STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Petitioner,

v.

RSC HIDDEN OAKS FORT MYERS, LLC d/b/a HIDDEN OAKS OF FORT MYERS,

Respondent.
_____/

DOAH CASE NO. 17-1589
AHCA NOS. 2016006583
2016006615
2016013742
2016013743

RENDITION NO.: AHCA-17-0642 -FOF-OLC

RSC HIDDEN OAKS FORT MYERS, LLC d/b/a HIDDEN OAKS OF FORT MYERS,

Petitioner,

v.

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Respondent,
_____/

DOAH CASE NO. 17-1591
AHCA NO. 2017000470
FILE NO. 11942925
LICENSE NO. 5531
FACILITY TYPE: ASSISTED LIVING FACILITY

FINAL ORDER

This cause was referred to the Division of Administrative Hearings where the assigned Administrative Law Judge (ALJ), Lynne A. Quimby-Pennock, conducted a formal administrative hearing. The issues in these cases are whether the Agency for Health Care Administration ("AHCA" or "Agency") should discipline RSC Hidden Oaks Fort Myers, LLC d/b/a Hidden Oaks of Fort Myers ("Hidden Oaks") for the statutory and rule violations alleged in the December 29, 2016 Administrative Complaint, and whether the Agency should renew the assisted living facility license held by Hidden Oaks. The Amended Recommended Order dated

September 26, 2017, is attached to this Final Order and incorporated herein by reference, except where noted infra.

RULING ON EXCEPTIONS

The Agency filed exceptions to the Recommended Order, and Hidden Oaks filed a response to the Agency's exceptions.

In determining how to rule upon the Agency's exceptions and whether to adopt the ALJ's Recommended Order in whole or in part, the Agency must follow section 120.57(1)(l), Florida Statutes, which provides:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action.

§ 120.57(1)(l), Fla. Stat. Additionally, "[t]he final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record."

§ 120.57(1)(k), Fla. Stat. In accordance with these legal standards, the Agency makes the following rulings on its exceptions:

In its sole exception to the Amended Recommended Order, The Agency takes exception to Paragraph 41 of the Amended Recommended Order, arguing that the ALJ applied the wrong burden of proof in this paragraph and thus the proceedings on which the conclusions of law in this paragraph are based did not comply with the essential requirements of law. Section 120.57(1)(*l*), Florida Statutes, requires an agency to "first determine from a review of the entire record, and state with particularity in the [final] order ... that the proceedings on which the findings [of fact] were based did not comply with essential requirements of law." Even though the phrase "did not comply with the essential requirements of law" is contained in the sentence regarding the rejection or modification of findings of fact, the Agency asserts failure to comply with the essential requirements of law is also a valid reason for the Agency to reject or modify the ALJ's incorrect determination of the burden of proof in a licensure case, which is a procedural issue that affects the findings of fact and proceedings as a whole, and is closely tied to the Agency's discretion to determine the fitness of licensure applications, pursuant to the Florida Supreme Court's reasoning in Department of Children and Families v. Davis Family Day Care Home, 160 So. 3d 854, 856-57 (Fla. 2015) and Department of Banking and Finance v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

As a licensee, Hidden Oaks ultimately bears the burden in proving that it meets all the requirements for re-licensure, and any conclusion of law to the contrary is clear legal error. Any conclusion of law to the contrary also goes against the Florida Supreme Court's opinions in Davis and Osborne Stern. In Davis, which re-affirmed the Osborne Stern case, the Court stated that "[i]n Osborne Stern, this Court clarified that it is the nature of the agency's action and the

underlying rights implicated by the action that govern the applicable evidentiary standard." Id at 857. Thus, the Court found that "the Second District correctly recognized that '[t]he holding of Osborne [Stern] was that the preponderance of the evidence burden of proof, not the clear and convincing burden, is applicable to license application proceedings.'" Id. The Florida Supreme Court's reasoning in Davis and Osborne Stern applies with equal persuasiveness to both initial and renewal licensure denials. Indeed, as the First District Court of Appeal observed in Terrell Oil Co. v. Department of Transportation, 541 So. 2d 713 (Fla. 1st DCA 1989), license renewal proceedings are not penal because they do not have the effect of suspending or revoking a license. Id. at 715. There is "a qualitative difference between the type of order ... that denies renewal of a license that has expired or is about to expire and one which suspends or revokes an active license." Id.

This same reasoning is also found in the case of Lauderhill Family Care Retirement Residence, Inc. d/b/a Lauderhill Family Care Retirement v. Agency for Health Care Administration, DOAH Case No. 14-0435 (AHCA 2014). In that case, the ALJ upheld the Agency's denial of an assisted living facility's licensure renewal application based on the fact that the facility failed to have a satisfactory biennial licensure survey, and the fact that the controlling interest of the facility was the controlling interest of a facility that had an unpaid fine and its license revoked. The facility argued that the Agency should have to prove the allegations that formed the basis of its denial by clear and convincing evidence, but the ALJ rejected this argument stating "[t]his is not a disciplinary proceeding to revoke the license of Petitioner. Rather, this proceeding is to determine whether Petitioner demonstrated by a preponderance of the evidence that it met the criteria applicable for re-licensure." See Endnote 5 of the Recommended Order. The ALJ concluded that "[a]s an applicant for a license, Petitioner bears

the burden of proof in this proceeding to demonstrate by a preponderance of the evidence that it satisfied all the requirements for licensure and was entitled to receive the license." See Paragraph 45 of the Recommended Order.

