STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR PERSONS WITH DISABILITIES,

Petitioner,

vs. Case No. 19-1812FL

MEADOWVIEW PROGRESSIVE CARE CORPORATION GROUP HOME, owned and operated by MEADOWVIEW PROGRESSIVE CARE CORPORATION,

Respondent.
_____

RECOMMENDED ORDER

On August 16, 2019, Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings (DOAH), conducted the final hearing by videoconference in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Trevor Suter, Esquire
Agency for Persons with Disabilities
4030 Esplanade Way, Suite 380
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For Respondent: G. Barrington Lewis, Esquire
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STATEMENT OF THE ISSUES

The issues are whether, pursuant to section 393.0673(1), Florida Statutes (2018), Respondent, which holds a license to

operate a group home facility, was identified in a verified report by the Department of Children and Families (DCF) as the perpetrator of exploitation of a vulnerable adult, failed to disclose on a renewal application a perpetrator of "the . . . abuse, neglect, or exploitation of a vulnerable adult" (Maltreatment),[1] and allowed a new employee to begin working at the group home before completing all of the background screening requirements; and, if so, what penalty should be imposed against Respondent's license.

PRELIMINARY STATEMENT

On March 1, 2019, Petitioner issued an Administrative Complaint against "Meadowview Progressive Care Corporation Group Home, owned and operated by Meadowview Progressive Care Corporation," which are, respectively, a group home and the corporate licensee. Citing group home facility license number 11-258-GH (License), the Administrative Complaint alleges that Meadowview Progressive Care Corporation (Respondent) holds the License to operate a group home located at 19740 Northwest 32nd Avenue, Miami Gardens (Group Home). The Administrative Complaint alleges that Respondent's corporate officers are Etha Griffith, Kim Griffith, and Francis Griffith.

Count I alleges that Respondent was responsible for the care of seven disabled adults. Count I alleges that DCF conducted a protective investigation of allegations of financial exploitation

of these seven persons "cared for by Respondent and Etha Griffith, Respondent's corporate officer." Count I alleges that DCF issued a verified report of exploitation against Etha Griffith for improperly using the funds of these seven residents (Verified Report). Count I concludes that Petitioner may revoke a license if DCF verifies "that the licensee is responsible for the . . . abuse, neglect, or exploitation of a vulnerable adult." § 393.0673, Fla. Stat.

Count II alleges that, on November 12, 2018, Respondent's corporate officer, Etha Griffith, submitted to Petitioner a license renewal application on behalf of Respondent (Application). Count II alleges that Etha Griffith attested to the truth of the answers supplied in response to questions asked in Section V of the Application, which is marked, "Affidavit." Count II alleges that Etha Griffith answered "no" to the question in Section V, Item 2 that asks whether "you or ownership controlling entity affiliated with this application" was "ever identified as responsible for . . . the abuse, neglect, or exploitation of a vulnerable adult?"

Count II alleges that DCF closed the above-described protective investigation with a verified finding of exploitation against "Respondent Etha Griffith." Count II alleges, first, that Etha Griffith's nondisclosure of a verified finding of exploitation constituted a "willful or intentional misstatement

regarding the health, safety, welfare, abuse, neglect, exploitation, abandonment, or location of a resident" and thus constitutes a Class I violation, as provided in Florida Administrative Code Rule 65G-2.007(20)(a). Count II alleges, second, that Etha Griffith's nondisclosure of a verified finding of exploitation constituted a "falsely represented material fact" in a license application, in violation of section 393.067. Count II concludes that Petitioner may deny a renewal application if "the licensee has "falsely represented or omitted a material fact" in its application, as provided by section 393.0673.

Count III alleges that, on January 15, 2019, Huguette Bastien Meliard was employed by Respondent and working at the Group Home, despite the absence, in her personnel file, of documentation of background checks of her local criminal record and employment history. Count III alleges that these omissions violated the requirement of a preemployment level 2 screening, pursuant to sections 393.0655(1) and 435.01, Florida Statutes, so as to constitute a Class I violation, as provided by Rule 65G-2.008(2). The Administrative Complaint concludes that Petitioner may revoke Respondent's license or impose a lesser penalty.

By Petition for Formal Administrative Hearing filed March 27, 2019, Respondent claimed that DCF never informed it or Etha Griffith of a finding of exploitation, Etha Griffith

answered honestly the question asked in Section V, Item 2, and Ms. Meliard had not yet been hired by Respondent on January 15, 2019.

On August 14, 2019, the parties filed a Prehearing Stipulation. The second sentence of the portion of the stipulation entitled, "Stipulated Facts and Nature of the Controversy," states that, on March 21, 2019, Petitioner filed "administrative complaints" to revoke "licenses" of Respondent. The first sentence identifies a group home facility license for a group home located at 2331 West Lake Miramar Circle, Miramar (Miramar Group Home).[2] However, there is only one administrative complaint in this proceeding, and it proposes discipline only against the License for the Group Home.

The first sentence also misstates that the two licenses are held by "Meadowview Progressive Care Corporation Group Home and Meadowview Progressive Care Corporation 2 Owned and operated by [Respondent]." Regarding the license for the Miramar Group Home, Petitioner offered into evidence applications that indicate that the licensee is "Meadowview Progressive Care, Inc.," not Respondent.

