STATE OF FLORIDA
AGENCY FOR PERSONS WITH DISABILITIES

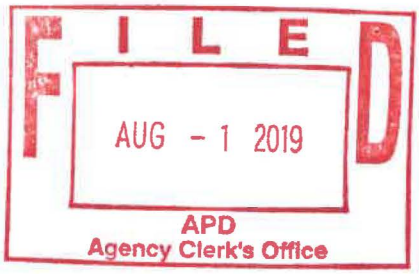
LOVING TOUCH "A BRIGHTER FUTURE" HOME, OWNED AND OPERATED BY ZULIA BRENOVIL, LOVING TOUCH ADULT FAMILY CARE, INC.,

Petitioner,

vs.

AGENCY FOR PERSONS WITH DISABILITIES,

Respondent.
_____/



DOAH Case No.: 18-6496FL

LOVING TOUCH "DYNAMIC" HOME, OWNED AND OPERATED BY ZULIA BRENOVIL, LOVING TOUCH ADULT FAMILY CARE, INC.,

Petitioner,

vs.

AGENCY FOR PERSONS WITH DISABILITIES,

Respondent.
_____/

DOAH Case No.: 18-6497FL

FINAL ORDER

This cause is before the Agency for Persons with Disabilities ("Agency" or "Respondent") for entry of a final order following the Division of Administrative Hearing's ("DOAH") issuance of a Recommended Order concerning the Agency's denial of Loving Touch "A Brighter Future" Home and Loving Touch "Dynamic" Home's, owned and operated by Zulia Brenovil ("Petitioners"), applications for licensure as group home facilities.

FACTUAL BACKGROUND

1. On March 28 and 29, 2019, an Administrative Law Judge ("ALJ") of DOAH conducted an administrative hearing with both parties represented by counsel and their witnesses attending via video teleconference. The ALJ issued a Recommended Order in favor of the Agency denying the license applications on May 28, 2019, which is attached as Exhibit A.

2. As explained in the Recommended Order, the ALJ found that the Agency reviewed Petitioners' applications, which included a search of the Department of Children and Families ("DCF") records on the Florida Safe Families Network that revealed four DCF reports containing verified findings of abuse, neglect, or exploitation against Ms. Brenovil. Recommended Order at ¶ 4-5. The ALJ then described each report as well as Ms. Brenovil's response to these verified findings and found "the testimony and evidence of the DCF investigators and the DCF

licensing specialist more compelling and credible than that of Brenovil." *Id.* at ¶ 6-33. The ALJ ultimately found that "the Petitioners did not carry their burden of proof to show that APD abused its discretion or when it denied their initial applications." *Id.* at ¶ 4.

3. Counsel for Petitioners filed written Exceptions to the Recommended Order on June 14, 2019. The untimely filing did not prejudice the Respondent and is excused. Counsel for Respondent filed a Response to Petitioner's Exceptions to the Recommended Order on June 20, 2019. Both Petitioners' Exceptions and the Respondent's Response were thoroughly considered in rendering this Final Order.

LEGAL STANDARD FOR EXCEPTIONS

4. Since several of Petitioners' Exceptions relate to the ALJ's findings of fact, it is important to note that the Agency has limited authority to overturn or modify an ALJ's findings of fact. *See, e.g., Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985) ("It is the hearing officer's [or ALJ's] function to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence."); *see also Gross v. Dep't of Health*, 819 So. 2d 997, 1000–01 (Fla. 5th DCA 2002) & *Holmes v. Turlington*, 480 So. 2d 150, 153 (Fla. 3rd DCA 1985). The Agency is not authorized to "weigh the evidence presented, judge

the credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion." *Bridlewood Group Home v. Agency for Persons with Disabilities* 136 So. 3d 652, 658 (Fla. 1st DCA 2013) (quoting *Heifetz*, 475 So. 2d at 1281). In addition, it is not proper for the Agency to make supplemental findings of fact on an issue about which the ALJ made no finding. *See Florida Power & Light Co. v. State of Florida, Siting Board, et al.*, 693 So. 2d 1025, 1026 (Fla. 1st DCA 1997).

