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

STATE OF FLORIDA, AGENCY FOR
HEALTH CARE ADMINISTRATION,

Petitioner,
v.

DOAH CASE NO. 18-5986F
RENDITION NO.: AHCA-19-0691 -FOF-MDO

COVENANT HOSPICE, INC.,

Respondent.
_____ /

FINAL ORDER

This case was referred to the Division of Administrative Hearings (DOAH) where the assigned Administrative Law Judge (ALJ), Yolonda Y. Green, issued a Recommended Order. At issue in this proceeding is whether the Agency for Health Care Administration (“Agency”) is entitled to recover its attorney’s fees and costs, pursuant to section 409.913(23), Florida Statutes, incurred prosecuting a matter pursuant to section 409.913. The Recommended Order dated June 12, 2019, is attached to this Final Order and incorporated herein by reference, except where noted *infra*. Additionally, after the issuance of the Recommended Order, the parties file a Joint Stipulation as to Amount of Costs, which is also attached to this Final Order and incorporated herein by reference.

RULING ON EXCEPTIONS

Respondent filed exceptions to the Recommended Order.

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 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 Respondent’s exceptions:

At the beginning of its exceptions, Respondent takes exception to the fact that the ALJ issued a recommended order, instead of a final order, in this matter. The Agency need not rule on Respondent’s exception to the ALJ’s issuance of a recommended order since it fails to identify the disputed portion of the Recommended Order by page number or paragraph. Alternatively, to the extent Respondent’s exception to the ALJ’s issuance of a recommended order in this matter could be construed as a motion for remand, the Agency hereby denies the motion.

In Exception I, Respondent takes exception to Paragraphs 58-61 of the Recommended Order, arguing the ALJ misapplied section 409.913(23), Florida Statutes, to this matter because

it was a federal audit, not a state audit. Respondent raised this argument before in the overpayment case, and it was rejected by both the ALJ and the Agency. See Agency for Health Care Administration v. Covenant Hospice, Inc.; DOAH Case No. 17-4641MPI (AHCA 2018) at Page 11 of the Final Order; appeal pending. Section 409.913(23)(a), Florida Statutes, authorizes the Agency to “recover all investigative, legal, and expert witness costs” for “an audit or an investigation of a violation committed by a provider which is conducted pursuant to this section [409.913].” (Emphasis added). Regardless of the role the federal government played in the audit at issue in this matter, the audit was conducted pursuant to section 409.913, Florida Statutes. Therefore, the Agency denies Respondent’s Exception I.

In Exception II. A., Respondent takes exception to Paragraph 58 of the Recommended Order, arguing the ALJ erred in stating Respondent asserted “that any entitlement to fees would be reserved for only state agency attorneys and not outside counsel.” The Agency disagrees and finds support for the ALJ’s statement in Paragraph 15 of Respondent’s March 28, 2019 Brief in Opposition to AHCA’s Amended Petition for Recovery of Costs and Fees that it filed with DOAH in this matter. Therefore, the Agency denies Respondent’s Exception II. A.

In Exception II. B., Respondent takes exception to Paragraph 59 of the Recommended Order because: 1) Respondent argues it did not take a contrary position at hearing; and 2) the ALJ erroneously flipped the words “state” and “federal” in the first sentence of Paragraph 59. In response to Respondent’s first argument, the ALJ’s statement that Respondent took a contrary position at hearing is supported by the record of the overpayment case. See Pages 7 and 13 of the parties’ Joint Prehearing Stipulation in DOAH Case No. 17-4641MPI. In response to Respondent’s second argument, the Agency agrees and will treat Respondent’s second argument as a motion to correct a scrivener’s error, which the Agency will grant because it is clear from

the remainder of Paragraph 59 that the ALJ simply transposed the words “state” and “federal” in the first sentence of Paragraph 59. Therefore, the Agency grants Respondent’s Exception II. A. to the extent that it modifies Paragraph 59 as follows:

59. Next, Covenant takes the position, which is contrary to their position at hearing, that AHCA is not entitled to costs as the audit was under state~~federal~~ law instead of ~~federal~~state law. AHCA seeks costs under section 409.913(23) “[f]or audits or investigations of a violation committed by a provider which is conducted pursuant to [section 409.913]. Covenant argues that section 409.913 does not contemplate audits directed by CMS, a federal agency, and conducted by Health Integrity, a federal contractor and, thus, AHCA is not entitled to costs under section 409.913(23).

FINDINGS OF FACT

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

CONCLUSIONS OF LAW

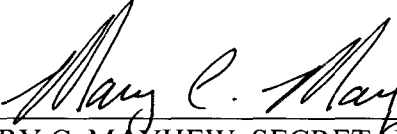
The Agency adopts the conclusions of law set forth in the Recommended Order, except where noted supra.

