STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ALICIA CHILITO, M.D.,

Petitioner,

vs. Case No. 15-3568

DEPARTMENT OF HEALTH,

Respondent.
_____/

RECOMMENDED ORDER

A hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2015), before Cathy M. Sellers, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"), on December 16, 2015, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Bruce Douglas Lamb, Esquire
Gunster, Yoakley, and Stewart, P.A.
401 East Jackson Street, Suite 2500
Tampa, Florida 33602

For Respondent: Leslie Jennings McIlroy, Esquire
Department of Health
4052 Bald Cypress Way, Bin A-02
Tallahassee, Florida 32399-1703

STATEMENT OF THE ISSUE

On April 17, 2015, Respondent, Department of Health, issued a Notice of Agency Action Denial of License Renewal ("First Denial Notice"), notifying Petitioner, Alicia Chilito, M.D.,

that it had denied her application for renewal of her physician license. Thereafter, on May 19, 2015, Respondent issued an Amended Notice of Agency Action Denial of License Renewal ("Second Denial Notice"), reiterating, and stating alternative grounds for, its denial of Petitioner's physician license.

Petitioner timely challenged Respondent's decision and the matter was referred to DOAH to conduct a hearing pursuant to sections 120.569 and 120.57(1). The final hearing initially was scheduled for August 14, 2015, but pursuant to motions, was set for December 16, 2015.

On August 14, 2015, Respondent filed a Motion to Relinquish Jurisdiction, contending that there were no disputed issues of material fact to be resolved in a hearing conducted under section 120.57(1). This motion was denied by order issued on September 1, 2015, on the basis that disputed issues of material fact existed regarding whether Petitioner was entitled to renewal of her license by default pursuant to section 120.60(1).

On December 11, 2015, Respondent filed Department of Health's Motion in Limine, seeking to limit the scope of the final hearing. A telephonic motion hearing was conducted on December 15, 2015, the day before the final hearing. The undersigned granted the motion and excluded evidence that may be offered at the final hearing to challenge the underlying factual basis on which the Termination Final Order was entered.

The final hearing was held on December 16, 2015. Joint Exhibits 1 through 4 were admitted into evidence. Petitioner did not present any witnesses. Petitioner's Exhibits 1 through 10 were tendered but not admitted, and were proffered for inclusion in the record. Respondent presented the testimony of Heidi Nitty. Respondent's Exhibit 1 was admitted into evidence without objection and Respondent's Exhibits 5 and 6 were admitted over objection. Official recognition was taken of the Final Order issued by the Agency for Health Care Administration ("AHCA") in the case of Agency for Health Care Administration v. Alicia Chilito, M.D., Case No. 12-571PH (AHCA November 4, 2013) and the Order Granting Motion to Relinquish Jurisdiction in the case of Agency for Health Care Administration v. Alicia Chilito, M.D., Case No. 12-0859MPI (Fla. DOAH July 12, 2012).

The one-volume Transcript was filed on January 8, 2016, and the parties were given until January 19, 2016, to file proposed recommended orders. The parties timely filed proposed recommended orders, which were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

1. Petitioner, Alicia Chilito, M.D., is a physician licensed to practice medicine in Florida pursuant to License No. ME 74131.

2. Respondent, Department of Health, is the state agency charged with regulating the practice of medicine, including licensing physicians pursuant to chapters 456 and 458, Florida Statutes (2015).

3. Petitioner timely filed a Renewal Notice, which constituted her application to renew her physician license.[1/] Respondent received Petitioner's Application on January 5, 2015.

4. Respondent did not, within 30 days of receipt of her application, request Petitioner to provide any additional information that it was permitted by law to require, nor did it notify her of any apparent errors or omissions in her application.