5. Fla. Stat. § 120.57(1)(k)-(l) provides the following with respect to exceptions to findings of fact and conclusions of law in a Recommended Order issued by an ALJ:

> (k) The presiding officer shall complete and submit to the agency and all parties a recommended order consisting of findings of fact, conclusions of law, and recommended disposition or penalty, if applicable, and any other information required by law to be contained in the final order. All proceedings conducted under this subsection shall be de novo. The agency shall allow each party 15 days in which to submit written exceptions to the recommended order. **The 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.**
>
> (l) 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.
>
> (Emphasis added).

6. Pursuant to Fla. Stat. § 120.57(1)(k), the exceptions are addressed individually below.

I. General Exception to Findings of Fact Related to DCF "Verified" Findings

7. Petitioners' General Exception relates to paragraphs 6, 9, 10, 11, 15, 16, 17, 20, and 21. With only one citation to the record and general reference to Chapter 120, Fla. Stat., Petitioners argue that the "ALJ failed to make any determination that Ms. Brenovil was actually guilty of any conduct which rose to the level of that described in DCF's policies. Instead, the ALJ only relied on the mere existence of the DCF findings. Ms. Brenovil never had notice and an opportunity to challenge DCF's findings."

8. As stated in ¶ 2 of Respondent's Response, the issue at hearing was not whether Ms. Brenovil was "guilty" of the DCF conduct, but whether the applicant has proved, by a preponderance of the evidence, that the applicant satisfies the requirements for licensure and it is entitled to receive a license. Stated differently, the issue noticed for hearing was whether the Agency abused its discretion in denying Petitioners' applications for licensure. The ALJ determined in ¶ 32 of the Recommended Order that Petitioner failed to carry its burden of proof to show that the Agency abused its discretion.

9. Petitioners cite no legal authority for their claim that they were not provided due process. In addition, neither DOAH nor the Agency has jurisdiction to decide constitutional issues. *See Key Haven Associated Enterprises, Inc. v. Board of Trustees of Internal Imp. Trust Fund,* 427 So. 2d 153, 158-159 (Fla. 1982); *see also* § 120.57(1)(l). As such, the Agency declines to reject or modify the findings of fact in these paragraphs.

II. Exceptions to Findings of Fact in Paragraphs 6 through 10:

10. As discussed *supra* ¶ 4-5, the Agency may not reject or modify findings of fact unless they were not based upon competent substantial evidence or the proceedings on which the findings were based did not comply with essential requirements of law. Also discussed *supra* ¶ 5, per Fla. Stat. 120.57(1)(f), "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. . ." Petitioners' exceptions include arguments pertaining to several paragraphs rather than clearly identifying which findings of fact in particular should be rejected or modified, as required by Fla. Stat. 120.57(1)(f). Petitioners do this for most proposed exceptions. *See* II. A-C & III. A-D of Petitioners' Exceptions to the Recommended Order. Nonetheless, they are addressed below.

11. Petitioners request exception to these paragraphs because they substantiate a finding of "threatened harm" against Ms. Brenovil for the events surrounding E.L. Although Petitioners identify potential uncertainty regarding ancillary issues, such as who switched the locks on E.L.'s door, the ALJ's findings are supported by competent substantial evidence in the record. The ALJ cited to Exhibit 6, pages 190 and 191, in ¶¶ 6 and 8-10 and the record testimony of DCF Investigator Perry in ¶ 7 of the Recommended Order. (Hr'g Tr. 175-176). Petitioners did not cite to any record evidence suggesting that the ALJ's interpretation of events contradicted this or other record evidence.

12. Petitioners also assert that "APD put on no competent substantial evidence to show that Ms. Brenovil took any affirmative steps to have the door handle reversed or that she had been aware of it and ignored it." Because this consolidated case involves a new application for licensure and not the revocation or termination of an existing license, the burden of proof lies with the applicants (Petitioners). *See Dep't*

of Banking & Fin. v. Osbourne Stern & Co., 670 So. 2d 932, 934 (Fla. 1996). As such, the Agency was under no obligation to provide such evidence.

13. Petitioners cite to DCF Operating Procedure 170-04 for their proposition that the events surrounding E.L. do not constitute "threatened harm." As provided in Respondent's Response, the Agency cannot reject the ALJ's interpretation of DCF procedures because those rulings are legal conclusions outside of the Agency's substantive jurisdiction. *See* § 120.57(1)(l), Fla. Stat.; *Barfield v. Dep't of Health*, 805 So. 2d 1008, 1010-1011 (Fla. 1st DCA 2001). Consequently, the Agency will not reject those findings.

