

STATE OF FLORIDA  
AGENCY FOR PERSONS WITH DISABILITIES

AGENCY FOR PERSONS WITH  
DISABILITIES,  
Petitioner,

v.

DOAH Case #: 17-3921FL

SMOOTH LIVING GROUP HOME,  
INC.,  
Respondent.

\_\_\_\_\_ /

SMOOTH LIVING GROUP HOME,  
INC.,  
Petitioner,

v.

DOAH Case #: 17-3922FL

AGENCY FOR PERSONS WITH  
DISABILITIES,  
Respondent.

\_\_\_\_\_ /



**FINAL ORDER**

This cause is before the Agency for Persons with Disabilities (Agency) for entry of a final order following the Division of Administrative Hearing's (DOAH) issuance of a Recommended Order.

Following an administrative hearing conducted by video teleconference before a designated Administrative Law Judge (ALJ) of DOAH on December 19, 2017, the ALJ issued a Recommended Order on March 21, 2018, recommending

the Agency enter a final order revoking Smooth Living's license in 17-3921FL and denying its application for a new license in 17-3922FL. A copy of the Recommended Order is attached to this Final Order.

Specifically, the Recommended Order found as to Count I that there was clear and convincing evidence that Smooth Living failed to perform a room check on a resident with a history of inappropriate sexual behavior within the prescribed timeframe, and that this failure constituted an immediate threat of serious harm to the resident's safety and welfare. Further, the Recommended Order found that Smooth Living had violated Fla. Stat. § 393.13(3)(a) and (g) and Rules 65G-2.0041(4)(a) and 65G-2.009(1)(d), (6)(d), and (9)(c), F.A.C., and that the remaining violations had not been established.

The Recommended Order found as to Count II that there was clear and convincing evidence that Smooth Living violated Rule 65G-2.009(6)(a), F.A.C., that requires a facility to provide supervision to protect residents from harm. The Recommended Order also found that, by having only one staff member on duty to oversee four residents with significant behavioral issues, Smooth Living caused an immediate threat of serious harm to the safety and welfare of the residents, in violation of Rule 65G-2.009(1)(d), F.A.C. Additionally, the Recommended Order found that, by failing to provide the proper supervision, Smooth Living violated Fla. Stat. § 393.13(3)(g), which provides that residents have a right to be free from

harm. Finally, the Recommended Order found that the remaining violations had not been established.

As to Count III, the Recommended Order found that there was clear and convincing evidence that Smooth Living did not perform an adequate search of a resident's bedroom on April 27, 2017, in violation of Rules 65G-2.0041(4)(a) and 65G-2.009(6)(a), F.A.C. Also, the Recommended Order noted that, because the possession of dangerous items constituted a potential threat to the health and safety of the residents and staff, this action also violated Rule 65G-2.009(1)(d), F.A.C. Finally, by failing to keep all clients in the facility free from harm, Smooth Living violated Fla. Stat. § 393.13(3)(g).

Smooth Living filed timely exceptions to the Recommended Order, and pursuant to Fla. Stat. § 120.57(1)(k), the exceptions are addressed individually below. Because the exceptions pertain to the ALJ's findings of fact, the Agency notes that it has very limited authority to overturn or modify an ALJ's findings of fact; specifically, an "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." Fla. Stat. § 120.57(1). See also Barfield v. Dep't of Health, 805 So. 2d 1008, 1010-1011 (Fla. 1<sup>st</sup> DCA 2001) (an

agency lacks substantive jurisdiction to reject evidentiary conclusions under Fla. Stat. § 120.57(1)(l)); Heifetz v. Dep't of Bus. Regulation, 475 So. 2d 1277, 1281 (Fla. 1<sup>st</sup> DCA 1985) (it is the ALJ's responsibility to consider all of the evidence presented, resolve conflicts, determine, credibility, weigh evidence, and make ultimate findings of fact).

1. **EXCEPTION 1, Page 7, paragraph 13:** In this paragraph, the ALJ noted the testimony of Jackson and Sams, observed that their testimony was contradicted by DiPino and Floyd, and concluded that DiPino and Floyd were the most credible witnesses concerning the timing of room checks.

Smooth Living cites to Fla. Stat. § 90.802 for the proposition that these findings of fact should be rejected because they are double hearsay.