5. Accordingly, Petitioner's application was complete on January 5, 2015, by operation of section 120.60(1), for purposes of commencing the 90-day period for Respondent to approve or deny her application.[2/]

6. The 90-day period from Respondent's receipt of Petitioner's complete application expired on or about April 6, 2015.[3/]

7. Heidi Nitty, a government analyst I with Respondent, was involved in the review of Petitioner's application. Her specific role in the application review process was "reviewing court documents and other orders for possible denial of renewal

and also recording [Respondent's] final orders in the national practitioner database."

8. In the course of Nitty's review, she determined that Petitioner previously had been terminated from the Florida Medicaid program. Accordingly, she entered a "do-not-renew modifier" to Petitioner's license application file in Respondent's computer system.

9. On January 20, 2015, Petitioner called Respondent to inquire about the status of her application. She was referred to Ms. Nitty, who was not available to speak to her at that time. Petitioner and Nitty exchanged calls over the course of that day, but did not speak to each other until January 21, 2015, when Petitioner again called, and that time, reached, Nitty. At that point, Nitty verbally informed Petitioner that her application "was being denied" due to having previously been terminated from the Florida Medicaid program.

10. On April 17, 2015——some 102 days after Petitioner filed her complete application——Respondent issued its First Denial Notice, notifying Petitioner that it was denying her application. The First Denial Notice stated that Petitioner's license renewal was being denied pursuant to section 456.0635(2)(e) because she was listed on the United States Department of Health and Human Services Office of Inspector General's List of Excluded Individuals and Entities.[4/]

11. On May 19, 2015——some 134 days after Petitioner filed her complete application——Respondent issued its Second Denial Notice, again stating its intent to deny Petitioner's application. However, the Second Denial Notice stated that Petitioner's license renewal was being denied pursuant to section 456.0635(3)(c) because she had been terminated for cause from the Florida Medicaid Program pursuant to section 409.913, Florida Statutes, as reflected in the Termination Final Order issued by AHCA on March 6, 2014.

12. The stated basis for AHCA's March 6, 2014, Termination Final Order was that Petitioner previously had been terminated from the federal Medicare program and the Florida Medicaid program. The Termination Final Order is a final order issued by AHCA, who is not a party to this proceeding.

13. Petitioner disputes the underlying factual basis for AHCA's Termination Final Order and claims that, in any event, she did not receive the notice, issued on January 17, 2014, that AHCA was proposing to terminate her from the Florida Medicaid program; thus, she did not challenge the proposed termination. Although Petitioner has raised these challenges to the Termination Final Order in her Petition for Hearing Involving Disputed Issues of Material Fact filed in this proceeding, the undersigned is not authorized to "reopen" AHCA's Termination Final Order and revisit its factual and legal underpinnings[5/] so

declined to take evidence on those issues at the final hearing in this proceeding.[6/]

14. Petitioner asserts that because Respondent's First Denial Notice and Second Denial Notice both were issued more than 90 days after Respondent received her complete application, she is entitled to licensure by default under section 120.60(1).

15. Respondent counters that the 90-day period for approving or denying Petitioner's license commenced on February 4, 2015, so its First Denial Notice was timely issued. Respondent further asserts that, in any event, Nitty's statement to Petitioner during their January 21, 2015, telephone discussion satisfied the "90-day approval or denial requirement" in section 120.60(1), so that Petitioner is not entitled to issuance of a renewed license by default.

16. It is undisputed that AHCA did not issue the written notices of its decision to deny Petitioner's license renewal until well after April 6, 2015. Therefore, unless Nitty's statement to Petitioner on their January 21, 2015, telephone call constituted Respondent's denial of Petitioner's application within 90 days after its receipt, Petitioner is entitled to issuance of her license by default, pursuant to section 120.60(1).

17. The evidence establishes that when Nitty told Petitioner on January 21, 2015——notably, in response to

communication that Petitioner initiated——that her license "was being denied," Respondent had not yet made its final decision to deny her application, so had not yet "approved or denied" Petitioner's license.

