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STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

MILA ALF, LLC d/b/a DIXIE LODGE
ASSISTED LIVING FACILITY,

Petitioner,

vs.

STATE OF FLORIDA, AGENCY FOR
HEALTH CARE ADMINISTRATION,

Respondent.
_______________________________________/

DOAH CASE NO. 17-1559
AHCA NO. 2015010344
FILE NO. 11910314
LICENSE NO. 1077
PROVIDER TYPE : ASSISTED
LIVING FACILITY
RENDITION NO.: AHCA-18-0433-FOF-OLC

FINAL ORDER

This case was referred to the Division of Administrative Hearings (DOAH) where the assigned Administrative Law Judge (ALJ), Yolanda Y. Green, conducted a formal administrative hearing. At issue in this proceeding is whether the Agency for Health Care Administration ("AHCA" or "Agency") should grant or deny Petitioner's change of ownership application based on the allegations set forth in the Second Amended Notice of Intent to Deny. The Recommended Order entered on May 10, 2018 is attached to this final order and incorporated herein by reference, except where noted infra.

RULINGS 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 for Health Care Administration ("Agency" or "AHCA") 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

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> 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 Respondent's exceptions:

In Exceptions One and Four through Twenty-Three, Respondent takes exception to the findings of fact in Paragraphs 12 through 19, 31, 32, 33, 34, 35, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61 and 64 of the Recommended Order, based on its "Recurring Argument" that the findings of fact in these paragraphs contradict the pre-hearing stipulations previously entered into by the parties while this matter was pending before an informal hearing officer. Respondent is essentially re-arguing its April 6, 2017 Motion to Relinquish Jurisdiction. The ALJ denied that motion, finding there were disputed issues of material fact present in this case. The Agency cannot second-guess the ALJ on a procedural matter that is beyond its substantive jurisdiction. See, e.g., Deep Lagoon Boat Club, Ltd. v. Sheridan, 784 So. 2d 1140, 1142 (Fla. 2d DCA 2001) (stating an agency does not have

substantive jurisdiction to decide whether the doctrine of collateral estoppel applies to a particular case). In addition, the findings of fact in Paragraphs 12 through 19, 31, 32, 33, 34, 35, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61 and 64 of the Recommended Order are based on competent, substantial record evidence. See Transcript, Volume 1, Pages 78, 82-85, 86-87, 91-92, 103-104; Transcript, Volume 2, Pages 116, 118-119, 120-134, 149 and 184; and Petitioner's Exhibit 1. 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 Exceptions One and Four through Twenty-Three.

In Exception Two, Respondent takes exception to the findings of fact in Paragraph 21 of the Recommended Order, arguing that the findings omit subsection (c) of rule 58A-5.0182(8), Florida Administrative Code. Respondent is correct. Thus, the Agency will treat Exception Two as a motion to correct a scrivener's error since it appears to be an unintentional error on the part of the ALJ. Therefore, the Agency grants Exception Two, and it modifies Paragraph 21 of the Recommended Order as follows:

> 21. The elopement standards are described in rule 58A-5.0182(8), which provides as follows:
>
> (8) ELOPEMENT STANDARDS
> (a) Residents Assessed at Risk for Elopement. All residents assessed at risk for elopement or with any history of elopement must be identified so staff can be alerted to their needs for support and supervision.
> 1. As part of its resident elopement response policies and procedures, the facility must make, at a minimum, a daily effort to determine that at risk residents have identification on their persons that includes their name and the facility's name, address, and

