

**STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION**

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ENCOMPASS HEALTH REHABILITATION
HOSPITAL OF ESCAMBIA COUNTY, LLC,

Petitioner,

CASE NO. 18-0073CON

AHCA NO. 2017015682

v.

RENDITION NO.: AHCA- 19 - 8264 -FOF-CON

STATE OF FLORIDA, AGENCY FOR
HEALTH CARE ADMINISTRATION,

Respondent,

and

WEST FLORIDA REGIONAL MEDICAL
CENTER; FORT WALTON BEACH
MEDICAL CENTER (“NORTHWEST
FLORIDA”); and FORT WALTON
BEACH MEDICAL CENTER (“FORT
WALTON BEACH”),

Intervenors.

FINAL ORDER

This case was referred to the Division of Administrative Hearings (DOAH) where the assigned Administrative Law Judge (ALJ), W. David Watkins, conducted a formal administrative hearing. At issue in this proceeding is whether the Agency for Health Care Administration (“AHCA” or “Agency”) should approve the Certificate of Need (“CON”) Application No. 10495 filed by Petitioner to establish a 50-bed comprehensive medical rehabilitation hospital in AHCA District 1. The Recommended Order entered on January 31, 2019 is attached to this final order and incorporated herein by reference.

RULINGS ON EXCEPTIONS

Petitioner filed exceptions to the Recommended Order, and Respondent and Intervenors filed a joint response to Petitioner's exceptions.

In determining how to rule upon Petitioner'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 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 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 Petitioner's exceptions:

In Exception No. 1, Petitioner takes exception to Paragraph 28 of the Recommended Order, arguing it is a conclusion of law that is erroneous. Contrary to Petitioner's argument, Paragraph 28 of the Recommended Order contains findings of fact, not conclusions of law.

Furthermore, the findings of fact in Paragraph 28 of the Recommended Order merely summarize Petitioner's legal strategy.¹ Lastly, the findings of fact in Paragraph 28 of the Recommended Order are based on competent, substantial record evidence. See Transcript, Volume 10, Pages 1251-1253, 1273; Joint Exhibit 2. Thus, the Agency is not at liberty to reject or modify them. See § 120.57(1)(I), 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, for all the reasons stated above, the Agency denies Exception No. 1.

In Exception No. 2, Petitioner takes exception to Paragraphs 30-32 of the Recommended Order, arguing the paragraphs contain erroneous conclusions of law. Contrary to Petitioner's argument, Paragraphs 30-32 of the Recommended Order contain findings of fact that are based on competent, substantial record evidence. See Transcript, Volume 8, Pages 1031, 1037-1039, 1040, 1042-1044; Intervenor's Exhibit 21. Thus, the Agency cannot reject or modify them. See § 120.57(1)(I), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, the Agency denies Exception No. 2.

In Exception No. 3, Petitioner takes exception to Paragraphs 33-35 of the Recommended Order, arguing the ALJ erroneously concluded Petitioner had waived its right to demonstrate "not normal" circumstances by failing to challenge the fixed need pool. However, no such conclusion of law is present in these paragraphs. Instead, Paragraphs 33-35 of the Recommended Order contain findings of fact that are based on competent, substantial record evidence. See Transcript, Volume 5, Pages 734-737; Transcript, Volume 8, Pages 1015, 1031,

¹ Petitioner's argument that the ALJ erroneously concluded Petitioner waived its right to demonstrate "not normal" circumstances is also belied by the fact that, beginning with Paragraph 29 of the Recommended Order, the ALJ goes

1048-1049, 1050-1051; Petitioner's Exhibit 42. Thus, the Agency is prohibited from rejecting or modifying them. See § 120.57(1)(I), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, the Agency denies Exception No. 3.

In Exception No. 4, Petitioner takes exception to Paragraphs 39-40 of the Recommended Order, arguing they contain erroneous conclusions of law. Contrary to Petitioner's argument, Paragraphs 39-40 of the Recommended Order contain findings of fact, not conclusions of law. The findings of fact in these paragraphs are based on competent, substantial record evidence. See Transcript, Volume 4, Pages 547-550, 573; Transcript, Volume 7, Page 943. Thus, the Agency cannot reject or modify them. See § 120.57(1)(I), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, the Agency denies Exception No. 4.