18. Nitty's role in the application review process was limited to determining whether Petitioner previously had been terminated from the Florida Medicaid program, and, if so, to draft a denial letter for review and approval by her superiors. That is precisely what she did. Based on her confirmation that Petitioner had previously been terminated from the Florida Medicaid program, Nitty drafted a denial letter, which was then sent up Respondent's "chain of command" for approval or rejection, and, ultimately, for signature by Respondent's Deputy Secretary for Administration. The "chain of command" included her immediate supervisor, the bureau chief, the division director, and legal counsel——any and all of whom had the authority to reject her recommendation. To that point, Nitty acknowledged that the denial letter she drafted had "some rewrite issues" and that her supervisor, had, in fact, rewritten the letter. Nitty was not the person authorized by Respondent to make its final, binding decision to approve or deny Petitioner's application, and she did not know who actually made the ultimate decision to deny Petitioner's license renewal. Thus, at bottom, when Nitty told Petitioner that her license

"was being denied," she was only conveying her preliminary assessment, as application review staff, that Petitioner's application was being denied. Nitty's communication of her preliminary assessment could not, and did not, constitute Respondent's "approval or denial" of Petitioner's application.[7/]

19. Thus, Respondent did not approve or deny Petitioner's application within the 90-day approval/denial period. Accordingly, pursuant to section 120.60(1), Petitioner's application is "considered approved."

20. There is no evidence showing that, as of the date of the final hearing, Petitioner had notified Respondent's agency clerk of her intent to rely on the default license provision in section 120.60(1).

CONCLUSIONS OF LAW

21. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding pursuant to sections 120.569 and 120.57(1).

22. In this proceeding, Respondent proposes to deny the renewal of Petitioner's physician license on the basis of section 456.0635(3)(c), which states in pertinent part:

> (3) The department shall refuse to renew a license, certificate, or registration of any applicant if the applicant or any principal, officer, agent, managing employee, or affiliated person of the applicant:
>
> * * *

> (c) Has been terminated for cause from the Florida Medicaid program pursuant to s. 409.913, unless the applicant has been in good standing with the Florida Medicaid program for the most recent 5 years.

23. Respondent's action denying the renewal of Petitioner's license under section 456.0635(3)(c) is tantamount to revoking her license. See Wilson v. Pest Control Comm'n, 199 So. 2d 777, 781 (Fla. 4th 1967). Accordingly, Respondent bears the ultimate burden of persuasion on this issue by clear and convincing evidence. See Coke v. Dep't of Child. & Fam. Servs., 704 So. 2d 726 (Fla. 5th DCA 1998); Dubin v. Dep't of Bus. Reg., 262 So. 2d 273, 274 (Fla. 1st DCA 1972); Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996). This standard of proof has been described as follows:

> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994)(citing Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

24. Here, it is undisputed that on March 6, 2014, AHCA issued a Termination Final Order, terminating Petitioner's participation in the Florida Medicaid program. Thus, Respondent has shown, by clear and convincing evidence, that section 456.0635(3)(c) constitutes a legal basis for denying the renewal of Petitioner's licensel.[8/]

25. However, notwithstanding that section 456.0635(3)(c) directs Respondent to deny renewal of a license when the provider has been terminated from the Florida Medicaid program, Respondent nonetheless remains bound by, and must comply with, chapter 120——including the provision in section 120.60(1) that entitles Petitioner to issuance of a license by default if Respondent fails to approve or deny her application within 90 days of its receipt of her complete application. See Dep't of Child. & Fam. Servs. v. I.B., 891 So. 2d 1168, 1173 (Fla. 1st DCA 2005)(notwithstanding an agency's statutory responsibility and mission, the agency must follow the Administrative Procedure Act ("APA") absent a specific statutory exemption therefrom). See also Gopman v. Dep't of Educ., 908 So. 2d 1118, 1122 (Fla. 1st DCA 2005)(absent an articulated statutory exemption, an agency lacks authority to effectively declare itself exempt from the APA and its provisions).[9/]

