

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Petitioner,

vs.

Case No. 15-7353

TALF, INC., d/b/a THE INN AT
UNIVERSITY VILLAGE,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on August 26, 2016, via video teleconference sites in Tampa and Tallahassee, Florida, before Administrative Law Judge Lynne A. Quimby-Pennock of the Division of Administrative Hearings (Division).

APPEARANCES

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STATEMENT OF THE ISSUES

Did Respondent, TALF, Inc., d/b/a The Inn at University Village (University Inn), violate requirements to demonstrate the financial ability to operate in accordance with statutes and rules? If so, what penalty should be imposed?

PRELIMINARY STATEMENT

By a one-count Administrative Complaint (AC), dated November 10, 2015, Petitioner, Agency for Health Care Administration (AHCA), began proceedings to revoke University Inn's assisted living facility license. On December 2, 2015, University Inn, via its president John Bartle, filed an Election of Rights form which disputed the allegation in the AC. On December 30, 2015, AHCA referred the matter to the Division to conduct the requested hearing.

The hearing was originally scheduled for March 3, 2016. The hearing was continued. On August 8, 2016, AHCA filed a Motion to Relinquish Jurisdiction (Relinquish Motion) based of Respondent's failure to provide the requested proof of financial ability to operate. Respondent opposed the Relinquish Motion. On August 16, 2016, an Order denying the Relinquish Motion was entered.

On August 23, 2016, AHCA filed a Motion in Limine (Motion), and Respondent's opposition to the Motion was filed on August 25,

2016. At the beginning of the hearing on August 26, 2016, the undersigned heard arguments from counsel. AHCA's Motion was denied.

AHCA presented the testimony of Catherine Anne Avery, the unit manager for AHCA's Assisted Living Licensure Unit; John Bartle, the president of the TALF Board; and in rebuttal, Eric West, a financial analyst with AHCA's Financial Analysis Unit. AHCA's Exhibits A and C were admitted without objection. AHCA's Exhibit B was admitted over objection. University Inn presented testimony from John Bartle and via deposition, Lois Markham, one of AHCA's licensure analysts for assisted living facilities. University Inn's Exhibits A, and C through Q were admitted without objection. University Inn's Exhibit B was admitted over objection.

At the hearing's conclusion, AHCA requested and University Inn did not object to additional time to file the proposed recommended orders. The one-volume Transcript was filed on September 12, 2016, and a Notice of Filing was issued the following day. On October 7, 2016, Respondent's Unopposed Motion for Enlargement of Time to File Proposed Recommended Order was filed, and granted. On October 31, 2016, both parties timely filed their proposed recommended orders, and each has been considered in the preparation of this Recommended Order.

On November 3, 2016, Respondent's Notice of Additional Authority was filed. AHCA filed its Motion to Strike Respondent's

Notice of Additional Authority (Motion to Strike) later that same day. On November 4, 2016, Respondent filed a Response in Opposition to AHCA's Motion to Strike.^{1/} AHCA's Motion to Strike is granted.

All references to the Florida Statutes are to the 2016 version, unless otherwise noted.

FINDINGS OF FACT

1. AHCA is the State regulatory authority responsible for licensure of assisted living facilities and enforcement of applicable state regulations, state statutes, and rules governing assisted living facilities pursuant to chapters 429, part I, and 408, part II, Florida Statutes, and Florida Administrative Code Chapters 58A-5 and 59A-35.

2. At all times material to this proceeding, University Inn was a licensed assisted living facility providing services for a continuing care retirement community in Tampa, Florida, under the licensing authority of AHCA. University Inn was required to comply with AHCA's applicable rules and statutes.

3. University Inn conducts business at University Village, which is affiliated with Westport Holdings Tampa, LP (Westport). Westport holds a certificate from the Office of Insurance Regulation (OIR) to operate University Inn as part of a continuing care retirement community. As such, University Inn is also regulated by the OIR.^{2/}

4. A continuing care retirement community allows its residents to transition from an independent living setting to care in an assisted living facility to care in a skilled nursing facility.

5. University Inn is physically located on the second and third floors of a building which also houses a licensed nursing facility known as TR & SNF, doing business as The Nursing Center at University Village (Center). Westport is also affiliated with the Center. University Inn and the Center share common vendors, utilities, services and personnel.