III. Exceptions to Findings of Fact in Paragraphs 11 through 16:

14. Petitioner requests exceptions to the ALJ's findings of fact primarily on the basis that the underlying facts should not have been classified as "inadequate supervision," which is a conclusion of law based on DCF Operating Procedure 170-4. As discussed *supra* ¶ 13, these are not conclusions over which the Agency has substantive jurisdiction and are therefore not at issue in a Fla. Stat. § 120.569 or 120.57 proceeding.

15. With respect to the ALJ's findings of fact in ¶¶ 11-16, Petitioners reiterate that "[a]lthough the investigative report was wide ranging," the verified finding was based on the DCF investigator's finding that the safety plans for two minors were not properly located in the group home as required. *See* II.C of Petitioners'

Exceptions to the Recommended Order and ¶¶ 13-15 of the Recommended Order. Although Petitioners cite evidence suggesting that the plans were available at some point in the past (as distant as 2016), Petitioners do not offer any evidence that the plans were available to staff members in the group home at the time of the inspection. As such, the ALJ's findings are based on competent and substantial evidence.

16. Petitioners also argue that the safety plan is not perfectly consistent with the DCF investigator's testimony. This is not a sufficient reason to reject the ALJ's findings of fact, particularly since that only concerns ¶ 14 of the Recommended Order. As discussed *supra* ¶ 4-5, Petitioners exceptions to these paragraphs amount to the Agency re-weighing and re-evaluating evidence properly considered by the ALJ, which is not appropriate so long as the findings of fact are based on competent and substantial evidence. As such, the Agency declines to reject or modify ¶¶ 11-16 of the Recommended Order.

IV. Exceptions to Findings of Fact in Paragraphs 17 through 20:

17. Petitioners request exception to these paragraphs, which again requires there not be competent and substantial evidence to support the ALJ's findings. Petitioners provided an alternative explanation of the facts underlying the verified findings of maltreatment/inadequate supervision, much of which is based on record testimony. The ALJ considered the conflicting testimony when he rendered his findings and ultimately found "the testimony and evidence of the DCF investigators and the DCF

licensing specialist more compelling and credible than that of Brenovil." *See supra* ¶ 2. Although there may be disagreement, the ALJ's determination was based on competent and substantial evidence. The Agency thus declines to reject those findings.

V. Exception to Findings of Fact in Paragraph 21:

18. Petitioners offer several of the same or similar arguments pertaining to the previous paragraphs, which the Agency again declines to adopt due to competent, substantial evidence substantiating the ALJ's findings.

19. Petitioners also argue that the Agency did not present any witnesses to testify about the verified findings of maltreatment/inadequate supervision contained in a DCF investigative report. Petitioners argue, "Absent any admissible non-hearsay evidence to support the verified finding of inadequate supervision in the 2009 case, the ALJ should not have found competent substantial evidence to support the verified finding of inadequate supervision." As discussed *supra* ¶ 8, the issue in this consolidated case is not whether the applicants are "guilty" of a crime, but whether the Petitioners proved by a preponderance of the evidence that the Agency should have approved their application for licensure as group home facilities. Petitioners provide no legal authority for the proposition that DCF verified findings must be based on competent, substantial evidence or that an ALJ cannot rely on DCF verified findings when determining whether or not the Respondent appropriately denied an

application for licensure. To the contrary, Fla. Stat. § 393.0673(2)(b) specifically provides that the Agency may deny an application for licensure if "[DCF] has verified that the applicant is responsible for the abuse, neglect, or abandonment of a child or the abuse, neglect, or exploitation of a vulnerable adult." Petitioners' request for an exception to ¶ 21 of the Recommended Order is denied.

VI. Exception to Finding of Fact in Paragraph 32:

20. Petitioners offer no legal authority for the proposition that the ALJ failed to "protect Petitioners' due process rights and evaluate the DCF findings *de novo*." *See* II.F of Petitioners' Exceptions to the Recommended Order. As discussed *supra* ¶ 7-9, DOAH and the Agency lack substantive jurisdiction over this issue and so the Agency cannot grant an exception to this "conclusion of law disguised as a finding of fact." *See* II.F of Petitioners' Exceptions to the Recommended Order.