26. As noted above, Petitioner asserts that Respondent failed to approve or deny her license within 90 days of its

receipt of her completed application. Petitioner bears the ultimate burden of persuasion on this issue by the preponderance of the evidence. See Balino v. Dep't of Health & Rehab. Servs., 348 So. 2d 349, 350 (Fla. 1st DCA 1977); South Fla. Water Mgmt. Dist. v. RLI Live Oak, LLC, 139 So. 3d 869, 872 (Fla. 2014) (preponderance means the "greater weight of the evidence").

27. Section 120.60(1) states:

> (1) Upon receipt of a license application, an agency shall examine the application and, within 30 days after such receipt, notify the applicant of any apparent errors or omissions and request any additional information the agency is permitted by law to require. An agency may not deny a license for failure to correct an error or omission or to supply additional information unless the agency timely notified the applicant within this 30-day period. The agency may establish by rule the time period for submitting any additional information requested by the agency. For good cause shown, the agency shall grant a request for an extension of time for submitting the additional information. If the applicant believes the agency's request for additional information is not authorized by law or rule, the agency, at the applicant's request, shall proceed to process the application. An application is complete upon receipt of all requested information and correction of any error or omission for which the applicant was timely notified or when the time for such notification has expired. An application for a license must be approved or denied within 90 days after receipt of a completed application unless a shorter period of time for agency action is provided by law. The 90-day time period is tolled by the initiation of a proceeding under ss. 120.569 and 120.57. Any

> application for a license which is not approved or denied within the 90-day or shorter time period, within 15 days after conclusion of a public hearing held on the application, or within 45 days after a recommended order is submitted to the agency and the parties, whichever action and timeframe is latest and applicable, is considered approved unless the recommended order recommends that the agency deny the license. Subject to the satisfactory completion of an examination if required as a prerequisite to licensure, any license that is considered approved shall be issued and may include such reasonable conditions as are authorized by law. Any applicant for licensure seeking to claim licensure by default under this subsection shall notify the agency clerk of the licensing agency, in writing, of the intent to rely upon the default license provision of this subsection, and may not take any action based upon the default license until after receipt of such notice by the agency clerk.

§ 120.60(1), Fla. Stat. (emphasis added).

28. As noted above, Respondent did not, within 30 days of its receipt of Petitioner's application on January 5, 2015, notify her of any apparent errors or omissions or request any additional information that it was permitted by law to require. Thus, Petitioner's application was complete, pursuant to section 120.60(1), for purposes of commencing the 90-day period for approval or denial, on January 5, 2015. Tuten v. State, 819 So. 2d 187, 189 (Fla. 4th DCA 2002)(agency receipt of a complete application triggers the 90-day approval/denial period); MVP Health, Inc. v. Agency for Health Care Admin., Case

No. 2009012001 (Fla. AHCA May 27, 2010)(recognizing that AHCA committed error in not determining an application complete for purposes of commencing the 90-day approval/denial period on the day on which the initial application was received by the agency).[10/] See Sumner v. Board of Psychological Examiners, 555 So. 2d 919, 920 (Fla. 1st DCA 1990)(90-day approval/denial period commenced on the day the application was received by the agency). Therefore, as addressed above, the 90-day period for approving or deny Petitioner's application expired on or about April 6, 2015.

29. As discussed above, the evidence establishes that when Nitty told Petitioner, on January 21, 2015, that her license renewal was being denied, Respondent had not yet made its final decision to approve or deny her application.[11/] It is clear that Nitty was not the final decision-maker and that her preliminary assessment regarding Respondent's approval or denial of Petitioner's license was subject to review by at least four levels of superiors——any and all of whom could reject or change her recommendation.