In Exception No. 5, Petitioner takes exception to Paragraphs 41-44 of the Recommended Order, arguing the paragraphs rely on the ALJ's erroneous conclusion of law that he could not consider "not normal" circumstances presented by Petitioner. The Agency disagrees with Petitioner. To the extent Paragraphs 41-44 of the Recommended Order contain conclusions of law, the conclusions of law do not concern the issue raised by Petitioner in its exception. In addition, Paragraphs 41-44 of the Recommended Order contain findings of fact, and reasonable inferences therefrom, that are all based on competent, substantial record evidence. See Transcript, Volume 6, Pages 794-795, 799-800, 801, 802-803, 832-833; Transcript, Volume 7, Pages 941-943. Thus, the Agency cannot reject or modify them. See § 120.57(1)(I), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, for all the reasons stated above, the Agency denies Exception No. 5.

In Exception No. 6, Petitioner takes exception to Paragraphs 45-54 of the Recommended Order, arguing they are all based on the ALJ's erroneous conclusion of law that he could not

on to address the merits of the "not normal" circumstances Petitioner raised in its CON application.

consider “not normal” circumstances. Petitioner’s argument is incorrect. The first sentence of Paragraph 45 of the Recommended Order clearly demonstrates the ALJ made such a consideration. In addition, the second sentence of Paragraph 45 of the Recommended Order contains conclusions of law regarding what the evidence showed. The Agency cannot re-weigh that same evidence to reach different conclusions of law. See Heifetz, 475 So. 2d at 1281. Finally, Paragraphs 46-54 of the Recommended Order contain findings of fact that are all based on competent, substantial record evidence. See Transcript, Volume 1, Pages 204-208; Transcript, Volume 4, Pages 525, 597; Transcript, Volume 7, Pages 901, 903, 910, 914, 915-916, 931-936, 949, 965-966, 968; Transcript, Volume 8, Pages 1044-1046; Petitioner’s Exhibit 75; Intervenor’s Exhibit 36. Thus, the Agency cannot alter them. See § 120.57(1)(I), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, for all the reasons stated above, the Agency denies Exception No. 6.

In Exception No. 7, Petitioner takes exception to Paragraphs 57-59 of the Recommended Order, arguing these paragraphs are based on the ALJ’s erroneous conclusion of law that he could not consider “not normal” circumstances presented by Petitioner. Petitioner is incorrect because the first sentence of Paragraph 58 clearly demonstrates the ALJ made such a consideration. In addition, the other conclusions of law present in these paragraphs concern the weight of the evidence presented, and the Agency cannot re-weigh the evidence in order to reach different conclusions of law. See Heifetz, 475 So. 2d at 1281. Finally, Paragraphs 57-59 of the Recommended Order also contain findings of fact that are all based on competent, substantial record evidence. See Transcript, Volume 5, Pages 670, 713-715, 729-730; Transcript, Volume 8, Pages 1037-1039; Joint Exhibit 2; Petitioner’s Exhibits 42, 43; Intervenor’s Exhibit 21. Thus,

the Agency is not at liberty to reject or modify them. See § 120.57(1)(I), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, for all the reasons stated above, the Agency denies Exception No. 7.

In Exception No. 8, Petitioner takes exception to Paragraphs 60-62 of the Recommended Order, arguing the findings in these paragraphs should be reversed because they are based on the ALJ's erroneous conclusion of law that he could not consider the "not normal" circumstances presented by Petitioner. This is not correct. There is nothing present in these paragraphs that indicates the ALJ made such a conclusion of law. Instead, as exemplified by Paragraph 62, the ALJ concluded that Petitioner failed to prove the existence of "not normal" circumstances. The Agency is not permitted to re-weigh the evidence in order to reach a different conclusion. See Heifetz, 475 So. 2d at 1281. Additionally, the findings of fact in Paragraphs 60-62 of the Recommended Order are all based on competent, substantial record evidence. See Transcript, Volume 6, Pages 833-834; Transcript, Volume 7, Pages 862-863, 894, 929-930; Transcript, Volume 8, Pages 1032-1033, 1053-1055; Transcript, Volume 10, Pages 1282-1283, 1284, 1285-1287; Joint Exhibit 2; Intervenor's Exhibit 21. Thus, the Agency is not permitted to reject or modify them. See § 120.57(1)(I), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, the Agency denies Exception No. 8.