The administrative law judge hereby strikes these sentences from the Prehearing Stipulation.[3]

At the hearing, Petitioner and Respondent each called two witnesses. The only exhibits admitted were pages 28 through 39

of Petitioner Composite Exhibit 2,[4] which are the Application and the Certificate of License that the Application sought to renew, and Respondent Composite Exhibit H, which are emails between Kim Griffith and the DCF protective investigator who prepared the Verified Report.

The court reporter filed the transcript on October 17, 2019. The parties filed their proposed recommended orders by October 25, 2019.

FINDINGS OF FACT

1. At all material times, as authorized by the License, Respondent, a Florida not-for-profit corporation, has provided services to intellectually disabled persons residing at the Group Home. At all material times, Respondent's directors have been Etha Griffith, her daughter Kim Griffith, and Francis Griffith. The record does not disclose if Respondent has any members. Etha Griffith, who is 79 years old, serves as an officer and the onsite manager of the group home, for which Kim Griffith and Francis Griffith serve as the backup managers or supervisors of the Group Home.

2. Petitioner presented no admissible evidence in support of Count I. Prominent among the excluded evidence is the Verified Report, as to which Petitioner failed to demonstrate its relevance, as explained in the Conclusions of Law, or its

authenticity, given that it is unsigned and bears other indicia of an investigation that, although closed, was never completed.[5]

3. In support of Count II, Petitioner introduced the Application,[6] which was filed on November 12, 2018. Etha Griffith[7] completed the Application by providing the information requested on Petitioner's application form, which serves a natural person or legal entity who or that is an applicant or licensee seeking the issuance or renewal of a group home facility license (Application Form). Etha Griffith signed the Application as Respondent's designated representative, and her signature was notarized on November 8, 2018.

4. The Application states the answer, "no," to the question posed in Section V, Item 2: "Have you or ownership controlling entity affiliated with this application ever been identified as responsible for the abuse, neglect, or abandonment of a child or the abuse, neglect, or exploitation of a vulnerable adult?" For several reasons, Petitioner failed to prove by clear and convincing evidence the material facts in support of Count II.

5. First, "no" was correct because the question refers to a determination, not allegation, of Maltreatment. The Application Form does not define "identified," whose common meaning is not "alleged," but "established,"[8] such as after a completed investigation. As explained in endnote 5, the evidence fails to

establish that DCF determined that Etha Griffith is the perpetrator of Maltreatment.

6. Second, even if there had been a determination of Maltreatment in the Verified Report by November 12, 2018, "no" was not a willful or intentional misstatement or a false statement because neither Etha Griffith nor any other agent of Respondent knew about the Verified Report or DCF's determination of Maltreatment--and not for a lack of inquiry. Aware that an investigation had taken place during the summer of 2018, in October 2018, Kim Griffith contacted the DCF protective investigator who had conducted the investigation and asked for any findings. The investigator returned to her, not the Verified Report, but a Notice of Conclusion, stating only that the investigation was "complete" and "closed," and DCF had recommended no additional services. Etha Griffith has never received a copy of the Verified Report. No agent of Respondent knew anything about the Verified Report until preparing for the hearing in this case. On these facts, Etha Griffith and Respondent's other agents had no reason to think, as of November 12, 2018, that DCF had determined that Etha Griffith had perpetrated Maltreatment.

7. Third, even if, by November 12, 2018, Etha Griffith were aware that DCF had determined that she had perpetrated Maltreatment, the failure to disclose this fact or the Verified

Report was not material. An audit of the Group Home by Petitioner led to DCF's protective investigation, and the findings of the protective investigation, such as they were,[9] implied that any misappropriation involved substantially smaller sums than those specified in the audit.[10] Knowledge of the audit findings would thus include knowledge of the protective investigation findings.

8. Fourth, as discussed in the Conclusions of Law, "no" is correct because, in the question posed in Section V, Item 2, "you" refers to the applicant or licensee, and "ownership controlling entity affiliated with this application" does not effectively refer to Etha Griffith.

9. The Application Form does not define these terms. Items 1, 3, and 4 also contain questions posed to "you." The questions in Items 1 and 3 alternatively address a "controlling entity affiliated with this application," so, except for dropping "ownership," the questions in Items 1 and 3 are directed to the same addressee as is the question in Item 2. The question in Item 4 is directed only to "you." All four of these items frame questions seeking potentially important information about past license discipline and adverse action involving the Medicaid and Medicare programs.[11]

10. Judging from her testimony at the hearing, Etha Griffith possesses modest language skills. Given the level of

analysis required to determine the meaning of "you" and "ownership controlled entity affiliated with this application," Etha Griffith could not possibly have understood that the question in Section V, Item 2 addressed her.

11. The two key issues in Count III are whether Ms. Meliard was an employee or a covered volunteer, as defined in the Conclusions of Law, and, if so, whether she had completed her local screening.

12. Ms. Meliard did not testify, nor did Petitioner direct any questions to Kim Griffith as to Count III. Petitioner's investigator testified that, upon his unannounced arrival at the Group Home at 2:05 p.m. on January 1, 2019, he found Ms. Meliard "seated in a chair by the front window," presumably in a common area of the house, such as a living room. Tr., p. 63. Ms. Meliard was alone in the Group Home, as the residents typically returned from their day programs around 3:00 p.m. Tr., p. 63. On the investigator's arrival, Ms. Meliard called Etha Griffith, who arrived at the Group Home very shortly after the call. Tr., p. 64. On her arrival, Etha Griffith told the investigator that she was "trying to give [Ms. Meliard] a job." Tr., p. 64. The testimony recited in this paragraph is credited.