Section 90.802, Florida Statutes, says only that, except as provided in statute, hearsay is inadmissible. Section 120.57(1)(c), Florida Statutes, provides: "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

While DiPino and Floyd did not testify, the ALJ noted in paragraphs 34-35 of the Recommended Order that Sams' statements, the incident

reporting forms, and the employee statements were admissible under Fla. Stat. § 90.803(18). The ALJ also noted that the abuse reports, while hearsay, could be considered because they supplemented or explained other competent evidence under Fla. Stat. § 120.57(1)(a), and the employee/owner statements made to Stanganelli in the reports during her investigation were admissible.

It is the ALJ's role to resolve evidentiary conflicts, and the Agency can reject an ALJ's findings of fact only where there is no competent, substantial evidence from which the findings can be reasonably inferred. Boyd v. Dep't of Bus. Regulation, 475 So. 2d 1117 (Fla. 4<sup>th</sup> DCA 1996); Holmes v. Turlington, 480 So. 2d 150 (Fla. 1<sup>st</sup> DCA 1985). Here, the ALJ weighed the evidence and made findings that are supported by competent, substantial evidence, and the Agency will not reject those findings.

2. **EXCEPTION 2, Page 8, paragraph 15:** In this paragraph, the ALJ noted that the incident reporting form stated that room checks were made every 20 minutes, even though the group home manager that evening stated otherwise.

Smooth Living asserts that the manager's statements regarding room checks should be disregarded because they are inadmissible hearsay

under Fla. Stat. § 90.802. While Section 90.802 states that, except as provided in statute, hearsay is inadmissible, Section 120.57(1)(c), Florida Statutes, provides that hearsay may be used to supplement or explain other evidence, but is not sufficient by itself to support a finding, unless it would be admissible over objection in civil actions.

It is the ALJ's role to resolve evidentiary inconsistencies, and the Agency cannot reject an ALJ's findings of fact where there is competent, substantial evidence from which the findings can be reasonably inferred.

Boyd v. Dep't of Bus. Regulation, 475 So. 2d 1117 (Fla. 4<sup>th</sup> DCA 1996);

Holmes v. Turlington, 480 So. 2d 150 (Fla. 1<sup>st</sup> DCA 1985). Because the

ALJ weighed the evidence and made findings that are supported by

competent, substantial evidence, the Agency will not reject those

findings.

Smooth Living also challenges the credibility of DiPino's statements.

The Agency is not entitled to reweigh the credibility of witnesses,

Heifetz, 475 So. 2d at 1281.

### 3. **EXCEPTION 3, Page 9, paragraphs 18 and 19**

**a. Paragraph 18:** In its Recommended Order in paragraph 18, the ALJ recounted provisions from the complaint in five sentences: "Count II alleges . . . ."; "It further alleges . . . ."; "It goes on to allege . . . .";

“Finally, it alleges . . . .”; and “Like Count I, the Complaint alleges . . . .” The ALJ made no findings of fact in paragraph 18, and contrary to Smooth Living’s argument, the Agency cannot create any. Florida Power & Light Co. v. State of Florida, Siting Board, et al., 693 So. 2d 1025, 1026 (Fla. 1<sup>st</sup> DCA 1997).

**b. Paragraph 19:** In paragraph 19, the ALJ observed that the incident reporting form did not address whether the facility was staffed properly when the incident occurred, but noted in paragraph 20 that only staffer Bryant was present at the time of the incident to oversee four residents.

This evidence is supported by competent and substantial evidence in the record – transcript volume 2, page 200 – where Bryant testified that, while there were two staffers on duty, that was not the case at the time of the incident; staffer Flowers left, taking two residents with him, leaving four residents under only Bryant’s supervision. This evidence is also supported by the Agency’s exhibits – pages 330, 332, 334, and 335.

Instead, Smooth Living focuses on Stanganelli’s testimony and her unfamiliarity with the staffing requirements of Rule 65G-2.008, F.A.C., essentially asking the Agency to reweigh the evidence. The

Agency cannot reweigh the credibility of witnesses. Heifetz, 475 So. 2d at 1281.

4. **EXCEPTION 4, Page 10, paragraph 21:** Similar to 3.a. above, the ALJ recounted allegations of the complaint in this paragraph. Because the ALJ made no factual findings in this paragraph, the Agency cannot create any. Florida Power & Light Co. v. State of Florida, Siting Board, et al., 693 So. 2d 1025, 1026 (Fla. 1<sup>st</sup> DCA 1997).
5. **EXCEPTION 5, Page 13, paragraph 26:** In this paragraph, the ALJ observed that the incident reporting form stated that DCF would close its investigation with a verified finding of inadequate staff supervision. Smooth Living now focuses on the behavior service plans and asks the Agency to reconsider the evidence based on this plan. The Agency cannot reweigh the evidence. Heifetz, 475 So. 2d at 1281.
6. **EXCEPTION 6, Page 13, paragraph 28:** In this paragraph, the ALJ recounts that the Agency relied on the business records exception to the hearsay rule to admit the abuse reports, and on statements made to Stanganelli, Liles, and Leitold, and statements contained in the incident reporting forms; the ALJ also noted that Smooth Living objected on hearsay grounds.