In Exception No. 9, Petitioner takes exception to Paragraphs 63-64 of the Recommended Order, arguing the findings in these paragraphs should be reversed because they are based on the ALJ's erroneous conclusion of law that he could not consider the "not normal" circumstances presented by Petitioner. Petitioner's argument is without merit. Paragraph 63 of the Recommended Order involves the ALJ's weighing of the evidence. The Agency cannot re-weigh the evidence in order to reach different legal conclusions. See Heifetz, 475 So. 2d at 1281. Paragraph 64 of the Recommended Order contains findings of fact that are based on

competent, substantial record evidence. See Transcript, Volume 5, Pages 670, 713-715, 729-730; Transcript, Volume 8, Pages 1059-1069; Joint Exhibit 2; Petitioner's Exhibits 42, 43; Intervenor's Exhibit 21. Thus, the Agency cannot reject or modify them. See § 120.57(1)(I), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, for all the reasons stated above, the Agency denies Exception No. 9.

In Exception No. 10, Petitioner takes exception to Paragraph 68 of the Recommended Order, arguing the ALJ erroneously relied on the finding of fact in the first sentence of the paragraph to reach his conclusion of law in Paragraph 115 of the Recommended Order. The Agency disagrees. Paragraph 68 of the Recommended Order involves one specific aspect of Petitioner's case, whereas Paragraph 115 of the Recommended Order is an all-encompassing conclusion of law concerning the ALJ's weighing and balancing of all the statutory and rule criteria to reach the decision that Petitioner's CON application should be denied. Additionally, Petitioner's argument does not constitute a valid basis for the Agency to reject or modify the findings of fact in Paragraph 68. See § 120.57(1)(I), Fla. Stat. Since the findings of fact in Paragraph 68 of the Recommended Order are based on competent, substantial record evidence (See Transcript, Volume 2, Pages 355-375), the Agency cannot disturb them. See § 120.57(1)(I), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, for all the reasons stated above, the Agency denies Exception No. 10.

In Exception No. 11, Petitioner takes exception to Paragraph 72 of the Recommended Order, arguing the findings in this paragraph should be reversed because they are based on the ALJ's erroneous conclusion of law that he could not consider the "not normal" circumstances presented by Petitioner. First, there is nothing present in these paragraphs that indicates the ALJ made such a conclusion of law. Second, the Agency cannot reject or modify findings of fact on

that basis. The Agency can only reject or modify findings of fact if they are not based on competent, substantial evidence. See § 120.57(1)(I), Fla. Stat. The findings of fact in Paragraph 72 of the Recommended Order are based on competent, substantial evidence. See Transcript, Volume 2, Pages 245-247; Joint Exhibit 2. Therefore, for the reasons stated above, the Agency must deny Exception No. 11.

In Exception No. 12, Petitioner takes exception to Paragraphs 73-76 of the Recommended Order, arguing the findings of fact in these paragraphs should be reversed because they are based on the ALJ's erroneous conclusion of law that he could not consider the "not normal" circumstances presented by Petitioner. First, there is nothing present in these paragraphs that indicates the ALJ made such a conclusion of law. Second, Petitioner's argument does not constitute a valid basis for the Agency to reject or modify the findings of fact in Paragraphs 73-76. See § 120.57(1)(I), Fla. Stat. Paragraphs 73-76 contain findings of fact that are all based on competent, substantial record evidence. See rule 59C-1.039, Florida Administrative Code; Transcript, Volume 8, Pages 1013, 1019-1020, 1023, 1027; Transcript, Volume 10, Pages 1253-1254; Intervenor's Exhibits 21, 23). Thus, the Agency cannot alter them. See § 120.57(1)(I), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, for the reasons stated above, the Agency denies Exception No. 12.