13. Petitioner's witnesses were in conflict as to the screening that Ms. Meliard had cleared. Petitioner's operations management consultant testified that Ms. Meliard had not cleared

level 1 or 2 screening. Tr., p. 44. Petitioner's investigator testified to the same effect, but immediately corrected himself by saying that she had cleared Level 2 screening, but not local screening. Tr., pp. 65-66. Petitioner is unable to produce documentary evidence of screenings because this material is confidential, even in hearings of this type, according to Petitioner's counsel. Tr., p. 46.

14. When asked if Ms. Meliard had cleared her level 2 screening, Etha Griffith testified, "That is the one we got, yeah." Tr., p. 95. No one asked Etha Griffith directly if Ms. Meliard had not yet passed her local screening. In a clear-and-convincing case, no finding is possible based on the negative implication inherent in Etha Griffith's statement. Her modest communication skills and laconic communication style betray a lack of mental acuity, so no inference is possible by Etha Griffin's use of the definite article, "the."

15. A personnel file, which may be opened for a candidate for employment, typically contains evidence of a local screening, which comprises an inquiry to the relevant local law enforcement agency and a response from the agency. Tr., p. 83. Proof of a failure to obtain a local screening thus depends on a negative--the absence of documentation in the personnel file. Unable to recall clearly whether he had seen evidence of a level 2 screening, Petitioner's investigator testified that he recalled

not seeing evidence in Ms. Meliard's personnel file of clearing the local screening. Tr., p. 83.

16. The testimony on the issues of employment and local screening is too vague and uncertain to support findings by clear and convincing evidence that, on January 10, 2019, Ms. Meliard was employed by Respondent and had not passed her local screening. The investigator presented himself as exceptionally capable and articulate, but nothing in the record suggests that he investigated with any diligence the employment or local screening issues involving Ms. Meliard.

CONCLUSIONS OF LAW

17. DOAH has jurisdiction. §§ 120.569 and 120.57(1), Fla. Stat.

18. Petitioner must prove the material allegations to discipline Respondent's license by clear and convincing evidence. § 120.57(1)(j). "Clear and convincing evidence" is evidence that is "precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue." Fla. Std. Jury Inst. (Civ.) 405.4.

19. Instead of state programs for the treatment of persons with developmental disabilities, the legislature has opted for "community-based programs and services . . ., private businesses, not-for-profit corporations, units of local government, and other

organizations capable of providing needed services to clients in a cost-efficient manner." § 393.062.

20. Section 393.0673(1) and (2) sets forth identical grounds for Petitioner, respectively, to discipline or deny a group home facility license.[12] Section 393.0673(1) predicates discipline on the following:

> (a) The licensee has:
> 1. Falsely represented or omitted a material fact in its license application . . .;
> 2. Had prior action taken against it by the Medicaid or Medicare program; or
> 3. Failed to comply with the applicable requirements of this chapter or rules applicable to the licensee; or
> (b) [DCF] has verified that the licensee is responsible for the abuse, neglect, or abandonment of a child or the abuse, neglect, or exploitation of a vulnerable adult.[13]

21. Rule 65G-2.002(20) provides:

> Willful or intentional misstatements. A licensee or applicant shall not make willful or intentional misstatements, orally or in writing, to intentionally mislead Agency staff, the Department of Children and Families, or law enforcement in the performance of their duties.
> (a) Willful or intentional misstatements regarding the health, safety, welfare, abuse, neglect, exploitation, abandonment or location of a resident shall be considered a Class I violation.
> (b) All other willful misstatements shall be considered Class II violations.

22. Petitioner has not explained its reasoning in Counts I and II in the Administrative Complaint, at hearing, or in its

proposed recommended order. As to Count I, Petitioner has not explained why the Verified Report naming Etha Griffith as a perpetrator of Maltreatment may operate as a verified report naming Respondent as a perpetrator of Maltreatment. As to Count II, Petitioner has not explained how Etha Griffith is addressed by a question in Section V, Item 2 of the Application Form directed to "you" or "ownership controlling entity affiliated with this application" and, if this question had addressed her, the materiality of the Application's failure to disclose that Etha Griffith was named as a perpetrator of Maltreatment.

23. Counts I and II illustrate different relationships that may arise between a corporation and its agents, such as directors, officers, and employees.[14] In Count I, the corporate licensee resists the imposition of liability for the acts and omissions of its agent. In Count II, the corporate licensee, which is unable to perform its corporate functions except through a natural person, necessarily affirms its agent's preparing and filing of the Application[15] and defends the accuracy of the agent's answer to the question in Section V, Item 2 of the Application.

24. Count I relies on a false equivalence between Respondent and Etha Griffith. Paragraph 8 alleges that DCF found Etha Griffith to be a perpetrator of Maltreatment, and Paragraph 9 alleges that Petitioner may discipline a license if a licensee

is found responsible for Maltreatment. Even if both allegations were true, Count I fails for the lack of a bridge between them. Compare Amer. States Ins. Co. v. Kelley, 446 So. 2d 1085, 1086 (Fla. 4th DCA 1984) (a corporation is an entity separate and distinct from the people that constitute it).

