

2019 AUG 20 P 12: 28

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

STATE OF FLORIDA, AGENCY FOR
HEALTH CARE ADMINISTRATION,

Petitioner,

DOAH CASE NO. 19-2371
AHCA NO. 2018010491

v.

ARCH CREEK SENIOR CARE SERVICES,
INC.,

Respondent.

_____ /

FINAL ORDER OF DISMISSAL WITH PREJUDICE

THIS CAUSE concerns an Administrative Complaint that the Agency for Health Care Administration (“Agency”) issued on November 16, 2018 (Exhibit A).

Findings of Fact

On November 26, 2018, Respondent received a copy of the Administrative Complaint by certified mail (Exhibit B).

On January 11, 2019, Petitioner filed a request for a formal administrative hearing (Exhibit C) with the Agency Clerk’s Office, challenging the Agency’s Administrative Complaint. The request for a formal hearing was untimely filed because Respondent failed to file it within 21 days of the date Respondent received the Administrative Complaint by certified mail and was not in substantial compliance with the requirements of rule 28-106.2015(5), Florida Administrative Code.

On January 14, 2019, the Agency Clerk entered an Order of Dismissal without Prejudice (Exhibit D), which gave Respondent the opportunity to explain the untimeliness of its request for a formal administrative hearing, and to amend its request for a formal administrative hearing so

that it would be in substantial compliance with the requirements of rule 28-106.2015(5), Florida Administrative Code.

Thereafter, Respondent filed a response to the Order of Dismissal without Prejudice, and the Agency Clerk ultimately referred the matter to the Division of Administrative Hearings (DOAH) for an evidentiary hearing.

On July 9, 2019, the administrative law judge (ALJ) assigned to the matter issued an Order Closing File and Relinquishing Jurisdiction (Exhibit E). In the Order Closing File and Relinquishing Jurisdiction, the ALJ specifically concluded that Respondent's reason for the untimeliness of its request for a formal administrative hearing did not constitute equitable tolling.

On July 18, 2019, Respondent filed a pleading entitled Respondent Arch Creek's "Exceptions" to July 9, 2019 DOAH Final Order and/or Motion for Due Process Board Rehearing and Reconsideration (hereinafter "Motion"), which is attached to this Final Order as Exhibit F. In the Motion, Respondent essentially re-argues its case and requested a hearing on the merits.

On July 22, 2019, Petitioner filed a memorandum in opposition to Respondent's Motion (Exhibit G), in which it argues Respondent is not entitled to any further proceedings in this matter.

Conclusions of Law

Rule 28-106.111(2), Florida Administrative Code, states that "[u]nless otherwise provided by law, persons seeking a hearing on an agency decision which does or may determine their substantial interests shall file a petition for hearing with the agency within 21 days of receipt of written notice of the decision." Rule 28-106.104(1), Florida Administrative Code, defines "file" as "received by the office of the agency clerk during normal business hours or by

the presiding officer during the course of a hearing.” There is no dispute that Respondent filed the Notice with the Agency Clerk on January 11, 2019, 46 days after the date Respondent received the Administrative Complaint by certified mail. Thus, the law requires the Agency to dismiss the request for hearing, and Respondent is deemed to have waived its right to a hearing, unless Respondent can show that the doctrine of equitable tolling applies. See § 120.569(2)(c), Fla. Stat. (2018); Fla. Admin. Code R. 28-106.111(4) (2007); Cann v. Department of Children and Family Services, 813 So. 2d 237 (Fla. 2d DCA 2002); Riverwood Nursing Ctr., LLC v. Agency For Health Care Admin., 58 So. 3d 907 (Fla. 1st DCA 2011).

As the ALJ correctly concluded on Page 2 of the Order Closing File and Relinquishing Jurisdiction, Respondent’s defense to its untimely filing of the request for a formal administrative hearing does not constitute equitable tolling. Instead, it constitutes excusable neglect, which is not a valid ground for extending the 21-day timeframe for requesting an administrative hearing. See Machules v. Dep’t of Admin., 523 So. 2d 1132, 1134 (Fla. 1988).

Section 120.569(2)(c), Florida Statutes, requires the Agency to provide a party with an opportunity to correct or amend a deficient hearing request unless it conclusively appears from the face of the hearing request that the defect cannot be cured. See also Brookwood Extended Care Center of Homestead, LLP v. Agency for Health Care Administration, 870 So. 2d 834 (Fla. 3d DCA 2003). Since Respondent’s request for a formal administrative hearing was untimely filed and Respondent has failed to demonstrate that it was either misled or lulled into inaction, had timely filed its Petition in the wrong forum, or had been prevented from timely filing its Petition by extraordinary circumstances so as to excuse the untimeliness of the request for a formal administrative hearing under the doctrine of equitable tolling, the Agency must dismiss Respondent’s request for a formal administrative hearing with prejudice since the defect of

untimeliness cannot be cured by Respondent. Furthermore, Respondent is not entitled to any further hearings on the merits of this matter because it has waived its right to a hearing in this matter by failing to timely file a request for an administrative hearing with the Agency Clerk.

Based upon the foregoing,

IT IS THEREFORE ORDERED AND ADJUDGED THAT:

Respondent's request for a formal administrative hearing is hereby dismissed with prejudice, and the pertinent agency action, namely the imposition of a \$1,500 fine on Respondent for three unclassified deficiencies, became final twenty-one (21) days after the date on which notice was received. Respondent shall govern itself accordingly.

Unless payment has already been made, payment in the amount of \$1,500 is now due from Respondent as a result of the agency action. Such payment shall be made in full within 30 days of the filing of this Final Order of Dismissal with Prejudice 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 20 day of August, 2019.



MARY C. MAYHEW, Secretary
AGENCY FOR HEALTH CARE ADMINISTRATION

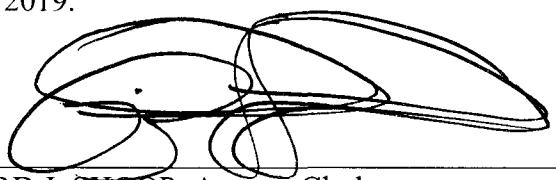
NOTICE OF RIGHT TO JUDICIAL REVIEW

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 HEREBY CERTIFY that a true and correct copy of this Final Order was served on the below-named persons by the method designated on this 20th day of August, 2019.



RICHARD J. SHOOP, Agency Clerk
AGENCY FOR HEALTH CARE ADMINISTRATION
2727 Mahan Drive, MS #3
Tallahassee, Florida 32308
Telephone: (850) 412-3689

Copies furnished to:

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