STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

WE CARE LIFE SOURCE, LLC,

Petitioner,

vs. Case No. 15-3621F

AGENCY FOR PERSONS WITH DISABILITIES,

Respondent.
_____/

FINAL ORDER

A hearing was conducted in this case before D.R. Alexander, an Administrative Law Judge of the Division of Administrative Hearings (DOAH), on October 12, 2015, by video teleconferencing at sites in Tampa and Tallahassee, Florida.

APPEARANCES

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For Respondent: Kurt E. Ahrendt, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Respondent, Agency for Persons with Disabilities (Agency), had a reasonable basis in law and fact to initially deny Petitioner's application for a license to operate

a group home, or whether other circumstances were present that would make an award of attorney's fees and costs unjust within the meaning of section 57.111(1)(e), Florida Statutes (2015).

PRELIMINARY STATEMENT

On October 6, 2014, the Agency issued proposed agency action denying an application by Petitioner for a license to operate a group home on the ground the application was incomplete. Petitioner requested a hearing, and the matter was referred to DOAH and assigned Case No. 14-5132. In a Recommended Order issued by former Administrative Law Judge Thomas P. Crapps on March 31, 2015, the application was deemed complete by operation of law, and a recommendation was made that the Agency either grant or deny the application. In a Final Order issued on April 22, 2015, the Agency adopted the Recommended Order in toto, approved the application, and issued a license.

On June 19, 2015, Petitioner filed its Motion for Attorneys' Fees and Costs pursuant to section 57.111. The Agency does not dispute that the amount of fees and costs claimed by Petitioner is reasonable, Petitioner is the prevailing party, and Petitioner is a small business entity. The only disputed issue is whether the Agency's decision to initially deny the application was substantially justified or

special circumstances are present that would make an award of fees and costs unjust.

At the final hearing, the Agency presented two witnesses. Respondent's Exhibits A through H were accepted in evidence.

There is no transcript of the hearing. Proposed findings of fact and conclusions of law were filed by the parties and have been considered in the preparation of this Final Order. The undersigned has also relied on the record in Case No. 14-5132.

FINDINGS OF FACT

1. Respondent is the state agency that licenses group homes pursuant to section 393.067. On June 13, 2014, Petitioner's corporate agent, Lavonda Hargrove, filed with the Agency an application for licensure to operate a group home facility in Wesley Chapel, Florida. Relevant to this dispute is a requirement by the Agency that if the applicant does not own the property on which the facility will be located, it must submit a copy of a fully-executed landlord/tenant lease agreement with the application packet. Petitioner did not own the property on which the facility would be operated and was required to comply with this requirement.

2. The initial application packet filed with the Agency was missing a number of required items and some questions on the application were left blank. However, as found by Judge Crapps,

a copy of an undated and partially signed residential lease agreement was submitted with the application. As noted below, its whereabouts are unknown.

3. On July 29, 2014, or more than 30 days after the application was filed,[1/] Myra Leitold, a Residential Program Supervisor in Tampa who reviewed the application, emailed Hargrove and informed her that the application had "to be completed in its entirety" and described areas of the application that required additional information. Leitold also attached to the email a generic checklist of 36 required documents for an initial license application, one of which was a "Landlord Agreement/Lease." While she identified some, but not all, of the items on the checklist that were missing, she did not specifically mention that a landlord agreement/lease had not been filed.

4. In response to the email, on September 12, 2014, Hargrove submitted a second application with the supplemental information requested in Leitold's email. Because a lease agreement had already been submitted with the first application, and no mention of one was made in Leitold's email, it is reasonable to assume that this was the reason why Hargrove did not submit another copy with her second application.

5. To make sure that her application was complete, on September 17, 2014, Hargrove emailed Leitold and stated the following:

> This is a follow up email to confirm your receipt of requested items for licensure of the Wesley Chapel home at 31733 Baymont Loop. Please advise if additional information is needed. Also, do you have any idea when you will be available to inspect the home?

6. In response to Hargrove's email, Leitold promptly sent an email stating as follows:

> I did receive the documents forwarded last week however, have not had an opportunity to review them. I should be able to get to them in the next week or two.

7. After her review of the second application was completed, Leitold believed it was still incomplete because there was no lease agreement in the packet. At the underlying hearing, Leitold acknowledged that it was possible the lease agreement had been filed with the initial application on June 13, 2014, but thought it unlikely the Agency had lost the document. As found by Judge Crapps, however, an agreement was filed but its whereabouts are unknown. In any event, Leitold did not advise Hargrove that her application was still incomplete. Instead, she forwarded the second application, without a lease agreement, to the Central Office in Tallahassee for final disposition. Applications are sent to Tallahassee

only if they are incomplete or involve pending violations by the applicant; otherwise, action on the application is made at the local level. Incomplete applications are always denied, and Leitold knew that when the application was forwarded to Tallahassee, this would be the final disposition of the matter.

8. After the application packet was reviewed by the Central Office in Tallahassee, with no executed lease agreement, on October 6, 2014, the Agency issued its Notice of License Application Denial for Group Home (Notice) based upon the ground that it did not include a lease agreement. (Presumably, the application satisfied all other licensing requirements.) Two Agency employees in Tallahassee who reviewed the application, Kim Walsh and Tom Rice, testified without dispute that a lease agreement is an essential part of an application, and without the document, they had no choice under the law except to deny the application. Neither Walsh nor Rice had knowledge that a partially executed and unsigned lease agreement had been submitted with the first application but was apparently lost or misplaced, or that Lietold had failed to notify Hargrove that this specific item was missing before the packet was sent to Tallahassee.