25. Count I imputes to Respondent the putative determination of wrongdoing by Etha Griffith, but the power to impute vicarious liability lies with the courts,[16] not agencies.[17] Typically associated with the common law, such as tort law, indirect liability will not be imposed by a court when the liability is a matter of statute, if the statute does not impose vicarious liability. Diaz de la Portilla v. Fla. Elections Comm'n, 857 So. 2d 913, 917-18 (Fla. 3d DCA 2003) (candidate not liable for violations of campaign treasurer when relevant statutes do not impute liability to candidate).

26. Chapter 415 does not prohibit DCF from determining that a corporation perpetrated Maltreatment,[18] but DCF did not do so.[19] Petitioner's attempt in Count I to treat Respondent as vicariously liable for the Maltreatment is particularly problematic because chapter 415 no longer provides a hearing on a verified report of Maltreatment[20] and imposes no evidentiary standard whatsoever on DCF's determination that a person has perpetrated Maltreatment.[21] Although, as this case demonstrates, section 393.0673(1)(b) provides a hearing when the discipline is

based on a verified report against the licensee, the language of the statute provides no opportunity to relitigate the Maltreatment determination by DCF, but limits the licensee to collateral defenses, such as whether the licensee is the perpetrator in a verified report of Maltreatment or whether the verified report is authentic and meets the applicable statutory requirements.

27. Count I fails, not because Petitioner is unable to discipline a group home facility licensee for the wrongful acts and omissions of its agents,[22] but because, without any statutory support, Petitioner has treated Respondent as the perpetrator of Maltreatment in a verified report that names Etha Griffith as the perpetrator.

28. By contrast, stating a claim for which relief may be granted, Count II fails due to the absence of evidence that the negative answer to the question in Section V, Item 2 constituted a false statement or omission of a material fact or a willful or intentional misstatement intentionally to mislead Petitioner.

29. Petitioner has adopted the Application Form as a rule. Rule 65G-2.002(2). Count II requires the interpretation of several provisions of the Application Form. The construction of a rule is a question of law,[23] as is the construction of a contract.[24]

30. As explained above,[25] the Verified Report is neither relevant nor authentic, so Petitioner has failed to prove the threshold element that DCF has "verified" or determined that Etha Griffith perpetrated Maltreatment, as required by section 393.0673(1)(b). Section 393.0673(1)(b) requires a determination, not an allegation, so this construction of the question ensures that Item 2 works in tandem with the statute. Consistent with this interpretation, Petitioner elsewhere has referred to an allegation of Maltreatment by modifying "perpetrator." Rule 65G-2.008(5) (a person who "has been identified as an alleged perpetrator").

31. The requirements of a false representation or false omission of a material fact in section 393.0673(1)(a)1. and a willful or intentional misstatement intentionally to mislead Petitioner in rule 65G-2.007(20)(a) demand proof that Etha Griffith knew that the answer to Section V, Item 2 was false when she filed the Application.[26] However, as explained in the Findings of Fact, the negative answer was not false due to the deficiencies of the Verified Report and, even if the Verified Report had determined that Etha Griffith were a perpetrator of Maltreatment, none of Respondent's agents, including Etha Griffith, had knowledge of the report's existence.

32. Additionally, the nondisclosure of the Verified Report was not be material. The "findings" of the Verified Report were

circumscribed by Petitioner's audit findings. Petitioner is housed within DCF, § 20.197, and its employees administering chapter 393 have access to all otherwise-confidential DCF records involving protective investigations, except for the name of the reporter. § 415.107(3)(a). If DCF has "reason to believe" that Maltreatment has been perpetrated on a resident of a group home facility, it is required to provide a copy of its investigative report to Petitioner. Compare Steinberg v. Bay Terrace Apt. Hotel, 375 So. 2d 1089, 1092 (Fla. 3d DCA 1979) (person to whom false representation is made not entitled to relief if it might have learned the truth by ordinary care and attention).

33. Lastly, Petitioner failed to prove a false statement or omission or willful or intentional misstatement because Petitioner failed to prove by clear and convincing evidence that "you" or "ownership controlling entity affiliated with this application" addresses Etha Griffith.

34. "You" means the applicant, who or which is the obvious focus of the Application Form. If "you" means the natural person completing the Application Form--e.g., the applicant if a sole proprietor or a designated representative if a corporation--the question in Item 4 would sometimes address the applicant and sometimes address the designated represent--itself, an illogical situation. Worse, Item 4 would elicit from a corporate applicant useless[27] information about the designated representative at the

expense of eliciting important information about the applicant. If "you" means only the designated representative, then Item 4 is directed to no one when the applicant is a natural person. If "you" serves double duty, addressing the applicant when it is a natural person and the designated representative when the applicant is a legal entity, then the Application Form would need explicitly to inform users of this complicated, contingent arrangement.