6. Sometime after February 13, 2015, AHCA became aware of an "Initial Order of Suspension" issued by the OIR to the Westport Holdings Tampa, LP, d/b/a University Village (University Village). University Village is part of the continuing care retirement community associated with University Inn and Center, located in Tampa, Florida.^{3/}

7. In late February or early March, AHCA conducted a survey of the Center and found that certain vendors had not been paid appropriately. The Center and University Inn are intertwined and the financial health of one affects the other. If any of the services provided to the residents are disrupted, residents' health, safety and welfare could be adversely affected.

8. Based on concerns for the University Inn's residents' well-being, Ms. Avery authorized utilization of section 408.810(8), Florida Statutes, which authorized AHCA to demand

University Inn to provide proof of its financial ability to operate.

9. On April 22, 2015, AHCA issued a certified letter to University Inn asking it to provide proof of financial ability (PFA) to operate. The letter sought the PFA information within ten days of receipt of the request. The initial paragraphs set the tone of the request as follows:

The Agency has received information concerning the financial status of your assisted living facility. It has come to our attention that the assisted living facility is in arrears in paying vendors for services and goods [sic] rendered.

This is an indication that your ALF is experiencing financial instability and may be jeopardizing patient care. The agency is authorized by Florida Statutes and the Florida Administrative Code to require you to submit evidence of financial ability to continue operating.

10. AHCA's demand letter provided the following statute and rule provisions for University Inn to review: section 408.810(8) and 408.810(9), Florida Statutes (2014); and Florida Administrative Code Rule 59A-35.062(3) and (7). University Inn was directed to obtain the Assisted Living Facility Proof of Financial Ability to Operate AHCA Form 3100-0009 July 2009, from AHCA's website, and in addition to that form, to provide "copies of your current operating account balance (30-day banking statement); any other lines of credit and any other evidence of available funds for your agency's use; numbers of staff by

professional discipline currently employed including contractors; proof of payment to staff and CONTRACTORS (current payroll records); and copies of invoices for all vendors providing goods and services in the last 12 months.”

11. Mr. Bartle was aware of AHCA’s request for the PFA at or near the time the request was made. Mr. Bartle contacted Sue Benovich, a certified public accountant, and asked her to start preparing the PFA for University Inn. Mr. Bartle turned the PFA request over to Anna Small, an attorney representing TALF and TR & SNF. Mr. Bartle testified that he “reviewed notes along the way, e-mails and back and forth . . . between the parties” as the PFA was being prepared and was satisfied that the forms were being prepared.

12. At some point after receipt of the letter, Ms. Small, on behalf of University Inn, asked AHCA for additional time in which to provide the information. AHCA set May 25, 2015, as the deadline for receipt of the PFA. University Inn did not submit the requested PFA by the revised (May) deadline.

13. Mr. Bartle was aware that Ms. Small left her law practice at Allen Dell “right after the 4th of July [2015]” because Ms. Small sought Mr. Bartle’s permission to transfer “the case to” another law firm. Mr. Bartle confirmed that he reviewed a draft in July and “assumed it would have been sent to the Agency at some point by Ms. Small.” Mr. Bartle did not know the PFA was not submitted until “the provider was served the complaint.”

14. On December 2, 2015, AHCA received University Inn's completed Election of Rights (request for hearing) form with an Attachment A. Attachment A contained approximately 18 pages following a page titled:

TALF, INC.

D/B/A THE INN AT UNIVERSITY VILLAGE
PROJECTED FINANCIAL STATEMENTS

FOR THE YEARS ENDING JULY 31, 2016 AND 2017

15. Mr. West reviewed the PFA (Attachment A) submitted by University Inn. Mr. West was unable to provide a professional opinion on the financial stability of TALF because he was not given a complete picture of the financial position of TALF.

16. In April 2015, AHCA performed several survey visits to University Inn. The surveys were conducted to ensure the health, safety, and well-being of University Inn's residents, and did not cite any deficiencies.

17. University Inn failed to comply with an authorized request to submit financial information to support its continued ability to operate.

CONCLUSIONS OF LAW

18. DOAH has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2015).

19. AHCA bears the burden of proving the allegations of its Administrative Complaint. See Dep't of Banking & Fin. v. Osborne

Stern & Co., 670 So. 2d 932, 935 (Fla. 1996; Fla. Dep't of Transp. v. J.W.C. Co. 396 So. 2d 778, 788 (Fla. 1st DCA 1981). Since AHCA seeks to impose fines and revoke a license, AHCA must prove its allegations by clear and convincing evidence. Nair v. Dep't of Bus. & Prof'l Reg., Bd. of Med., 654 So. 2d 205 (Fla. 1st DCA 1995.

20. The clear and convincing standard was described in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), as follows:

[T]he 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.