In Exception No. 13, Petitioner takes exception to Paragraphs 77-80 of the Recommended Order, arguing the paragraphs contain erroneous conclusions of law. Of the paragraphs to which Petitioner takes exception, only Paragraph 80 of the Recommended Order contains conclusions of law. In Paragraph 80, the ALJ concludes in the last sentence of the paragraph that Petitioner failed to provide sufficient evidence of the long-term financial feasibility of the proposal. The ALJ's conclusion of law is based on the findings of fact in

Paragraphs 77-80, which, in turn, are all based on competent, substantial record evidence. See Transcript, Volume 9, Pages 1138-1140, 1149-1151, 1153, 1159, 1161-1170, 1209, 1229; Joint Exhibit 2. Thus, the Agency is prohibited from rejecting or modifying them. See § 120.57(1)(I), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, the Agency denies Exception No. 13.

In Exception No. 14, Petitioner takes exception to Paragraphs 81-82 of the Recommended Order, arguing the findings of fact in these paragraphs should be reversed because they are based on the ALJ's erroneous conclusion of law that he could not consider the "not normal" circumstances presented by Petitioner. First, there is nothing present in these paragraphs that indicates the ALJ made such a conclusion of law. Second, the Agency cannot reject or modify findings of fact on that basis. The Agency can only reject or modify findings of fact if they are not based on competent, substantial evidence. See § 120.57(1)(I), Fla. Stat. The findings of fact in Paragraphs 80-81 of the Recommended Order are based on competent, substantial evidence. See Transcript, Volume 8, Pages 1013, 1015, 1051-1054; Joint Exhibit 3; Intervenor's Exhibit 21. Therefore, for the reasons stated above, the Agency denies Exception No. 14.

In Exception No. 15, Petitioner takes exception to Paragraphs 87-91 of the Recommended Order, arguing the findings of fact in these paragraphs should be reversed because they are based on the ALJ's erroneous conclusion of law that he could not consider the "not normal" circumstances presented by Petitioner. First, there is nothing present in these paragraphs that indicates the ALJ made such a conclusion of law. Second, the Agency cannot reject or modify findings of fact on that basis. The Agency can only reject or modify findings of fact if they are not based on competent, substantial evidence. See § 120.57(1)(I), Fla. Stat. Since Paragraphs 87-91 of the Recommended Order contain findings of fact that are all based on

competent, substantial record evidence (See Transcript, Volume 5, Page 683; Transcript, Volume 9, Pages 1180-1183; Transcript, Volume 10, Pages 1254, 1290-1291; Joint Exhibits 2, 3; Intervenor's Exhibit 23), the Agency is prohibited from rejecting or modifying them. See § 120.57(1)(I), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, for the reasons stated above, the Agency denies Exception No. 15.

In Exception No. 16, Petitioner takes exception to Paragraphs 92-98 of the Recommended Order, arguing the findings of fact in these paragraphs should be reversed because they are based on the ALJ's erroneous conclusion of law that he could not consider the "not normal" circumstances presented by Petitioner. First, there is nothing present in these paragraphs that indicates the ALJ made such a conclusion of law. Second, the Agency cannot reject or modify findings of fact on that basis. The Agency can only reject or modify findings of fact if they are not based on competent, substantial evidence. See § 120.57(1)(I), Fla. Stat. Since Paragraphs 92-98 of the Recommended Order contain findings of fact that are all based on competent, substantial record evidence (See Transcript, Volume 8, Pages 1015; 1040, 1061, 1064-1069; Transcript, Volume 9, Pages 1185-1190; Intervenor's Exhibits 21, 23), the Agency is prohibited from rejecting or modifying them. See § 120.57(1)(I), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, for the reasons stated above, the Agency denies Exception No. 16.

