STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Petitioner,

vs.

BLUE ANGEL ENTERPRISES, INC. d/b/a BLUE ANGEL RESIDENCES,

Respondent.
_____/

DOAH CASE NO. 18-6677
AHCA NOS. 2018004077 & 2018004263
FILE NO. 11968277
LICENSE NO. 12211
PROVIDER TYPE : ASSISTED LIVING FACILITY
RENDITION NO.: AHCA-19-0768 -FOF-OLC

FINAL ORDER

This case was referred to the Division of Administrative Hearings (DOAH) where the assigned Administrative Law Judge (ALJ), Andrew D. Manko, conducted a formal administrative hearing. At issue in this proceeding is whether Respondent committed the violations alleged in the Agency for Health Care Administration's ("Agency" or "AHCA") Amended Administrative Complaint, and, if so, what penalty should be imposed. The Recommended Order entered on July 5, 2019 is attached to this final order and incorporated herein by reference, except where noted infra.

RULINGS ON EXCEPTIONS

Both Petitioner and Respondent filed exceptions to the Recommended Order.

In determining how to rule upon the parties' 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 the parties' exceptions:

Petitioner's Exceptions

In its First, Second, and Third Exceptions, Petitioner takes exception to Paragraphs 47, 78, and 79 of the Recommended Order, arguing the conclusions of law in those paragraphs contradict the ALJ's findings of fact in the Recommended Order as they pertain to Count IV of the Amended Administrative Complaint. The Agency agrees. In Paragraph 15 of the Recommended Order, the ALJ correctly found the Agency discovered an unlocked medicine cabinet in the back building on Respondent's property during the January 9, 2018 survey. In Paragraph 33 of the Recommended Order, the ALJ correctly found the Agency discovered an unlocked medication cabinet in the main building during a follow-up survey on February 26, 2018. However, in Paragraphs 47, 78, and 79 of the Recommended Order, the ALJ incorrectly concluded the Agency failed to prove by clear and convincing evidence Respondent committed

an uncorrected Class III deficiency for having an unlocked medicine cabinet because the unlocked medicine cabinet observed by the Agency during its follow-up survey on February 26, 2018 was a different medicine cabinet in a different building than the one observed by the Agency during the January 9, 2018 survey when it initially cited Respondent for the violation. Regardless of what medication cabinet was unlocked during each survey, Respondent clearly violated rule 58A-5.0185(6), Florida Administrative Code, by failing to keep centrally stored medications "in a locked cabinet, locked cart, or other locked storage receptacle, room, or area at all times." The focus of the rule is on the activity itself, not the location where the activity takes place. The ALJ's focus on which medication cabinet was unlocked during what survey overlooks the purpose of the rule, which is to ensure the safety of Respondent's residents, and is unreasonable. Furthermore, the Agency put Respondent on notice that having unlocked medication cabinets was a violation, and Respondent did not correct the violation because the Agency found an unlocked medication cabinet during the follow-up survey. Lastly, in the years since the final order in Agency for Health Care Administration v. Tampa Health Care Associates, LLC; DOAH Case No. 03-165 (AHCA 2003) was rendered, there have been other Agency final orders rendered that have upheld uncorrected Class III deficiencies even though the subsequent violation did not involve the exact same physical location as the first violation. See, e.g., Senior Lifestyles, Inc. d/b/a Kipling Manor Retirement Center v. Agency for Health Care Administration, DOAH Case No. 13-4660 (AHCA 2014) (Agency cited uncorrected Class III deficiencies involving physical plant deficiencies where second violations were in different resident rooms than the ones cited in the first survey). The Agency finds that it has substantive jurisdiction over the conclusions of law in Paragraphs 47, 78, and 79 of the Recommended Order, and that it can substitute conclusions of law that are as or more reasonable than those of

the ALJ. Therefore, the Agency grants Petitioner's First, Second, and Third Exceptions, rejects the conclusions of law in Paragraph 79, and modifies the conclusions of law in Paragraphs 47 and 78 as follows:

> 47. Based on the findings of fact above and the weight of the credible evidence, AHCA established by clear and convincing evidence that Blue Angel violated rule 58A-5.0185(6) by failing to keep the centrally-stored medication cabinet in the back structure locked and properly dispose of the expired medications found therein. ~~However,~~ AHCA ~~did not~~ established by clear and convincing evidence that Blue Angel failed to timely correct that Class III deficiency ~~(e.g., keeping medication in an unlocked cabinet in the unlicensed back structure). The evidence was undisputed that Blue Angel had properly removed all of the medication from the cabinet in the back structure and,~~ thus, a fine ~~cannot~~should be imposed. § 408.813(2)(c), Fla. Stat.
> 78. ~~However,~~ ~~b~~Based on the findings of fact and ultimate fact above, AHCA ~~did not~~ established by clear and convincing evidence that Blue Angel failed to correct that cited deficiency within 30 days. ~~Blue Angel corrected that cited deficiency by removing and properly disposing of all medication from the cabinet in the back structure before the revisit survey. As such, "a fine may not be imposed." § 408.813(2)(c), Fla. Stat.~~

In its Fourth through Tenth Exceptions, Petitioner takes exception to Paragraphs 45, 49, 59, 60, 61, 62, and 63 of the Recommended Order, arguing the conclusions of law contained therein are incorrect because the ALJ failed to apply section 408.812(5), Florida Statutes, to the matter; and, as a result, erroneously concluded that the fine for unlicensed activity must be calculated from the date the Agency provided actual notice of unlicensed activity to Respondent. However, contrary to Petitioner's argument, the plain language of section 408.812(5), Florida Statutes, reveals that it applies to a "controlling interest or licensee" who has more than one licensed facility and engages in unlicensed activity because it states "the agency may revoke all licenses" and impose a $1,000 a day fine "against each licensee" in response to unlicensed activity. (Emphasis added). Here, there was no allegation in the Agency's Amended

Administrative Complaint, and no finding of fact in the Recommended Order, that Respondent has more than one licensed facility. Thus, sections 408.812(3)-(4), Florida Statutes, not section 408.812(5), Florida Statutes, apply to Respondent. Under sections 408.812(3)-(4), Florida Statutes, the fine for unlicensed activity may not be imposed until the Agency first notifies the person or entity committing the unlicensed activity that they must cease such activity, and the person or entity fails to do so. As the ALJ found in Paragraph 29 of the Recommended Order, January 22, 2018 was the first date the Agency notified Respondent the Agency believed it was engaging in unlicensed activity. The ALJ found in Paragraph 35 of the Recommended Order that Respondent ceased such unlicensed activity on January 23, 2018. Based on the factual findings in Paragraphs 29 and 33, to which Petitioner did not take exception, the ALJ concluded in Paragraphs 45, 49, 59, 60, 61, 62, and 63 of the Recommended Order Respondent should only be fined $1,000 for engaging in unlicensed activity. The ALJ's conclusions are reasonable under the facts of the matter. Therefore, the Agency denies Petitioner's Fourth through Tenth Exceptions.

Respondent's Exceptions

In its first exception, Respondent takes exception to the findings of fact in Paragraph 8 of the Recommended Order, arguing the evidence shows the Agency did not have permission from the owner of the real property prior to entering the property. However, Paragraph 8 of the Recommended Order does not address the subject of Respondent's exceptions. Rather, it contains a general summary of Agency surveyors' authority, and limitations thereon, when it comes to investigating unlicensed activity. Additionally, the findings of fact in Paragraph 8 of the Recommended Order are all based on competent, substantial record evidence. See Transcript, Volume III, Pages 187-188, 198, 200. Thus, the Agency is not at liberty to reject or

modify them. See § 120.57(1)(*l*), 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, the Agency denies Respondent's first exception.

In its second exception, Respondent takes exception to the findings of fact in Paragraph 10 of the Recommended Order, arguing the evidence indicates the sole focus of the Agency's surveyor was the unlicensed back structure. The findings of fact in Paragraph 10 of the Recommended Order are all based on competent, substantial record evidence. See Transcript, Volume II, Pages 202, 205, 210, 216-217. Thus, the Agency cannot reject or modify them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Therefore, the Agency denies Respondent's second exception.