30. Relying on Sumner and Department of Transportation v. Calusa Trace Development Corp., 571 So. 2d 543 (Fla. 4th DCA 1990), Respondent contends that Nitty's verbal statement to Petitioner in the January 21, 2015, telephone call met the "approval/denial within 90 days" requirement in

section 120.60(1) because providing verbal notice of the agency's decision within the 90-day period is sufficient to avoid the default provision in that statute. That reliance is misplaced.

31. In Sumner, the Board of Psychological Examiners ("Board"), at a public meeting held within 90 days of its receipt of Sumner's complete application for certification to take the psychologist licensure examination, voted to deny her application. Thereafter, but before expiration of the 90-day period, Sumner called to inquire about the status of her application; at that time, she was verbally informed that the Board had denied her application at its meeting. However, the Board's written notice of its previously-made denial decision was not issued within the 90-day period from receipt of her application. On appeal, the court rejected Sumner's argument that she was entitled to issuance of default license under section 120.60(1), holding that the agency was not required to provide written notice, within the 90-day period, of its decision to deny her license. Key to the court's decision was that the Board had denied the application within the 90-day period and that she had been notified of that action, albeit verbally.

32. In Calusa Trace, the District Secretary for District Seven of the Department of Transportation ("DOT"), verbally

informed Calusa Trace, in a face-to-face meeting held within 90 days of the receipt of its complete application, that its application for a state highway connection permit was denied. However, DOT did not issue its written denial until after the 90-day period from receipt of Calusa's application had expired. On appeal, the court affirmed that providing verbal notice within the 90-day period of the agency's denial decision is sufficient to meet the requirement in section 120.60(1) that the application be "approved or denied within 90 days after receipt" for purposes of avoiding approval by default. Again, key to the court's holding was that the agency had, in fact, made its final decision to deny, and, had denied the application within the 90-day period.

33. These cases are factually distinguishable from this case. In both Sumner and Calusa Trace, the entity or person who had final decision-making authority over approval or denial of the application made the final decision to deny——i.e., denied—— the permit within the 90-day period. By contrast, here, Nitty was merely part of Respondent's license review staff. She was not the final decision-maker who approved or denied Petitioner's license. Thus, when Nitty told Petitioner during their January 21, 2015, telephone call, that her license "was being denied," it is indisputable that Respondent's final decision-maker, who had the authority to approve or deny Petitioner's application,

had not yet made the final decision to deny her license. Indeed, Nitty acknowledged that the denial letter she drafted was subject to four levels of review by superiors, that her supervisor had rewritten the letter she drafted, and that she did not know who made the ultimate decision to deny Petitioner's application. Furthermore, Respondent presented no evidence showing that the person who was authorized to make the final decision to deny Petitioner's application did so within the 90-day period.

34. Under these circumstances, it cannot be concluded that Nitty's verbal statement to Petitioner during their January 21, 2015, telephone call constituted Respondent's "approv[al] or den[ial] of her application within 90 days after receipt" of her completed application. To that point, if an agency were able to evade the 90-day approval/denial requirement simply because an application reviewer who is not authorized to make the final decision spoke to an applicant about that reviewer's preliminary assessment of what the agency's decision may be, agencies effectively would have carte blanche to disregard the Legislature's unequivocal direction in section 120.60(1) that a license application be "approved or denied within 90 days after receipt of a completed application."

35. Respondent contends that even if it did not meet the 90-day approval/denial period, it still is not required to issue a default license to Petitioner because, as Respondent put it:

> Moreover [sic] section 456.0635, Florida Statutes [sic] controls over section 120.60, Florida Statutes [sic] because section 456.0635, Florida Statutes [sic] is the more recently enacted statute and the more specific statute. See Florida Virtual Sch. V. K12, Inc., 148 So. 3d 97, 101 (Fla. 2014).

The undersigned disagrees that the "specific statute controls over general statute" statutory construction canon applies in this case.