35. "Ownership controlling entity affiliated with this application" yields its meaning more grudgingly. The core of this phrase seems to be "ownership controlling entity,"[28] which likely describes an entity that controls the applicant. "Ownership" suggests that the means of control is by way of equity, not, say, management or debt. Thus, as used in Section V, Item 2, this phrase seems to apply only to an applicant that is a legal entity, as a natural person cannot be owned. For a legal entity with owners, the obvious question is when does a natural person or legal entity own enough to control the applicant? For a legal entity without owners, such as Respondent, this phrase thus would be inoperative.

36. But "ownership controlling entity" may mean more. Although unmentioned in the Application Form, "controlling entity" is defined in rule 65G-2.001(8)(a) and (b) as "the applicant or licensee" or a "person or entity that serves as an

officer of, is on the board of directors of, or has a 5-percent or greater ownership interest in the applicant or licensee" ("5% owner").

37. Ignoring the troublesome modifier, "ownership,"[29] which would restrict the scope of the rule in Section V, Item 2 to a 5% owner, there are one factual and two legal impediments to applying the rule in this case so as to capture Etha Griffith as an officer or director.

38. First, Etha Griffith lacks the language and cognitive skills to understand that this phrase refers to her, even if it did.[30] Pupo-Diaz v. State, 966 So. 2d 1010, (Fla. 2d DCA 2007) (failure to prove by preponderance of evidence that applicant falsely failed to reveal a driver license suspension due to applicant's "lack of understanding of the wording of the questions"). And Petitioner bears the responsibility for this failure to communicate. At the risk of stating the obvious, the legislature has directed that agencies draft rules, which would include the Application Form, in "readable language" that avoids the use of "obscure words and unnecessarily long or complicated constructions" or "unnecessary . . . specialized language that is understood only by members of particular . . . professions." § 120.54(2)(b).

39. Second, the information sought in Section V, Item 2 as to an officer, director, or 5% owner would not be relevant.

Petitioner is not authorized to deny or discipline a group home facility license on the ground that an officer, director, or 5% owner has been determined to be a perpetrator of Maltreatment.[31]

40. Third, as suggested in the preceding paragraph, Petitioner lacks the authority to direct the question contained in Section V, Item 2 to an officer, director, or 5% owner. In doing so, Petitioner is not "implement[ing] or interpret[ing] the specific powers and duties granted by [any] enabling statute,"[32] as required by the flush left language of section 120.52(8).[33]

41. The language of rule 65G-2.001(8)(a) and (b)[34] is found in section 408.803(7)(a) and (b), which defines a "controlling interest" for licensing programs administered by the Agency for Health Care Administration (AHCA).[35] In contrast to section 393.0673(1) and (2), which applies only to a "licensee" or an "applicant," section 408.815(1) authorizes discipline or denial for acts or omissions by a "controlling interest."[36] The contrast between the scope of these two regulatory regimes is underscored by the overlapping grounds for discipline or denial that are available to AHCA, including a false representation or omission of a material fact from an application, a violation of applicable law, and current exclusion from the Medicaid or Medicare program, although not a determination that the applicant is a perpetrator of Maltreatment.

42. Plainly, the legislature has restricted the regulatory reach of Petitioner in chapter 393, relative to AHCA in chapter 408, part II--a choice that Section V, Item 2 unlawfully overrides with its alternative addressee. Therefore, the reference to "ownership controlling entity affiliated with this application" in Section V, Item 2 of the Application Form is an invalid rule on which neither the administrative law judge nor Petitioner may base agency action under section 120.57(1)(e)1.

43. Count III fails for a lack of clear and convincing evidence. Section 393.0655(1) requires a level 2 employment screening for "direct service providers," who are persons over 18 years of age with "direct face-to-face contact with a client while providing services to the client or . . . access to a client's living areas or to a client's funds or personal property." § 393.063(13). Section 393.0655(1) adds: "Background screening shall include employment history checks as provided in s. 435.03(1) and local criminal records checks through local law enforcement agencies." Section 393.0655(1)(a) states: "A volunteer who assists on an intermittent basis for less than 10 hours per month does not have to be screened if a person who meets the screening requirement of this section is always present and has the volunteer within his or her line of sight."

44. Petitioner has failed to prove that Ms. Meliard was a direct service provider as an employee of Respondent. The only affirmative evidence is that she was in the process of applying to become an employee. Petitioner never asked Kim Griffith about Ms. Meliard's employment status and never produced evidence of payments from Respondent to her. On these facts, an inference of employment might be possible in a preponderance case, but not in a clear-and-convincing case.

45. Petitioner has failed to prove Ms. Meliard was a direct service provider as an unpaid volunteer. The evidence fails to establish that Ms. Meliard was ever in contact with residents or had access to their rooms without being in direct view of a screened person. The evidence places Ms. Meliard alone in the front room of the Group Home for a few minutes, but not alone with residents or alone with access to a resident's living area.[37]

46. Petitioner has failed to prove by clear and convincing evidence that Ms. Meliard did not undergo local screening. The testimony as to screening was imprecise, implicit, confused, and not of such weight that it has produced a firm belief or conviction, without hesitation, that Ms. Meliard in fact had not passed her local screening.

47. The administrative law judge reserves jurisdiction to award a reasonable attorney's fee against Petitioner, pursuant to section 57.105(5). After the issuance of the final order, the

administrative law judge will issue a notice of hearing to address Petitioner's liability under section 57.105 and, if established, the amount of fees.