21. Although ¶ 32 addresses a legal standard, the ALJ's commentary on the weight of evidence is more consistent with a finding of fact than conclusion of law. *See, e.g., Heifetz v. Dep't of Bus. Regulation*, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). Insofar as this is a finding of fact, Petitioners argue that they offered "a wealth of evidence to show that DCF's findings, which according to the Notice of License Application Denial were the sole basis for denying the applications, were invalid and not reached in accordance with DCF's published rules and standards for verifying allegations of abuse, neglect, abandonment, or exploitation." The ALJ considered

this evidence and found it less persuasive than Respondent's, which is reflected in this finding of fact. Read together with the ALJ's previous findings of fact, this is supported by competent, substantial evidence and so the Agency declines to reject it.

VII. Exceptions to Findings of Fact in Paragraph 33:

22. Petitioners do not identify any factual or legal basis for this exception. Even if there is, Petitioners' argument is not persuasive because it examines this paragraph in isolation. When read in its entirety, the ALJ's findings of fact compare Respondent's evidence, such as the DCF investigators' testimony and documentary evidence in ¶¶ 6-21, with Petitioners' evidence, such as Brenovil's Response to the DCF Verified Findings in ¶¶ 22-31. Although not expressly identified in this paragraph, the ALJ's finding is supported by competent, substantial evidence.

VIII. Exception to Finding of Fact in Paragraph 34:

23. Petitioners request for exception to this paragraph is based on the same arguments made for previous exceptions. Petitioners' legal basis is a general reference to due process and DCF Operating Procedures, neither of which are within the Agency's substantive jurisdiction. *See* ¶¶ 5, 9, 13-14, and 20.

24. Petitioners also argue that "this finding is impermissible burden shifting as it was APD's burden to show that the DCF findings upon which it based its denials

were valid." Petitioners cite to no legal authority to support this proposition. As such, the Agency declines to reject this finding.

IX. Exceptions to Conclusion of Law in Paragraphs 37 & 39:

25. Petitioners offer the same argument that was rejected *supra* ¶ 23, which is again unpersuasive. Petitioners also advance several other arguments, some of which ignore the plain language of Fla. Stat. § 393.0673(2) by suggesting a *de novo* proceeding means an ALJ is obligated to, essentially, provide a separate hearing in order to verify all DCF verified findings in order to evaluate whether the Agency abused its discretion. *See* III.A of Petitioners' Exceptions to the Recommended Order. This does not appear to be the intent behind either Fla. Stat. §120.57 or Fla. Stat. § 393.0673(2). Additionally, as stated in ¶ 3 of Respondent's Response, Petitioners were provided due process in the instant proceeding. DCF investigators testified about their investigations and the findings (Hr'g. Tr. 39-61, 74-84, 173-184), Petitioners exercised their right to cross examine those same investigators (Hr'g. Tr. 61-74, 84-105, 138-168, 184-204), and Petitioners' representative, Zulia Brenovil, provided testimony regarding the investigations (Hr'g Tr. 242-282).

26. Citing to *Dep't of Banking & Fin. v. Osborne Stern & Co*, 670 So.2d 932, 934 (Fla. 1996), Petitioners also argue that "[t]he burden of persuasion may always rest with Petitioners, but the burden with respect to certain issues still rests with APD." *Dep't of Banking & Fin.* involved the denial of registration to deal in securities based

on the applicant's violation of securities law, not denial of a license to operate a group home facility based on DCF verified findings. Violation of securities laws would result in not only the denial of registration, but also "the imposition of substantial fines." *Id.* at 935-36. Here, DCF verified findings do not result in fines, but may –pursuant to Florida Statute, result in the denial of a license in order to protect the vulnerable population served by the Agency. Insofar as this exception pertains to ¶ 37 and 39, neither of those conclusions of law are incorrect or misleading and the Agency thus declines to reject or modify them.