In its third exception, Respondent takes exception to the findings of fact in Paragraph 24 of the Recommended Order, arguing they are contrary to the evidence. The findings of fact in Paragraph 24 of the Recommended Order are all based on competent, substantial record evidence. See Transcript, Volume II, Pages 221-222, 225. Thus, the Agency is prohibited from rejecting or modifying them. See § 120.57(1)(*l*), Fla. Stat.; Heifetz, 475 So. 2d at 1281. Additionally, the findings of fact in Paragraph 24 of the Recommended Order concern the credibility and weight of the evidence, which is solely within the ALJ's purview. See Heifetz, 475 So. 2d at 1281 ("The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion."); Stinson v. Winn; 938 So. 2d 554 (Fla. 1st DCA 2006) ("Credibility of the witnesses is a matter that is within the province of the administrative law judge, as is the weight

to be given the evidence."). Therefore, for all the reasons stated above, the Agency denies Respondent's third exception.

In its fourth and fifth exceptions, Respondent takes exception to the conclusions of law in Paragraph 67 of the Recommended Order, arguing the ALJ's conclusions of law within the paragraph are contradictory to the evidence presented. The ALJ's conclusions of law in Paragraph 67 of the Recommended Order are based on his weighing of the evidence presented. Respondent is essentially asking the Agency to re-weigh the evidence in order make conclusions of law that differ from those of the ALJ, which the Agency cannot do. See Heifetz, 475 So. 2d at 1281 ("The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion."); Stinson v. Winn; 938 So. 2d 554 (Fla. 1st DCA 2006) ("Credibility of the witnesses is a matter that is within the province of the administrative law judge, as is the weight to be given the evidence."). Therefore, the Agency denies Respondent's fourth and fifth exceptions.

In its sixth exception, Respondent takes exception to Paragraph 70 of the Recommended Order, arguing the evidence does not support the ALJ's conclusion of law that revocation of Respondent's license is an appropriate penalty. Based on the rulings on Respondent's first five exceptions supra, which are all hereby incorporated by reference, the Agency finds that the ALJ's conclusion of law in Paragraph 70 is reasonable. Therefore, the Agency denies Respondent's sixth exception.

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, except where noted supra.

ORDER

1. Respondent's assisted living facility license is hereby REVOKED.

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

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

5. Respondent is given notice of Florida law regarding unlicensed activity. It is advised of Section 408.804 and Section 408.812, Florida Statutes. Respondent should also

consult the applicable authorizing statutes and administrative code provisions. Respondent 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. A $2,500 fine is hereby imposed on Respondent. Unless payment has already been made, 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 17 day of September, 2019.

MARY C. MAYHEW, Secretary
AGENCY FOR HEALTH CARE ADMINISTRATION

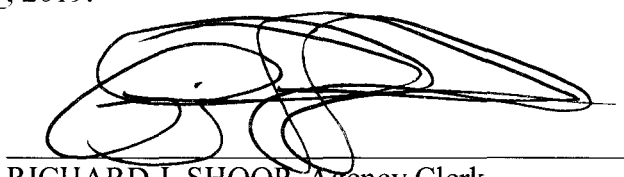
NOTICE OF RIGHT TO JUDICIAL REVIEW

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 CERTIFY that a true and correct copy of this Final Order was served on the below-named persons by the method designated on this 17th day of September, 2019.



RICHARD J. SHOOP, Agency Clerk
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2727 Mahan Drive, MS #3
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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)	Patricia Caufman, Field Office Manager Area 5/6 Field Office (Electronic Mail)
Katrina Derico-Harris Medicaid Accounts Receivable Agency for Health Care Administration (Electronic Mail)	Rickey L. Strong, Esquire Jeffrey S. Howell, P.A. 2898-6 Mahan Drive Tallahassee, Florida 32308 (via electronic mail to rick@jsh-pa.com)
Shawn McCauley Medicaid Contract Management Agency for Health Care Administration (Electronic Mail)	Nicola Brown, Esquire Gisela Iglesias, Esquire Assistant General Counsels (Electronic Mail)

Honorable Andrew D. Manko Administrative Law Judge Division of Administrative Hearings The DeSoto Building 1230 Apalachee Parkway Tallahassee, Florida 32399-3060 (Electronic Filing)	Armando Vazquez, Administrator Blue Angel Enterprises, Inc. d/b/a Blue Angel Residences 4814 North Darby Avenue Tampa, Florida 33603 (U.S. Mail)

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.