RECOMMENDATION

It is

RECOMMENDED that the Agency for Persons with Disabilities enter a final order finding Respondent not guilty of all counts set forth in the Administrative Complaint.

DONE AND ENTERED this 26th day of November, 2019, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of November, 2019.

ENDNOTES

[1]/ When the context requires, "Maltreatment" will also refer to the abuse, neglect, or abandonment of a child.

[2]/ The Miramar Group Home was formerly located in Pembroke Pines.

[3]/ A stipulation contrary to the law is not binding on the trial judge. See, e.g., Troup v. Bird, 53 So. 2d 717, 721 (Fla. 1951). Any attempt to broaden the scope of this proceeding to include a second license invites confusion, especially when it is attempted by a prehearing stipulation, rather than a motion to amend an administrative complaint.

Any attempt to add a second respondent to the case is unlawful. Nothing in this record indicates that Petitioner has ever advised the licensee of the Miramar Group Home of proposed agency action against its license, so as to confer jurisdiction under section 120.569(1). Parties may not confer jurisdiction by stipulation, Int'l Studio Apt. Ass'n v. Sun Holiday Resorts, 375 So. 2d 335 (Fla. 4th DCA 1979); waiver, Lee v. Div. of Fla. Land Sales & Condo, 474 So. 2d 282, 284 (Fla. 5th DCA 1985); pleading, Hadley v. Hadley, 140 So. 2d 326, 327 (Fla. 3d DCA 1962), action of counsel lacking suitable authority, U.S. Bank, N.A. v. Rios, 166 So. 3d 202, 209 (Fla. 2d DCA 2015); or, one may assume, inadvertence by Respondent's counsel, especially when nothing in the record suggests that he also represents the licensee of the Miramar Group Home.

Suggesting that Petitioner may have realized its error in the Prehearing Stipulation, at hearing, Petitioner did not offer into evidence Petitioner Exhibit 1, which is a composite exhibit consisting of two applications for licenses for the Miramar Group Home, and did not pursue any line of evidence of which this exhibit might have been a part. See Tr., p. 38.

[4]/ In its proposed recommended order, Petitioner noted that it was "allowed only one exhibit in evidence." Petitioner's proposed recommended order, p. 2. Actually, only part of one of Petitioner's exhibits was admitted; the excluded part of this exhibit was an earlier renewal application filed by Respondent.

The grounds for the exclusion of the Verified Report are detailed in the next endnote.

The administrative law judge also excluded eight additional exhibits offered by Petitioner containing over 150 pages of financial information in support of a charge of financial exploitation. The Administrative Complaint includes no such charge. The charge stated in Count I is based on the Verified Report, not the underlying financial exploitation that is the subject of the Verified Report. Petitioner never requested leave to amend the Administrative Complaint, nor could Respondent have been prepared to try this more-detailed claim, if the new allegations had been added to the case at the hearing.

The remaining exhibits of Petitioner not admitted into evidence pertain to the Miramar Group Home, which is discussed in the preceding endnote.

[5/] The Verified Report is inadmissible on two grounds: relevance and authenticity. The Verified Report is irrelevant because it names Etha Griffith as the perpetrator of the Maltreatment to support Count I, which seeks to impose discipline against Respondent as the named perpetrator of Maltreatment.

The Verified Report is not authentic because it fails to meet three statutory criteria for a verified report. Alternatively, the Verified Report is not relevant because this failure and other circumstances described below preclude assigning any weight to the Verified Report in determining whether DCF has verified that Etha Griffith is the perpetrator of Maltreatment. § 90.401 ("[r]elevant evidence is evidence tending to prove or disprove a material fact"). To differentiate between the grounds for irrelevance set forth in this and the preceding paragraphs, the recommended order refers to the grounds referenced in this paragraph as a lack of authenticity.

As for the statutory criteria, for each report of Maltreatment, section 415.104(3)(g) and (h) requires DCF to "[d]etermine the immediate and long-term risk to each vulnerable adult through utilization of standardized risk assessment instruments" and "[d]etermine the [necessary] protective, treatment, and ameliorative services . . . and cause the delivery of those services." Section 415.104(4) requires DCF, within 60 days of receipt of the report of Maltreatment, to complete the investigation and notify, among others, the caregiver "of any recommendations of services to be provided to ameliorate the causes or effects of [Maltreatment]."

There is no indication that DCF's protective investigation complied with any of these requirements, which are obviously

crucial to protect the well-being of vulnerable adults who have been subjected to Maltreatment. The Verified Report recounts allegations from an audit conducted by Petitioner that Etha Griffith stole thousands of dollars from residents, including about $5000 per month in reimbursements to which she was not entitled. Yet, the Verified Report lacks detailed findings about any theft, concluding only that "there is evidence to support the allegations" and that the residents "are being charged for services that the provider is supposed to provide such as soap, toiletries, shampoo, food, and transportation to doctor's appointments." Although the protective investigation does not seem to have found ongoing theft of $5000 per month, it finds some evidence of theft, but inexplicably fails to recommend intervention services or judicial action. This omission constitutes a failure to satisfy the crucial statutory requirements set forth above, but also constitutes a factual circumstance suggestive of an incomplete investigation.