9. On October 23, 2014, Hargrove requested a hearing to contest the decision. Although she was knew why the application was denied, in her request for a hearing, Hargrove did not

indicate any specific material facts in the Notice that were in dispute. Moreover, she never indicated that a lease agreement had been filed with her initial application. According to Mr. Rice, the Agency's Program Administrator, had Hargrove disclosed this fact in her request for a hearing or brought it to the attention of Agency personnel in a timely manner, the matter could have been resolved without a hearing.

10. A formal hearing was conducted by Judge Crapps on February 24, 2015. Just prior to the hearing, a lease agreement was provided to the Agency in the form of a proposed exhibit. Because it was not fully executed, the case was not settled, and an evidentiary hearing was conducted. At the hearing, Hargrove testified that the fully executed lease agreement was at her home.

11. In his Recommended Order, Judge Crapps accepted Hargrove's testimony that a lease agreement had been filed with the initial application but made no finding as to what happened to the document. Even if the agreement was lost by the Tampa office, or was not fully executed, he observed that the Agency did not notify Hargrove within 30 days after the application was filed of any apparent errors or omissions, as required by section 120.60(1). For this reason, he deemed the application complete by operation of law. He also criticized the Agency for failing to specifically identify the missing lease agreement in

its email sent on July 29, 2014. He recommended that the Agency reconsider the application and make a decision to approve or deny. The Agency's Final Order adopted the Recommended Order without change and approved the application.

CONCLUSIONS OF LAW

12. An award of attorney's fees and costs shall be made to a prevailing small business party in any administrative proceeding initiated by a state agency unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust. See § 57.111(4)(a), Fla. Stat. A proceeding is substantially justified "if it had a reasonable basis in law or fact at the time it was initiated by a state agency." § 57.111(3)(e), Fla. Stat. Facts coming to light after the decision was made cannot be used to second-guess the action. See, e.g., Ag. for Health Care Admin. v. Gonzalez, 657 So. 2d 56 (Fla. 1st DCA 1995). Thus, the sole focus is on the information available to the Agency at the time it acted.

13. The Agency has stipulated that Petitioner is the prevailing small business party and the amount of requested fees and costs is reasonable. Thus, the only issue to decide is whether there was a reasonable basis in law and fact for the Agency's decision to deny the application, based on the information available at the time of its decision, or whether special circumstances exist that would make an award unjust.

Once the prevailing small business party proves that it qualifies as such under section 57.111, the Agency has the burden to show substantial justification or special circumstances. Dep't of HRS v. S. Bch. Pharmacy, Inc., 635 So. 2d 117, 122 (Fla. 1st DCA 1994). If the Agency can make neither showing, an award of fees and costs is mandatory.

14. Based upon the information available at the time a decision was made, the Agency had a reasonable basis in fact to deny the application as being incomplete. This is because the application packet reviewed by the Central Office lacked a lease agreement; and, by law, the Agency had no choice except to deny the application. This was reasonable and appropriate governmental action based on the information available to the Agency at that time. Although Petitioner later produced evidence to show that a partially executed lease agreement had been submitted with the first application, and Hargrove was never told that this item was missing from her application, these facts alone are not sufficient to find that the Agency could not in good faith rely on the application packet forwarded to Tallahassee for its review. See, e.g., Casa Febe Ret. Home, Inc. v. Ag. for Health Care Admin., 892 So. 2d 1103, 1105 (Fla. 2d DCA 2004); Ag. for Health Care Admin. v. MVP Health, 74 So. 3d 1141 (Fla. 1st DCA 2011). Petitioner has failed to

demonstrate otherwise, or to prove that the Agency was not substantially justified in denying the application.[2/]

15. Although the second defense is rarely used by state agencies, special circumstances are present here that make an award unjust. Had Petitioner's representative indicated in her request for a hearing that a lease agreement was submitted with the initial application, or otherwise raised this issue in a timely manner, or submitted a fully executed lease agreement to the Agency prior to the hearing, the dispute could have been resolved informally. In other words, had any one of those relatively simple steps been taken, it would have allowed the Agency to correct a mistake before the case proceeded to hearing. Accordingly, these circumstances can be fairly characterized as "special," and make an award of fees and costs unjust.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that Petitioner's Motion for Attorney's Fees and Costs is denied.

DONE AND ORDERED this 18th day of November, 2015, in Tallahassee, Leon County, Florida.

D. R. Alexander

D. R. ALEXANDER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of November, 2015

ENDNOTES

[1/] Pursuant to section 120.60(1), within 30 days after an application is filed, an agency must notify an applicant of any apparent omissions or errors. If notification is not provided within this timeframe, an application is considered complete, and action on the application must be taken within 90 days thereafter, or the application is deemed to be approved, subject to certain conditions. Id. One condition requires that the applicant affirmatively advise the agency that it intends to rely upon the default provisions. Id. According to the Recommended Order, Petitioner did not avail itself of this procedure and therefore the statutory default provisions were not triggered.

[2/] Petitioner essentially seeks to impute the actions of Lietold to the decision makers in Tallahassee, who acted in good faith, based on the information before them, and had no knowledge regarding the lost or misplaced lease agreement or Lietold's failure to advise Hargrove about the missing item. Petitioner cites no administrative decision or appellate case to support this proposition.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.