IT IS THEREFORE ORDERED AND ADJUDGED THAT:

1. In accordance with the Recommended Order and the terms of the attached Joint Stipulation as to Amount of Costs, the Agency will not include attorney’s fees as part of the investigative, legal and expert witness costs it is entitled to recover in this matter pursuant to section 409.913(23), Florida Statutes, should the Agency prevail in 1D18-3909 and 1D18-4797, which are currently pending before the First District Court of Appeal as of the date this Final Order is rendered.
2. Should the Agency prevail in 1D18-3909 and 1D18-4797, Respondent shall pay the Agency \$14,466.52, which is the total amount of investigative, legal and expert witness costs the Agency is entitled to recover in DOAH Case No. 17-4641MPI

pursuant to section 409.913(23), Florida Statutes, as stipulated to by the parties in Paragraph 5 of the Joint Stipulation as to Amount of Costs. Respondent shall make full payment of \$14,466.52 to the Agency for Health Care Administration within 30 days of the date the appeals in 1D18-3909 and 1D18-4797 are finalized in the Agency's favor, unless other payment arrangements have been agreed to by the parties. Respondent shall pay by check payable to the Agency for Health Care Administration and mailed to the Agency for Health Care Administration, Office of Finance and Accounting, 2727 Mahan Drive, Mail Stop 14, Tallahassee, Florida 32308.

DONE and ORDERED this 19 day of August, 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 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 HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been furnished to the persons named below by the method designated on this 17th day of August, 2019.



RICHARD J. SHOOP, Agency Clerk
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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.

STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Petitioner,

vs.

DOAH Case No.: 18-5986F

COVENANT HOSPICE, INC.,

Respondent.

JOINT STIPULATION AS TO AMOUNT OF COSTS

The Agency for Health Care Administration (“AHCA”) and Covenant Hospice, Inc. (“Covenant”) (collectively, the “Parties”), by and through their undersigned counsel, hereby enter into the following Joint Stipulation as to the Amount of Costs (the, “Stipulation”).

1. On October 17, 2018, AHCA entered a Final Order in DOAH Case Number: 17-4641, adopting and incorporating by reference the Recommended Order, which found that AHCA was entitled to recover its investigative, legal, and expert witness costs incurred in that matter (the “MPI Case”).
2. On November 15, 2018, AHCA filed its Petition for Recovery of Petitioner’s Fees and Costs with the Division of Administrative Hearings, DOAH Case Number: 18-5986F.
3. On June 12, 2019, the Administrative Law Judge entered a Recommended Order concluding AHCA was not entitled to recovery of its legal fees.
4. This matter is pending entry of a Final Order by AHCA.
5. In order to minimize additional litigation, the Parties stipulate that AHCA’s investigative, legal, and expert witness costs in the MPI case are Fourteen Thousand Four Hundred Sixty-Six Dollars and Fifty-Two Cents (\$14,466.52) (hereinafter, the “Stipulated Cost Amount”).
6. This stipulation has no impact on the merits of the pending appeal (Covenant v.

AHCA, Florida First DCA Consolidated Case Number: 1D18-4797 and 1D18-3909) (hereinafter, the “Appeal”), and neither party may use the existence of this Stipulation in support of, or against, any argument in the Appeal. Payment of the Stipulated Cost Amount is dependent on AHCA prevailing pursuant to section 409.913(23), Florida Statutes, upon the outcome of the Appeal, and therefore, Covenant will only be required to pay the Stipulated Cost Amount upon the conclusion of the Appeal, if AHCA remains the prevailing party at that time.

7. AHCA agrees that it will not pursue the recovery of its attorney’s fees under section 409.913(23), Florida Statutes, in DOAH Case Numbers: 17-4641MPI, 17-6836RU, 18-5986F, or Florida DCA Consolidated Case Numbers: 1D18-4797 and 1D18-3909, or any other cases related to DOAH Case Number 17-4641MPI.

WHEREFORE, the Parties respectfully request AHCA enter a Final Order consistent with the Final Order in DOAH Case Number: 17-4641MPI, the Recommended Order in DOAH Case Number: 18-5986F, and this Joint Stipulation.

Respectfully submitted this 26th day of July, 2019.

By: /s/ Joshua D. Taggatz
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ATTORNEYS FOR AGENCY FOR
HEALTH CARE ADMINISTRATION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via electronic mail to Joshua Taggatz (jtaggatz@reinhardt.com) and Bryan Nowicki (bnowicki@reinhardt.com) on this 26th day of July, 2019.

By: */s/ M. Drew Parker* _____