Another circumstance suggestive of an incomplete investigation is that the Verified Report is unsigned by the protective investigator and protective investigator supervisor, even though the Application Form provides lines for their signatures. The affidavit of the DCF records custodian attests that DCF's files contain an unsigned report. Nor does the custodian's affidavit assert that Etha Griffith is listed in a verified report as a perpetrator of Maltreatment.

On the other hand, the vague assurance that "there is evidence to support the allegations" is not necessarily an indicator of an incomplete investigation. A verified report is not required to meet any standard of proof. See endnote 21.

Pursuant to section 415.104(4), a protective investigation must be completed within 60 days. Less than one week before the deadline in effect for the investigation of Etha Griffith, DCF closed its investigation, but, for the reasons set forth in this endnote, the protective investigator had not completed her work. References in this recommended order to the Verified Report therefore do not imply that it constitutes a verified report under section 415.104.

[6/] Because Respondent already held the License, the Application was a renewal application, but the same form is used as an initial and renewal application. For this reason, the recommended order uses "application" and "renewal application" interchangeably.

[7/] Kim Griffith initialed two representations that are irrelevant to the present case.

[8/] The first definition of "indicate" in the Merriam-Webster online dictionary is "to establish the identity of." No definition approximates "allege." https://www.merriam-webster.com/dictionary/identify

[9/] See endnote 5.

[10/] See endnote 5, fourth paragraph.

[11/] As an affirmative response to Item 2 would justify license discipline under section 393.0673(1)(b) or a denial of a license application under 393.0673(2)(b), discipline or denial could be based on an affirmative response to Item 3, which asks about adverse action in the Medicare or/and Medicaid program. § 393.0673(1)(a)2. and (2)(a)2.

[12/] For this reason, the recommended order uses "applicant" and "licensee" interchangeably.

[13/] Similar provisions apply to an applicant. § 393.0673(2).

[14/] Not-for-profit corporations may have members, but not shareholders or owners. §§ 617.0601 and 617.01401(16). Because it is unclear whether Respondent has any members or, if so, whether Etha Griffith is a member of Respondent, this recommended order does not address the relationship between Respondent and a member, although it would not be materially different from the relationship between Respondent and an agent.

[15/] See, e.g., Jacksonville Am. Pub. Co. v. Jacksonville Paper Co., 197 So. 672, 679 (Fla. 1940).

[16/] See, e.g., Weiss v. Jacobsen, 62 So. 2d 904 (Fla. 1953).

[17/] The inverse process is holding a shareholder or director liable for the acts and omissions of the corporation--i.e., piercing the corporate veil. This, too, is judge-made law. See, e.g., American States Ins. Co. v. Kelley, 446 So. 2d 1085 (Fla. 4th DCA 1984). Absent statutory authorization, agencies lack the authority to pierce the corporate veil. Roberts' Fish Farm v. Spencer, 153 So. 2d 718, 720 (Fla. 1963).

[18/] Section 415.104 authorizes DCF to investigate a report of Maltreatment by a "caregiver." Section 415.102(5) defines a

"caregiver" as a "person" responsible for the care of a vulnerable adult. Although "person" is not defined in chapter 415, section 1.01(3) defines "persons" to include "individuals, children, [and] corporations."

[19/] If DCF lacks this authority, then the imputation of vicarious liability would be equally unwarranted.

[20/] The Florida Senate, Committee on Children, Families, and Elder Affairs, "Review of State Child Abuse Registries," Issue Brief 2011-205 (October 2010), https://www.flsenate.gov/UserContent/Session/2011/Publications/InterimReports/pdf/2011-205cf.pdf (Issue Brief).

The Issue Brief notes that, when repealing the provision in chapter 415 for an administrative hearing on the proposed verified report, the legislature also repealed other statutes that imposed adverse employment consequences upon a person who was listed as a perpetrator of Maltreatment in a verified report. The Issue Brief lists cases in other jurisdictions rejecting as unconstitutional similar programs that: 1) do not provide for a hearing and 2) generate adverse employment consequences.

Obviously, section 393.0673(1)(b) and (2)(b) imposes adverse effects on a group home facility license or an application to obtain such a license. It is an open question whether a person is entitled to an administrative hearing under chapter 120 or a judicial hearing under the case law when the determination that he is a perpetrator of Maltreatment supports the loss of a group home facility license or the denial of an application for such a license. Compare Herold v. Univ. of S. Fla., 806 So. 2d 638 (Fla. 2d DCA 2002); Sickon v. Sch. Bd., 719 So. 2d 350 (Fla. 1st DCA 1998) (dictum).

[21/] The evidentiary standard for reports of Maltreatment was formerly provided in the statute that provided a hearing for an alleged perpetrator to seek to expunge a confirmed report or amend a confirmed report to indicated. See § 415.1075(1)(d) (1999). There is no longer any provision in chapter 415 imposing on DCF a specific evidentiary standard in determining whether a person has perpetrated Maltreatment. It is an open question whether a statute may impose discipline against a license based on an agency's determination of Maltreatment without meeting a minimal evidentiary standard.

[22/] Section 393.0673(5) authorizes Petitioner to issue an immediate suspension or revocation order when "any condition in the facility presents a threat to the health, safety, or welfare of the residents." Here, the focus is on the condition, regardless of who or what caused the condition to arise, although, if the problem were documented by a verified report of Maltreatment, Petitioner would have to prove the facts underlying the verified report.

