJ's recommended penalty of revocation of Respondent's license, the Agency is permitted under the statute to revoke a license for the violation concerning proof of financial ability to operate. See § 400.121(1), Florida Statutes (2014). Respondent presented no evidence to show that a lesser penalty should be imposed. In regard to Respondent's argument that the conclusions of law in Paragraph 48 of the Recommended Order are not factually supported, the ALJ's conclusions of law in Paragraph 48 of the Recommended Order are based on the ALJ's weighing of the evidence presented in this matter. The Agency is not permitted to re-weigh such evidence. See Heifetz; 475 So. 2d at 1281. Therefore, the Agency grants Respondent's fifth exception only to the extent that it modifies Paragraph 48 of the Recommended Order as follows:

> 48. Section 400.121(1)(a), Florida Statutes, allows the Agency to revoke a license and impose an administrative fine not to exceed $500.00 per violation per day up to a maximum fine of $5,000 for any violation of chapter 408, or applicable agency rules. The Agency has proven by clear and convincing evidence that TR & SNF violated section 408.810(8). There is no evidence supporting

mitigation of the possible penalties. The Agency's proposed administrative fine of ~~$105~~,000.00 and revocation of the license of TR & SNF is reasonable.

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, except where noted supra.

ORDER

1. Counts I and III of the Agency's March 11, 2015 Administrative Complaint are hereby upheld as final, Count II of the Agency's March 11, 2015 Administrative Complaint is hereby dismissed, a $5,000 fine is hereby imposed on Respondent, and Respondent's nursing home license is hereby revoked.

2. In order to ensure the health, safety, and welfare of the Respondent's clients, the revocation of the Respondent's license is stayed for 30 days from the filing date of this Final Order for the sole purpose of allowing the safe and orderly discharge of clients. § 408.815(6), Fla. Stat. The Respondent is prohibited from accepting any new admissions during this period and must immediately notify the clients that they will soon be discharged. The Respondent must comply with all other applicable federal and state laws. At the conclusion of the stay, or upon the discontinuance of operations, whichever is first, the Respondent shall promptly return the license which is the subject of this agency action to the appropriate licensure unit in Tallahassee, Florida. Fla. Admin. Code R. 59A-35.040(5).

3. In accordance with Florida law, the Respondent is responsible for retaining and

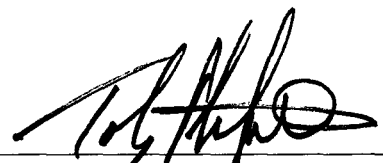
appropriately distributing all client records within the timeframes prescribed in the authorizing statutes and applicable administrative code provisions. The Respondent is advised of Section 408.810, Florida Statutes.

4. In accordance with Florida law, the Respondent is responsible for any refunds that may have to be made to the clients.

5. The Respondent is given notice of Florida law regarding unlicensed activity. The Respondent is advised of Section 408.804 and Section 408.812, Florida Statutes. The Respondent should also consult the applicable authorizing statutes and administrative code provisions. The Respondent is notified that the revocation of its registration may have ramifications potentially affecting accrediting, third party billing including but not limited to the Florida Medicaid program, and private contracts.

6. Unless payment has already been made, payment in the amount of $5,000 is now due from the Respondent as a result of the agency action. Such payment shall be made within thirty (30) days of the date of rendition 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 Intake Unit, 2727 Mahan Drive, Mail Stop 61, Tallahassee, Florida 32308.

DONE AND ORDERED in Tallahassee, Florida, on this 3rd day of August, 2016.



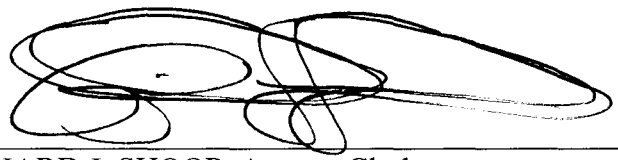
for: ELIZABETH DUDEK, Secretary
AGENCY FOR HEALTH CARE ADMINISTRATION

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 CERTIFY that a true and correct copy of this Final Order was served on the below-named persons by the method designated on this 4th day of August, 2016.