> telephone number. Staff attention must be directed towards residents assessed at high risk for elopement, with special attention given to those with Alzheimer's disease or related disorders assessed at high risk.
> 2. At a minimum, the facility must have a photo identification of at risk residents on file that is accessible to all facility staff and law enforcement as necessary. The facility's file must contain the resident's photo identification within 10 days of admission or within 10 days of being assessed at risk for elopement subsequent to admission. The photo identification may be provided by the facility, the resident, or the resident's representative.
> (b) Facility Resident Elopement Response Policies and Procedures. The facility must develop detailed written policies and procedures for responding to a resident elopement. At a minimum, the policies and procedures must provide for:
> 1. An immediate search of the facility and premises,
> 2. The identification of staff responsible for implementing each part of the elopement response policies and procedures, including specific duties and responsibilities,
> 3. The identification of staff responsible for contacting law enforcement, the resident's family, guardian, health care surrogate, and case manager if the resident is not located pursuant to subparagraph (8)(b)1.; and,
> 4. The continued care of all residents within the facility in the event of an elopement.
> (c) Facility Resident Elopement Drills. The facility must conduct and document resident elopement drills pursuant to sections 429.41(1)(a)3. and 429.41(1)(l), F.S.

In Exception Three, Respondent takes exception to the findings of fact in Paragraphs 23 through 27 of the Recommended Order, arguing they are contrary to the evidence. The findings of fact in Paragraphs 23 through 27 of the Recommended Order are based on competent, substantial record evidence. See Transcript, Volume 1, Pages 53-55 and 96-99; and Petitioner'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 denies Exception Three.

In Exception Twenty-Four, Respondent takes exception to the conclusions of law in Paragraph 77 of the Recommended Order, arguing the ALJ erred in concluding Petitioner's failure to prepare an adverse incident report after Resident 17 eloped was not sufficient to

demonstrate Petitioner engaged in intentional or negligent acts affecting the health, welfare and safety of residents. The Agency must deny Exception Twenty-Four because the conclusions of law in Paragraph 77 of the Recommended Order are based on the ALJ's weighing the record evidence. The Agency cannot re-weigh that evidence in order to reach different conclusions of law. See §120.57(1)(l), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Furthermore, the ALJ's conclusion of law regarding whether the facts constituted an intentional or negligent act affecting the health, welfare and safety of residents is outside of the Agency's substantive jurisdiction. See Gross v. Department of Health, 819 So. 2d 997, 1001 (Fla. 5th DCA 2002).

In Exception Twenty-Five, Respondent takes exception to the conclusions of law in Paragraph 79 of the Recommended Order, arguing the ALJ erred by not concluding Petitioner committed three Class II deficiencies, and incorporated its "Recurring Argument" as the basis for the exception. Based on the ruling on Respondent's Exceptions One and Four through Twenty-Three supra, which is hereby incorporated by reference, the Agency denies Exception Twenty-Five.

In Exception Twenty-Six, Respondent takes exception to the conclusion of law in the second sentence of Paragraph 82 of the Recommended Order, arguing it misstates the record. Respondent's argument is not valid. The Class II deficient practice referenced in Paragraph 82 of the Recommended Order is the same one discussed in Paragraph 79 of the Recommended Order, which is what the ALJ meant by "discussed above" in the second sentence of Paragraph 82 of the Recommended Order. Furthermore, Respondent's argument is not a valid reason for the Agency to reject or modify conclusions of law. See § 120.57(1)(*l*), Fla. Stat. Therefore, the Agency denies Exception Twenty-Six.

In Exception Twenty-Seven, Respondent takes exception to the conclusion of law in the first sentence of Paragraph 88 of the Recommended Order, arguing the ALJ erred by concluding there were 10 Class III deficiencies when she had found Petitioner had committed 11 Class III deficiencies elsewhere in the Recommended Order. Respondent is correct. The ALJ failed to include Tag A0160 as part of the Class III deficiencies listed in the first sentence of Paragraph 88 of the Recommended Order, even though she found there was evidence to support the violation. See Paragraph 59 of the Recommended Order. The Agency will treat will treat Exception Twenty-Seven as a motion to correct a scrivener's error since it appears to be an unintentional error on the part of the ALJ. Therefore, the Agency grants Exception Twenty-Seven, and it modifies Paragraph 88 of the Recommended Order as follows:

> 88. Here, the evidence presented at hearing supports the cited deficiencies for a single Class II deficiency, Tag 0165, and 11~~0~~ Class III deficiencies, including Tag A0008, Tag A0026, Tag A0030, Tag A0052, Tag A0054, Tag A0077, Tag A0078, Tag A0083, Tag A0090, ~~and~~ Tag A0093, and Tag A0160. The deficiencies demonstrate issues during the provisional licensure. However, the Second Amended NOID reflects that only one uncorrected deficiency was found in the follow-up survey. That being the case, there is insufficient evidence to prove there was a pattern of deficiencies.