Section 393.0673(1)(a)3. authorizes discipline for failing to comply with the provisions of chapter 393 or rules applicable to a group home facility license. Rule 65G-2.012(1)(b) requires the "designated facility operator"--here, Etha Griffith--to "be a person of responsible character and integrity." Rule 65G-2.012(2)(d)3. and (3) designates as a Class III violation noncompliance by a provider--Respondent--or a provider's employee--e.g., Etha Griffith--with the prohibition against "[b]orrowing or otherwise using a resident's personal funds for any purpose other than the resident's benefit."

But Petitioner's options are limited in terms of reliance on a verified report of Maltreatment. The background screening discussed elsewhere in this recommended order does not screen for DCF's determination that a person is a perpetrator of Maltreatment, §§ 393.0655(1) and 435.04, so a verified report of Maltreatment would not preclude a perpetrator's passing such a screening. The reason for this omission likely is the unavailability of a hearing on a proposed verified report, as mentioned in the Issue Brief discussed in endnote 20.

[23/] See, e.g., Collier Cnty. Bd. Of Cnty. Comm'rs v. Fish & Wildlife Conservation Comm'n, 993 So. 2d 69 (Fla. 2d DCA 2008).

[24/] See, e.g., Chhabra v. Morales, 906 So. 2d 1261, 1262 (Fla. 4th DCA 2005) (however, provisions "rationally susceptible to more than one construction" present a question of fact); Comm. Capital Res. v. Giovannetti, 955 So. 2d 1151, 1153 (Fla. 3d DCA 2007) (however, an ambiguity in wording presents a question of fact). In general, intrinsic evidence, which is drawn from a contract itself, is always available to aid in the construction of the contract, B.F. Goodrich Co. v. Brooks, 113 So. 2d 593, 596 (Fla. 2d DCA 1959) (citation omitted), but extrinsic or parole evidence is available only if the ambiguity is latent, as a patent ambiguity would require the court to rewrite the contract for the parties. See, e.g., Nationstar Mortg. Co. v. Levine, 216 So. 3d 711, 715 (Fla. 4th DCA 2017) (extrinsic evidence may not explain a contractual provision whose ambiguity is patent, which

means that "'the use of defective, obscure, or insensible language'" is evident on the face of the document) (citation omitted).

[25/] See endnote 5 for a discussion of authenticity, as used with regard to the Verified Report.

[26/] Compare Martin Co. v. Carpenter, 132 So. 2d 400, 406 (Fla. 1961) (false statement by employee regarding workers' compensation); Johnson v. Davis, 480 So. 2d 625, 627 (Fla. 1985) (fraudulent representation or concealment by seller).

[27/] It is unclear whether there is any limitation upon whom a corporate applicant may designate as a representative, so the force of a question as to Maltreatment directed to a designated representative easily could be evaded. The introductory instructions in the Application Form require only that the designated representative indicate her "role in the operation of the facility (licensee, supervisor, manager, board member, etc.)." Even if the parenthetical impliedly restricts the choice of a designated representative to a person with managerial responsibilities, the most problem-plagued licensee should be able to hire as a manager a natural person who is not a verified perpetrator of Maltreatment to complete the Application Form and, if the licensee chooses, terminate the employment of the person on the next day.

[28/] "Affiliated with this application" raises its own issues, but not in this case, as Etha Griffith is clearly affiliated with the Application.

[29/] Petitioner has implicitly joined in this rhetorical device regarding the modifier, "ownership" in Section V, Item 2. Petitioner's proposed recommended order recites the question, but omits "ownership," without ellipses, so that, as amended, the question asks, "Have you or controlling entity . . .." Petitioner's proposed recommended order, p. 4. If an inadvertent lapse in recitation, it happened twice. See Prehearing Stipulation, Petitioner's Statement. Prehearing Stipulation, p. 5.

[30/] It is unclear whether even Petitioner's counsel and witnesses thought that this phrase to Etha Griffith. If they did, they never said so.

[31/] See last paragraph of endnote 22.

[32/] Section 120.52(8) flush left language continues: "No agency shall have authority to adopt a rule only because it is reasonably related to the purpose of the enabling legislation . . .."

[33/] The rule claims that it implements sections 393.067 and 393.13. Section 393.13 is The Bill of Rights for Persons with Developmental Disabilities, which includes no substantive criteria for denying or disciplining a group home facility license. Section 393.067(1) authorizes Petitioner to adopt an application addressing, among other things, provider qualifications, but provides Petitioner with no authority to extend this grant of authority to a controlling entity.

[34/] Rule 65G-2.001(8)(c) and (d) is identical to section 408.803(7)(c) and (d), but these provisions are irrelevant to the present case.

[35/] These provisions of chapter 408, part II apply to 26 programs administered by the Agency for Health Care Administration, but obviously not to the group home facility program administered by Petitioner under chapter 393.

[36/] The use of "controlling interest" relieves the agency, statutes, and rules from specifying among the applicant, officer, director, and 5% owner. Petitioner's importation of this omnibus reference into the Application Form creates additional confusion due to the overlapping references to the applicant or licensee as "you" and a "controlling entity."

[37/] In a clear-and-convincing case, the evidence would need to show that Ms. Meliard had access to the residents' bedrooms, such as if they were unlocked.

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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.