36. First——and fundamentally——this canon applies only when statutes, on their face, conflict with each other. State Farm Mut. Auto Ins. Co. v. Nichols, 932 So. 2d 1067, 1073 (Fla. 2006). That is not the case here. Respondent correctly asserts that under specified circumstances, including those present in this case, section 456.0635 requires Respondent to deny renewal of a physician license. However, as discussed above, Respondent, as a state agency, must nonetheless comply with the APA——including issuing a default license under section 120.60——unless the Legislature has specifically exempted it from such compliance. See Gopman, 908 So. 2d at 1122. See also Dep't of Child. & Fam. Servs. v. I.B., 891 So. 2d at 1173 (even though agency has statutorily-conferred responsibilities, absent an

articulated statutory exemption, "the [APA] applies [to the agency] no less than to every other 'state department, and each departmental unit.'"). Here, Respondent has not identified any articulated statutory exemption that would relieve it from complying with section 120.60(1). Therefore, under the circumstances in this case, it is required by law to issue a default license to Petitioner, even though it is placed in the position of issuing a license that it otherwise would have denied had it met the approval/denial timeframe in section 120.60(1).[12/] Accordingly, Respondent's contention that section 456.0635 controls over section 120.60(1) is rejected.

37. Further, the logical import of Respondent's position is that any agency that engages in licensing could declare itself exempt from section 120.60(1) if it determined that a "conflict" existed between that provision and its substantive statute. If that were the case, agencies would have the discretion to effectively write the default license provision out of section 120.60(1), in derogation of the established statutory construction principle that the Legislature does not intend to enact useless provisions, so interpretations that would render a statute meaningless must be avoided. Dennis v. State, 51 So. 3d 456 (Fla. 2010). See Bennett v. St. Vincent's Med. Ctr., Inc., 71 So. 3d 828 (Fla. 2011)(statutes must be

interpreted to give full effect and meaning to all words and provisions where possible).

38. Respondent also contends that Petitioner is not entitled to a default license because she did not notify Respondent's clerk in writing of her intent to rely on the default provision of section 120.60(1). Although there is no evidence showing that, as of the date of the final hearing, Petitioner had so notified the Respondent's clerk, the statute does not state any time limit or deadline for doing so. Thus, if Petitioner ultimately were to prevail in this proceeding, she could thereafter notify Respondent's clerk, in accordance with the requirements of section 120.60(1). Because Petitioner has not yet invoked her right to issuance of a default license does not mean that she is not entitled to such license; it simply means that she must comply with the requirements in section 120.60(1) to obtain that license.

39. Based on the foregoing, the undersigned concludes that even though Respondent showed, by clear and convincing evidence, that section 456.0635(3)(c) establishes a legal basis for Respondent's denial of Petitioner's renewal license, Petitioner proved, by a preponderance of the evidence, that Respondent failed to approve or deny her license within 90 days of receipt of her complete application. Therefore, by operation of section 120.60(1), Petitioner's renewal license application is

considered approved. Upon Petitioner's notification of Respondent's agency clerk in accordance with the specific requirements of section 120.60(1), of her intent to rely on the default provision of that statute, Respondent is required to issue her renewal license. § 120.60(1), Fla. Stat. ("Any application for a license which is not approved or denied within the 90-day . . . period . . . is considered approved . . . . [A]ny license that is considered approved shall be issued and may include reasonable conditions as authorized by law.")

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Respondent enter a final order that: (1) acknowledges that Petitioner's application for renewal of License No. ME 74131 is considered approved pursuant to section 120.60(1), Florida Statutes, and (2) directs Respondent's agency clerk, upon Petitioner's notification to said agency clerk that complies with section 120.60(1), to issue Petitioner's license, which may include such reasonable conditions as Respondent is authorized by law to require.

DONE AND ENTERED this 29th day of February, 2016, in Tallahassee, Leon County, Florida.

CATHY M. SELLERS
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of February, 2016.