It is unclear why the ALJ chose to utilize the reasoning of Wilson v. Pest Control Commission, 199 So. 2d 777 (Fla. 5th DCA 1967); Coke v. Department of Children and Family Services, 704 So. 2d 726 (Fla. 5th DCA 1998); and Dubin v. Department of Business Regulation; 262 So. 2d 273 (Fla. 1st DCA 1972). The Wilson court's conclusion that "the decision of the commission not to renew petitioner's license was tantamount to imposing upon the petitioner a penalty" (Wilson, 199 So. 2d at 781) is not in harmony with the Osborne Stern court's holding, or section 120.57(1)(j), Florida Statutes, which states that "[f]indings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings..." Likewise, the Coke case has no bearing on this matter because, in Coke, DCF "agree[d] that in this proceeding it had the burden of proving [Coke's] lack of entitlement to a renewal of her license and that the evidence needed to be clear and convincing." Here, the Agency did not call its January 17, 2017 Notice of Intent to Deny for the Assisted Living Facility Renewal Application an "administrative complaint," nor did the Agency agree that it bore the burden of proving the violations alleged in the January 17, 2017 Notice of Intent to Deny for Assisted Living Facility Renewal Application by clear and convincing evidence. Finally, the Dubin case is distinguishable from the case at hand because it concerned an agency's denial of a renewal application without first providing the applicant a hearing, and because it relied on the Wilson case, which, as stated above, is not in harmony with the Osborne Stern case or applicable law.

Had the ALJ followed Davis and Osborne Stern, the burden of proof would have remained with Hidden Oaks to prove it met all requirements to have its license renewed by a preponderance of the evidence. § 120.57(1)(j), Fla. Stat. Though the outcome recommended by the ALJ will not change as a result, the Agency feels compelled to correct the ALJ's error in this regard in order to avoid confusion in future cases. Thus, upon review of the entire record and the Davis and Osborne Stern cases, the Agency finds that the ALJ did not comply with the essential requirements of law when she used the incorrect burden of proof as stated in Paragraph 41 of the Amended Recommended Order. The Agency further finds that it has substantive jurisdiction over the conclusions of law in this paragraph because it is the single state agency responsible for the licensure and regulation of 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 its exception and modifies Paragraph 41 of the Amended Recommended Order as follows:

> 41. The burden of proof in DOAH Case No. 17-1591 is on ~~AHCA~~Hidden Oaks, ~~as its~~since the Agency's stated intention ~~is~~ to deny the renewal of Hidden Oaks' license is not tantamount to revoking the license. ~~See Wilson v. Pest Control Comm'n, 199 So. 2d 777, 781 (Fla. 4th 1967).~~ ~~AHCA~~Hidden Oak's burden of persuasion on this issue is by ~~clear and convincing~~ a preponderance of the evidence. ~~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., supra.

FINDINGS OF FACT

The Agency adopts the findings of fact set forth in the Amended Recommended Order.

CONCLUSIONS OF LAW

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

ORDER

1. A $4,500 fine and $1,500 survey fee is hereby imposed on Hidden Oaks; and Hidden Oaks' licensure renewal application is hereby denied.

2. In order to ensure the health, safety, and welfare of Hidden Oaks' 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, Hidden Oaks is prohibited from accepting any new admissions during this period and must immediately notify the clients that they will soon be discharged. Hidden Oaks 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. Hidden Oaks 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, Hidden Oaks 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, Hidden Oaks is responsible for retaining and appropriately distributing all client records within the timeframes prescribed in the authorizing statutes and applicable administrative code provisions. Hidden Oaks is advised of Section 408.810, Florida Statutes.

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

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

6. Unless payment has already been made, payment in the amount of $6,000 is now due from Hidden Oaks. Such payment shall be made in full within 30 days of the filing of this Final Order unless other payment arrangements have been made. The payment shall be made by check payable to Agency for Health Care Administration, and shall be mailed to the Agency for Health Care Administration, Attn. Central Intake Unit, 2727 Mahan Drive, Mail Stop 61, Tallahassee, Florida 32308.

DONE AND ORDERED in Tallahassee, Florida, on this 2nd day of November, 2017.

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 3rd day of November, 2017.

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

Copies furnished to:

Jan Mills Facilities Intake Unit Agency for Health Care Administration (Electronic Mail)	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)	John Seehawer, Field Office Manager Area 8 Field Office (Electronic Mail)
Katrina Derico-Harris Medicaid Accounts Receivable Agency for Health Care Administration (Electronic Mail)	Shaddrick A. Haston, Esquire 1618 Mahan Center Boulevard, Suite 103 Tallahassee, Florida 32308 (via electronic mail to shad@shadhaston.com)

Shawn McCauley Medicaid Contract Management Agency for Health Care Administration (Electronic Mail)	Thomas J. Walsh II, Esquire Assistant General Counsel (Electronic Mail)
Honorable Lynne A. Quimby-Pennock 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.