RICHARD J. SHOOP, Agency Clerk
AGENCY FOR HEALTH CARE ADMINISTRATION
2727 Mahan Drive, MS #3
Tallahassee, Florida 32308
Telephone: (850) 412-3630

Copies furnished to:

Jan Mills Facilities Intake Unit Agency for Health Care Administration (Electronic Mail)	Anne Menard, Unit Manager Home Care Unit Agency for Health Care Administration (Electronic Mail)

Finance & Accounting Revenue Management Unit Agency for Health Care Administration (Electronic Mail)	Theresa DeCanio, Field Office Manager Area 7 Field Office (Electronic Mail)
Katrina Derico-Harris Medicaid Accounts Receivable Agency for Health Care Administration (Electronic Mail)	Jay Adams, Esquire Broad and Cassel 215 South Monroe Street, Suite 400 Tallahassee, Florida 32301 (U.S. Mail)
Shawn McCauley Medicaid Contract Management Agency for Health Care Administration (Electronic Mail)	John F. Loar, Esquire Broad and Cassel 215 South Monroe Street, Suite 400 Tallahassee, Florida 32301 (U.S. Mail)
Honorable John D.C. Newton II Administrative Law Judge Division of Administrative Hearings The DeSoto Building 1230 Apalachee Parkway Tallahassee, Florida 32399-3060 (Electronic Filing)	M. Stephen Turner, Esquire Broad and Cassel 215 South Monroe Street, Suite 400 Tallahassee, Florida 32301 (U.S. Mail)
Eric Silver, Esquire Stearns, Weaver, Miller, Weissler, Alhadeff & Sitterson, P.A. 150 West Flagler Street, Suite 2200 Miami, Florida 33130 (U.S. Mail)	Thomas J. Walsh II, Esquire Assistant General Counsel (Electronic Mail)

NOTICE OF FLORIDA LAW

408.804 License required; display.--

(1) It is unlawful to provide services that require licensure, or operate or maintain a provider that offers or provides services that require licensure, without first obtaining from the agency a license authorizing the provision of such services or the operation or maintenance of such provider.

(2) A license must be displayed in a conspicuous place readily visible to clients who enter at the address that appears on the license and is valid only in the hands of the licensee to whom it is issued and may not be sold, assigned, or otherwise transferred, voluntarily or involuntarily. The license is valid only for the licensee, provider, and location for which the license is issued.

408.812 Unlicensed activity. --

(1) A person or entity may not offer or advertise services that require licensure as defined by this part, authorizing statutes, or applicable rules to the public without obtaining a valid license from the agency. A licenseholder may not advertise or hold out to the public that he or she holds a license for other than that for which he or she actually holds the license.

(2) The operation or maintenance of an unlicensed provider or the performance of any services that require licensure without proper licensure is a violation of this part and authorizing statutes. Unlicensed activity constitutes harm that materially affects the health, safety, and welfare of clients. The agency or any state attorney may, in addition to other remedies provided in this part, bring an action for an injunction to restrain such violation, or to enjoin the future operation or maintenance of the unlicensed provider or the performance of any services in violation of this part and authorizing statutes, until compliance with this part, authorizing statutes, and agency rules has been demonstrated to the satisfaction of the agency.

(3) It is unlawful for any person or entity to own, operate, or maintain an unlicensed provider. If after receiving notification from the agency, such person or entity fails to cease operation and apply for a license under this part and authorizing statutes, the person or entity shall be subject to penalties as prescribed by authorizing statutes and applicable rules. Each day of continued

operation is a separate offense.

(4) Any person or entity that fails to cease operation after agency notification may be fined $1,000 for each day of noncompliance.

(5) When a controlling interest or licensee has an interest in more than one provider and fails to license a provider rendering services that require licensure, the agency may revoke all licenses and impose actions under s. 408.814 and a fine of $1,000 per day, unless otherwise specified by authorizing statutes, against each licensee until such time as the appropriate license is obtained for the unlicensed operation.

(6) In addition to granting injunctive relief pursuant to subsection (2), if the agency determines that a person or entity is operating or maintaining a provider without obtaining a license and determines that a condition exists that poses a threat to the health, safety, or welfare of a client of the provider, the person or entity is subject to the same actions and fines imposed against a licensee as specified in this part, authorizing statutes, and agency rules.

(7) Any person aware of the operation of an unlicensed provider must report that provider to the agency.