21. Section 408.810 provides the following in pertinent part:

(8) Upon application for initial licensure or change of ownership licensure, the applicant shall furnish satisfactory proof of the applicant's financial ability to operate in accordance with the requirements of this part, authorizing statutes, and applicable rules. The agency shall establish standards for this purpose, including information concerning the applicant's controlling interests. The agency shall also establish documentation requirements, to be completed by each applicant, that show anticipated provider revenues and expenditures, the basis for financing the anticipated cash-flow requirements of the provider, and an applicant's access to contingency financing.

A current certificate of authority, pursuant to chapter 651, may be provided as proof of financial ability to operate. The agency may require a licensee to provide proof of financial ability to operate at any time if there is evidence of financial instability, including, but not limited to, unpaid expenses necessary for the basic operations of the provider.

(9) A controlling interest may not withhold from the agency any evidence of financial instability, including, but not limited to, checks returned due to insufficient funds, delinquent accounts, nonpayment of withholding taxes, unpaid utility expenses, nonpayment for essential services, or adverse court action concerning the financial viability of the provider or any other provider licensed under this part that is under the control of the controlling interest. A controlling interest shall notify the agency within 10 days after a court action to initiate bankruptcy, foreclosure, or eviction proceedings concerning the provider in which the controlling interest is a petitioner or defendant. Any person who violates this subsection commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083. Each day of continuing violation is a separate offense.
(Emphasis added).

22. Rule 59A-35.062 provides the following in pertinent part:

(7) An applicant for renewal of a license shall not be required to provide proof of financial ability to operate, unless the licensee or applicant has demonstrated financial instability. If an applicant or licensee has shown signs of financial instability, as provided in Section 408.810(9), F.S., at any time, the Agency may require the applicant or licensee to provide proof of financial ability to operate by submission of:

(a) AHCA Form 3100-0009, July 2009, Proof of Financial Ability Form, that includes a balance sheet and income and expense statement for the next 2 years of operation which provide evidence of having sufficient assets, credit, and projected revenues to cover liabilities and expenses; and

(b) Documentation of correction of the financial instability, including but not limited to, evidence of the payment of any bad checks, delinquent bills or liens. If complete payment cannot be made, evidence must be submitted of partial payment along with a plan for payment of any liens or delinquent bills. If the lien is with a government agency or repayment is ordered by a federal or state court, an accepted plan of repayment must be provided.

23. The AC alleges that University Inn violated provisions of chapters 408, part II, and 429, part I. Those provisions require an assisted living facility to furnish satisfactory proof of financial ability to operate. The statute says that AHCA shall establish standards for this purpose, including information about applicant's controlling interests, which it did through rule 59A-35.062(7).

24. Clear and convincing evidence, in the form of the order suspending the certificate for the continuing care community, showed that AHCA had sufficient evidence of financial instability to require proof of financial ability.

25. Rule 59A-35.062(7) authorizes AHCA to require a provider to submit proof of financial ability by completing and submitting a Proof of Financial Ability Form, a balance sheet, and an income and expense statement. Providing some of that information (which

did not comply with the request) approximately seven months after it was requested does not allow AHCA to adequately protect the residents, staff and/or vendors as required. AHCA has proven by clear and convincing evidence that it had reasonable cause to request the financial information and that University Inn failed to provide it.

26. Section 408.815 provides the following in pertinent part:

(1) In addition to the grounds provided in authorizing statutes, grounds that may be used by the agency for denying and revoking a license or change of ownership application include any of the following actions by a controlling interest:

* * *

(c) A violation of this part, authorizing statutes, or applicable rules.

27. Section 429.14 provides the following in pertinent part:

(1) In addition to the requirements of part II of chapter 408, the agency may deny, revoke, and suspend any license issued under this part and impose an administrative fine in the manner provided in chapter 120 against a licensee for a violation of any provision of this part, part II of chapter 408, or applicable rules, or for any of the following actions by a licensee, any person subject to level 2 background screening under s. 408.809, or any facility staff:

* * *

(b) A determination by the agency that the owner lacks the financial ability to provide continuing adequate care to residents.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is recommended that Agency for Health Care Administration enter a final order revoking the license of TALF, Inc., d/b/a The Inn at University Village.

DONE AND ENTERED this 16th day of November, 2016, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of November, 2016.

ENDNOTES

^{1/} See Fla. Admin. Code R. 28-106.204.

^{2/} All continuing care retirement communities are regulated by OIR.

^{3/} The suspension was later removed.

COPIES FURNISHED:

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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.