X. Exception to Conclusions of Law in Paragraphs 50-54:

27. Petitioners argue that "applicant" does not mean Zulia Brenovil, the person who owns and operates both facilities seeking licensure and who is also the subject of the aforementioned DCF verified findings. *See supra* ¶ 2. Pursuant to Rule 65G-2.001(2), Florida Administrative Code, "applicant" is defined to mean "a person or entity that has submitted a written application to the Agency for the purposes of obtaining an initial residential facility license or renewing an existing residential facility license." Petitioners offer several arguments in support of defining "applicant" in this context to mean the entities (not person), which technically do not have any DCF verified findings associated with them. These arguments are without merit for the reasons stated in ¶¶ 50-54 of the Recommended Order. The Agency thus declines to reject or modify any of these conclusions of law.

XI. Exceptions to Conclusions of Law in Paragraphs 55-61:

28. Petitioners' arguments regarding the "alter ego" doctrine are not within the Agency's substantive jurisdiction. *See supra* ¶ 5. Similarly, the corporate principles cited by Petitioners are applicable where action may be taken against a person individually rather than the corporate entity he or she owns, operates, or manages, i.e. piercing the "corporate veil." *See WH Smith, PLC v. Benages & Assocs.*, 51 So. 3d 577, 582 (Fla. 3d DCA 2010) (*citing Gasparini v. Pordomingo*, 972 So. 2d 1053, 1055 (Fla. 3d DCA 2008)). None of the cases cited by Petitioners pertain to either denial of facility licensure or the Agency.

29. As the ALJ explained in these paragraphs, principles of corporate law provide that "a court may disregard the corporate identity if it would be inequitable for the court to uphold a legal distinction between the corporation and its sole member." *See* ¶ 58 of the Recommended Order. The Agency finds this interpretation is consistent with the Agency's substantial interest in protecting Agency clients from abuse, neglect, abandonment, and exploitation. As such, the Agency declines to reject or modify the ALJ's conclusions of law on this issue.

XII. Exceptions to Conclusions of Law in Paragraphs 62-66:

XII.A: Collateral Estoppel & *Res Judicata*

30. Petitioners' arguments for rejecting or modifying the ALJ's conclusions of law regarding collateral estoppel and *res judicata* are neither persuasive nor correct.

For the reasons stated in the ALJ's conclusions of law in these paragraphs – particularly ¶ 66 of the Recommended Order, are a correct and accurate statement of the pertinent laws in this situation. As such, the Agency will not reject or modify the conclusions of law in these paragraphs.

XII.B: APD's Denial Was Arbitrary and Capricious

31. Petitioners' arguments are contingent upon collateral estoppel or *res judicata* applying to these paragraphs, which are rejected for the reasons set forth *supra* ¶ 30. Additional arguments advanced here have no bearing on the paragraphs to which they seek exception (some of which are properly classified as exceptions to findings of fact, not conclusions of law), so this exception is also rejected.

XIII. Exception to Conclusion of Law in Paragraph 67:

32. Petitioners' exception requires additional findings of fact which the ALJ did not render. For instance, Petitioners argue that the reason for Respondent's denial was not due to the DCF verified findings. The ALJ made no findings of fact on this point (nor did Petitioners request an exception to a related finding of fact) and, as stated *supra* ¶ 4, it is not proper for the Agency to make supplemental findings of fact on an issue about which the ALJ made no finding. *See Florida Power & Light Co. v. State of Florida, Siting Board, et al.*, 693 So. 2d 1025, 1026 (Fla. 1st DCA 1997). As such, this exception is denied.

XIV. Exceptions to Conclusion of Law in Paragraph 68:

33. Petitioners' exception incorporates by reference "all exceptions stated above" and is denied for those same reasons.

CONCLUSIONS OF LAW

34. Pursuant to Fla. Stat. § 120.57(1)(k)-(l), the Agency rejects all of the Petitioners' exceptions. *See supra* ¶ 5. The Recommended Order is approved and adopted in toto.

CONCLUSION

Based on the foregoing Findings of Fact and Conclusions of Law, Petitioners' request for licensure of their group home facilities is hereby DENIED.

DONE AND ORDERED in Tallahassee, Leon County, Florida, on August 1, 2019.

Clarence Lewis
for 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.[1]

Copies furnished to:

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Rita Castor
Regional Operations Manager
APD Southeast Region

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 August 1, 2019.

Danielle Thompson, Agency Clerk
Agency for Persons with Disabilities
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[1] 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 30th day after that date.