In Exception No. 17, Petitioner takes exception to Paragraphs 101-102 of the Recommended Order, arguing the findings of fact in these paragraphs should be reversed because they are based on the ALJ's erroneous conclusion of law that he was precluded from considering West Florida's purposeful under-staffing of its CMR unit. Paragraphs 101-102 of the Recommended Order concern the Intervenor's standing in this matter, which is an issue of law that is outside of the Agency's 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). Therefore, the Agency denies Exception No. 17.

In Exception No. 18, Petitioner takes exception to Paragraphs 108 and 114-115 of the Recommended Order, arguing the ALJ erred by concluding Petitioner failed to carry its burden of proof in this matter. Petitioner is, in essence, asking the Agency to re-weigh the evidence in order to make conclusions of law that differ from those in Paragraphs 108 and 114-115. However, the Agency is not allowed to do so. See Heifetz, 475 So. 2d at 1281. Furthermore, the ALJ correctly weighed and balanced the applicable statutory and rule criteria in reaching his conclusions of law. Therefore, for the reasons stated above, the Agency denies Exception No. 18.

In Exception No. 19, Petitioner takes exception to Paragraph 109 of the Recommended Order, arguing the ALJ erred by concluding Petitioner waived its right argue the Agency's fixed need pool was flawed by not challenging the fixed need pool calculation. The Agency disagrees with Petitioner, and finds that the ALJ's conclusions of law in Paragraph 109 are reasonable and should not be disturbed. See § 120.57(1)(l), Fla. Stat. Therefore, the Agency denies Exception No. 19.

In Exception No. 20, Petitioner takes exception to Paragraph 110 of the Recommended Order, arguing the ALJ erroneously concluded that Petitioner failed to rebut the presumption of zero need in this matter. Petitioner is again asking the Agency to re-weigh the evidence in order to make conclusions of law that are different than those of the ALJ, which it cannot do. See Heifetz, 475 So. 2d at 1281. Therefore, the Agency denies Exception No. 20.

In Exception No. 21, Petitioner takes exception to Paragraph 111 of the Recommended Order, arguing the conclusions of law in this paragraph should be reversed because they are based on the ALJ's erroneous conclusion of law that he was precluded from considering West Florida's purposeful under-staffing of its CMR unit. The Agency finds that, while it has substantive jurisdiction over the conclusions of law in Paragraph 111 of the Recommended Order because they involve the interpretation of an Agency rule, the ALJ's conclusions of law are reasonable and should not be disturbed. See § 120.57(1)(I), Fla. Stat. Therefore, the Agency denies Exception No. 21.

In Exception No. 22, Petitioner takes exception to Paragraph 113 of the Recommended Order, arguing the ALJ erroneously concluded Petitioner had improperly amended its CON application after it was submitted to the Agency. The Agency disagrees. The Agency finds that, while it does have substantive jurisdiction over the conclusions of law in Paragraph 113 of the Recommended Order because it is the state agency charged with administering Florida's CON program, the ALJ's conclusions of law in the paragraph are reasonable and should not be disturbed. See § 120.57(1)(I), Fla. Stat. Therefore, the Agency denies Exception No. 22.

FINDINGS OF FACT

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


CONCLUSIONS OF LAW

The Agency hereby adopts the conclusions of law set forth in the Recommended Order.

ORDER

Based upon the foregoing, Petitioner's CON Application No. 10495 is hereby denied. The parties shall govern themselves accordingly.

DONE and ORDERED this 3 day of March, 2019, in Tallahassee, Florida.



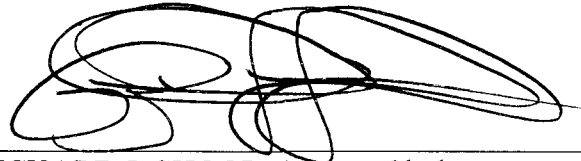
MARY C. MAYHEW, SECRETARY
AGENCY FOR HEALTH CARE ADMINISTRATION

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO A JUDICIAL REVIEW WHICH SHALL BE INSTITUTED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A SECOND COPY ALONG WITH THE FILING FEE AS 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 RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing Final Order has been furnished by the method indicated to the persons named below on this 14th day of March, 2019.



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