ENDNOTES

[1/] Petitioner's physician's license expired on January 31, 2015. The application form, DH-MQA-1229, stated, in pertinent part: "[t]he fee of $279.00 and the renewal notice must be postmarked on or before January 31, 2015."

[2/] See note 10, infra.

[3/] April 5, 2015, a Sunday, was the ninetieth day from January 5, 2015. Florida Administrative Code Rule 28-106.103 provides in pertinent part: "[t]he last of the period shall be included unless it is a Saturday, Sunday, or legal holiday, in which even the period shall run until the end of the next day which is not a Saturday, Sunday, or legal holiday."

[4/] This citation is incorrect. Section 456.0635(2)(e) sets forth the bases for refusing to issue an initial license. Section 456.0635(3) sets forth the grounds on which Respondent can refuse to renew a license. Here, Respondent proposed to deny Petitioner's renewal license. Accordingly, it appears that the citation should have been to subsubsection (3)(c) of section 456.0635. Respondent's witness also acknowledged that the basis for denial stated in the First Denial Notice was not factually accurate.

[5/] An agency's power to reopen or reconsider final orders must either be given by statute or inherent by reason of the nature of the agency and the functions it is empowered to perform. Peoples Gas System, Inc. v. Mason, 187 So. 2d 335, 338 (Fla. 1966). In Florida, agencies have been determined to have inherent power to reopen and reconsider final orders which are still under their control. Id. Here, the undersigned has neither statutory nor inherent authority to reopen AHCA's March 6, 2014, Termination Final Order.

[6/] In support of Respondent's position that Petitioner was on notice that it had denied her license, Respondent provided letters from Petitioner's former counsel, written in February 2015, stating that it had come to their attention that Respondent had "suggested" that Petitioner's license would not be renewed. These letters do not show that Petitioner was on notice, before the 90-day approval period expired, that Respondent had denied her license. If anything, they support the inference that Nitty's January 21, 2015 statement to Petitioner was her preliminary assessment, and that Petitioner perceived it as such.

[7/] Petitioner proffered evidence on these issues to preserve them for appeal.

[8/] This conclusion assumes that Respondent does not, in any manner, determine the accuracy (or inaccuracy) of the underlying factual basis for AHCA's March 6, 2014, Termination Final Order, including any events leading to its entry. As noted above, the undersigned lacks the statutory authority to "reopen" AHCA's Termination Final Order and revisit its underlying factual and legal grounds.

[9/] See paragraph 36, infra.

[10/] Respondent cites the Recommended Order in Adoption Advisory Associates, Inc. v. Department of Children and Family Services, Case No. 99-3438, ¶¶ 208-209 (DOAH June 13, 2000) for the proposition that Petitioner's application did not become complete until after the 30-day period for notifying Petitioner of any errors or omissions had expired. More recent appellate case law makes abundantly clear that this is not an accurate reading of section 120.60(1). In Tuten, under similar circumstances in which the agency did not request additional information within 30 days of receipt of the application, the court held that the application became complete for purposes of triggering the 90-day "approval/denial" period on the day on

which it was received by the agency. Id. ("[b]oth sections 373.4141(1) and 120.60(1), Florida Statutes, provide that the 'receipt' of an application is the triggering date")(emphasis added). MVP Health, a recent administrative case that arose under substantively comparable circumstances, also makes clear that the 90-day "approval/denial" period commences upon the agency's receipt of information that renders the application substantively sufficient to enable the agency's review on the merits. In MVP Health, the applicant submitted an application for a home health agency license. AHCA timely reviewed the application and requested additional information (regarding ownership issues). The applicant provided the requested information within the timeframe specified by the agency, and the agency did not dispute that it had received that information. However, the agency questioned the accuracy (not the substantive sufficiency) of the information the applicant had provided and thereafter issued a "Notice to Deem Application Complete and Withdrawn from Further Review," effectively denying the license. The applicant challenged the denial, asserting that it was entitled to a default license pursuant to section 120.60(1) because its application was complete on the day AHCA received the additional information. In determining that the applicant was entitled to a default license under section 120.60(1), the ALJ eloquently explained:

> Nothing in Section 120.60(1), Florida Statutes, suggests, however, that the 90-day or shorter period does not commence until the agency declares the application complete. The statute says that an 'application shall be considered complete upon receipt of all requested information and correction of any error or omission for which the applicant was timely notified or when the time for such notification has expired.' § 120.60(1), Fla. Stat. (emphasis added). The date upon which an agency was in receipt of all legally required elements of an application is an historical fact. If the agency never received all of the required elements, that too is a matter of historical fact. The question of whether a particular 'application shall be considered complete,' therefore, is ultimately a factual one, as is the question of when the application was completed, in cases where it is considered complete. If, for whatever

> reason, the agency misapprehended the historical events as they unfolded, its subjective understanding cannot alter or override the objective reality. The facts, after all, are the facts. Here, MVP's application was complete as of July 24, 2009, regardless of whether the Agency knew that fact. Consequently, the 60-day period began on that date, regardless of whether the Agency noticed.

Id. at ¶ 35 (emphasis in original).

Although AHCA, in its final order issued in MVP, purported to reject this conclusion of law, its substituted conclusion of law acknowledges that:

> [t]he evidence presented in this matter demonstrates that the Agency erroneously found the Petitioner's initial licensure to be incomplete. In actuality, the Petitioner's application was complete, and Petitioner met all requirements for licensure at the time the application was submitted.

MVP Health, Inc. v. Agency for Health Care Admin., Case No. 2009012001 (Fla. AHCA May 27, 2010) at p.5 (emphasis added).

These cases make abundantly clear that an application is complete under section 120.60(1) upon the agency's receipt of the application itself, when——as here——the agency does not request additional information or notify the applicant of error or omission within 30 days of receipt, or, in the case of an application in which the agency does timely request additional information or notify the applicant of error or omission, the agency's receipt of the information that corrects these deficiencies. Respondent's position is directly contrary to this established case law and therefore is rejected.

[11/] The Legislature's purpose in enacting section 120.60(1) is to require agencies to timely review license applications and to timely make a final decision whether to approve or deny an application, so that an applicant, who has important legal rights at issue, is not placed in the position of having to wait an indefinite amount of time for an agency to "get around to" making a final decision.

[12/] Tuten v. State involved essentially identical circumstances. In Tuten, the Department of Environmental Protection ("DEP") issued, after the 90-day approval/denial period had expired, its final agency decision that the project for which the permit was sought could not be approved under the applicable statutory and rule standards. On appeal, the court ordered DEP to issue a default permit pursuant to section 120.60(1), even though the project did not meet the applicable standards. Id. at 189. Tuten counsels that an agency that fails to approve or deny a complete application within 90 days of receipt must issue a default permit——even when the application does not meet the applicable licensing standards. That said, it is noted that section 120.60(1) authorizes the agency to impose reasonable conditions on the default license. See paragraph 39, infra.

COPIES FURNISHED:

Bruce Douglas Lamb, Esquire
Gunster, Yoakley, and Stewart, P.A.
401 East Jackson Street, Suite 2500
Tampa, Florida 33602
(eServed)

Jay Patrick Reynolds, Esquire
Department of Health
Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-1703
(eServed)

Leslie Jennings McIlroy, Esquire
Department of Health
4052 Bald Cypress Way, Bin A-02
Tallahassee, Florida 32399-1703
(eServed)

Shannon Revels, Agency Clerk
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1703
(eServed)

Nichole C. Geary, General Counsel
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1701
(eServed)

John H. Armstrong, M.D., F.A.C.S.
State Surgeon General
Department of Health
4052 Bald Cypress Way, Bin A00
Tallahassee, Florida 32399-1701
(eServed)

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.