In Exception Twenty-Eight, Respondent takes exception to the conclusions of law in Paragraphs 88 and 90 of the Recommended Order, arguing the ALJ erred in concluding that there was not a demonstrated pattern of deficient practice by Petitioner. Respondent's argument is not correct. The cases cited to by Respondent in Exception Twenty-Eight are distinguishable from the case at hand. In Agency for Health Care Administration v. BA Home Health Care, Inc., Case No. 10-359PH (AHCA 2011), the hearing officer found the licensee had committed deficiencies affecting 9 of 11 eleven residents and six of nine employees, and that the violations continued on uncorrected for a four-month period, thus constituting a pattern of deficient

performance. See the BA Home Health Recommended Order at Page 5. In Senior Lifestyles, LLC d/b/a Kipling Manor Retirement Center v. Agency for Health Care Administration, DOAH Case No. 13-4660 (AHCA 2014), the evidence established that the licensee had committed 119 deficiencies over a three-year period, thus constituting a pattern of deficient performance. See the Kipling Manor Final Order at Page 17. In Avalon's Assisted Living, LLC d/b/a Avalon's Assisted Living v. Agency for Health Care Administration, DOAH Case Nos. 14-0610 and 14-1339 (AHCA 2015), the evidence established the licensee had committed multiple deficiencies that were found during multiple surveys conducted by the Agency during a period of several months, and that all of the deficiencies involved the same general issues. See the Avalon Recommended Order at Pages 17-18. Here, the ALJ found Petitioner committed one Class II deficiency and eleven Class III deficiencies that were found by the Agency during one survey. That is not enough to establish a "pattern of deficient performance," especially considering the Agency conducted another survey two months later in which it found no new deficiencies and found that only one of the eleven Class III deficiencies previously found were still uncorrected. See Respondent's Exhibit 2. Thus, the Agency finds that, while it has substantive jurisdiction over the conclusions of law in Paragraphs 88 and 90 because it is the state agency in charge of licensing and regulating assisted living facilities in Florida, it cannot substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency denies Exception Twenty-Eight.

In Exception Twenty-Nine, Respondent takes exception to the conclusions of law in Paragraph 92 of the Recommended Order, arguing the ALJ erred in concluding that Respondent should not deny Petitioner's licensure application. Both Petitioner, Respondent and the ALJ all correctly state that the Agency has broad discretion in determining whether to grant or deny a

licensure application. As the Third District Court of Appeal concluded, "[t]he fitness of license applicants, particularly those involving 'regulation of occupations which are engaged in by privilege rather than right and which are potentially injurious to the public welfare,' is subject to agency discretion that may extend beyond the express standards and guidelines articulated by the legislature." See Trust Care Health Services v. Agency for Health Care Administration, 50 So. 3d 13, 17–18 (Fla. 3d DCA 2010). As the ALJ correctly concluded in Paragraph 91 of the Recommended Order, Petitioner "failed to meet certain minimum requirements during the provisional licensure process." That, by itself, gives the Agency a valid basis for denying Petitioner's change of ownership application. See § 429.14(1)(h), Fla. Stat. (2015). The Agency is mindful of the negative impact such denial will have on Petitioner's residents, but the Agency is more concerned about allowing Petitioner to continue caring for its residents in light of the deficiencies that have been found. Thus, the Agency finds that it has substantive jurisdiction over the conclusions of law in Paragraph 92 of the Recommended Order because it is the state agency in charge of licensing and regulating assisted living facilities in Florida, and that it can substitute conclusions of law that are as or more reasonable than those of the ALJ. Therefore, the Agency grants Exception Twenty-Nine and modifies Paragraph 92 of the Recommended Order as follows:

> 92. ~~However, t~~The analysis ~~does not~~ ends there. Even though Dixie Lodge demonstrated a significant negative impact on residents should Dixie Lodge close its doors, the Agency still has the discretion to deny its change of ownership application since Dixie Lodge failed to meet certain minimum requirements during the provisional licensure process. See § 429.14(1)(h), Fla. Stat. (2015). ~~Considering the population it serves, the relatively minor nature of the Class II violation proven, and the fact that the evidence of the Class III violations was uncorrected within the time allowed by AHCA rules, the potential negative impact on residents would be far too great to warrant denial of the CHOW~~

~~application. Whether AHCA elects to issue Dixie Lodge a conditional license is within AHCA's discretion.~~

FINDINGS OF FACT

The Agency hereby adopts the findings of fact set forth in the Recommended Order, except where noted supra.

CONCLUSIONS OF LAW

The Agency hereby adopts the conclusions of law set forth in the Recommended Order, except where noted supra.

ORDER

1. Petitioner's change of ownership application is hereby denied. Such denial will, in turn, result in the expiration of Petitioner's license.

2. In order to ensure the health, safety, and welfare of Petitioner's clients, the license expiration date is extended for 30 days for the sole purpose of allowing the safe and orderly discharge of clients. § 408.815(6), Fla. Stat. As a condition of this extension, Petitioner is prohibited from accepting any new admissions during this period and must immediately notify the clients that they will soon be discharged. Petitioner is subject to monitoring by the Agency and possibly third parties. The Agency may terminate the 30-day extension or modify the conditions at any time. Petitioner must comply with all other applicable federal and state laws. At the conclusion of 30 days, or upon the discontinuance of operations, whichever is first in time, Petitioner shall promptly return the license certificate 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, Petitioner is responsible for retaining and appropriately distributing all client records within the timeframes prescribed in the authorizing

statutes and applicable administrative code provisions. Petitioner is advised of Section 408.810, Florida Statutes.

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

5. Petitioner is given notice of Florida law regarding unlicensed activity. It is advised of Section 408.804 and Section 408.812, Florida Statutes. Petitioner should also consult the applicable authorizing statutes and administrative code provisions. Petitioner 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.

DONE AND ORDERED in Tallahassee, Florida, on this 12 day of July, 2018.

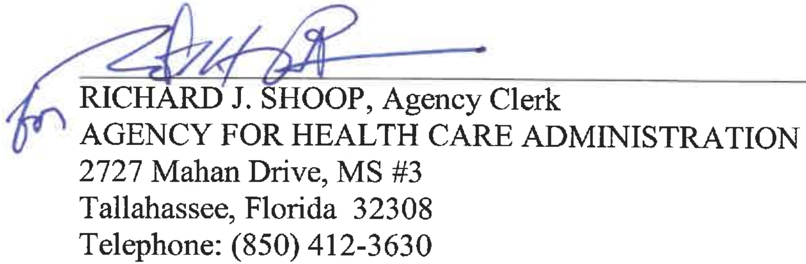
JUSTIN M. SENIOR, Secretary
AGENCY FOR HEALTH CARE ADMINISTRATION

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 12th day of July, 2018.



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Copies furnished to:

Jan Mills Facilities Intake Unit Agency for Health Care Administration (Electronic Mail)	Keisha Woods, Unit Manager Assisted Living Unit Agency for Health Care Administration (Electronic Mail)
Finance & Accounting Revenue Management Unit Agency for Health Care Administration (Electronic Mail)	Robert Dickson, Field Office Manager Area 4 Field Office (Electronic Mail)
Katrina Derico-Harris Medicaid Accounts Receivable Agency for Health Care Administration (Electronic Mail)	John F. Gilroy III, Esquire John F. Gilroy III, P.A. Post Office Box 14227 Tallahassee, Florida 32317 (via electronic mail to john@jgilroylaw.com)
Shawn McCauley Medicaid Contract Management Agency for Health Care Administration (Electronic Mail)	Thomas J. Walsh II, Esquire Assistant General Counsel (Electronic Mail)
Honorable Yolanda Y. Green Administrative Law Judge Division of Administrative Hearings The DeSoto Building 1230 Apalachee Parkway Tallahassee, Florida 32399-3060 (Electronic Filing)	

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.