Smooth Living argues that these “findings of fact” should be rejected on hearsay grounds. Because the ALJ made no factual findings in this paragraph, the Agency cannot create any. Florida Power & Light Co. v. State of Florida, Siting Board, et al., 693 So. 2d 1025, 1026 (Fla. 1<sup>st</sup> DCA 1997).

Smooth Living also asks the Agency to reweigh the evidence by focusing on inconsistencies in the DCF report. The Agency cannot reweigh evidence. Heifetz, 475 So. 2d at 1281.

7. **EXCEPTION 7, Page 14, paragraph 29:** In this paragraph, the ALJ reviewed Stanganelli’s testimony and stated there was no testimony that: (a) abuse reports were kept in the ordinary course of DCF’s business; (b) it was a regular practice of DCF to make such records; and (c) Stanganelli was a qualified person to make such assertions. Regarding statements made by employees to DCF and the Agency, the ALJ observed that they were statements made by an adversary.

Smooth Living argues that these findings of fact should be rejected because the legal predicates for admission of business records were not met. First, the ALJ agreed with this argument in paragraph 29. Second, as shown in paragraphs 34-35 of the Recommended Order, the ALJ admitted hearsay, not because the records qualified under the business

records exception to the hearsay rule, but because they were statements by a party opponent and were made during employees' scope of employment and during the existence of the employer-employee relationship. The Agency cannot reject this evidentiary conclusion. Barfield v. Dep't of Health, 805 So. 2d 1008, 1010-1011 (Fla. 1<sup>st</sup> DCA 2001).

8. **EXCEPTION 8, Page 17, paragraph 37:** In this paragraph, the ALJ listed the rule violations cited in the complaint, noted that some were incorrectly numbered, and observed that some were not clear as to how they were at issue. Because the ALJ made no factual findings in this paragraph, the Agency cannot create any. Florida Power & Light Co. v. State of Florida, Siting Board, et al., 693 So. 2d 1025, 1026 (Fla. 1<sup>st</sup> DCA 1997).

Because there is no basis to reject the findings of fact and conclusions of law of the ALJ, the Recommended Order is approved and adopted. Accordingly, Smooth Living's license in 17-3921FL is revoked and its application for a new license in 17-3922FL is denied.

DONE AND ORDERED in Tallahassee, Leon County, Florida, on

May 24, 2018.

*Tom Rankin*

Tom Rankin, Deputy Director of Operations  
Agency for Persons with Disabilities

**NOTICE OF RIGHT TO APPEAL**

A party who is adversely affected by this final order is entitled to judicial review. To initiate judicial review, the party seeking it must file one copy of a "Notice of Appeal" with the Agency Clerk. The party seeking judicial review must also file another copy of the "Notice of Appeal," accompanied by the filing fee required by law, with the First District Court of Appeal in Tallahassee, Florida, or with the District Court of Appeal in the district where the party resides. The Notices must be filed within thirty (30) days of the rendition of this final order.<sup>1</sup>

Copies furnished to:

Trevor Suter, APD Senior Attorney  
Trevor.Suter@APDCares.org

DOAH  
Filed via e-ALJ

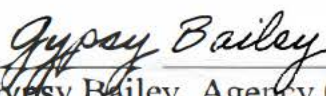
Sean Moyles  
Langston, Hess, Augustine, Sojourner & Moyles, PA  
SMoyles@langstonhess.com

Jeff Smith, Regional Operations Manager  
APD Suncoast Region

---

<sup>1</sup> The date of "rendition" of this Final Order is the date that is stamped on its first page. The Notices of Appeal must be received on or before the 30<sup>th</sup> day after that date.

I HEREBY CERTIFY that a copy of this Final Order was provided by regular US or electronic mail to the above individuals at the addresses listed on May 25, 2018.

  
\_\_\_\_\_  
Gypsy Bailey, Agency Clerk  
Agency for Persons with Disabilities  
4030 Esplanade Way, Suite 335B  
Tallahassee, FL 32399-0950  
apd.agencyclerk@apdcares.org