STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR PERSONS WITH DISABILITIES,

Petitioner,

vs. Case No. 20-2087F

MEADOWVIEW PROGRESSIVE CARE CORPORATION GROUP HOME, OWNED AND OPERATED BY MEADOWVIEW PROGRESSIVE CARE CORPORATION,

Respondent.
_____/

FINAL ORDER ON PETITIONER'S LIABILITY FOR ATTORNEY'S FEES

On May 28, 2020, Robert E. Meale, Administrative Law Judge (ALJ) of the Division of Administrative Hearings (DOAH), conducted an evidentiary hearing on Petitioner's liability for attorney's fees. Due to the coronavirus pandemic, the parties participated by separate telephone connections.

APPEARANCES

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STATEMENT OF THE ISSUE

The issue is whether Petitioner is liable for Respondent's attorney's fees, pursuant to section[1] 57.105(5), Florida Statutes, for claims that Petitioner asserted against Respondent in DOAH Case 19-1812FL.

PRELIMINARY STATEMENT

Petitioner commenced DOAH Case 19-1812FL by filing a three-count Administrative Complaint to revoke Respondent's license to operate a group home facility. Allegations common to all three counts include an allegation that, at all material times, Respondent has held a group home facility license (License), and one of its officers is Etha Griffith.

Count I alleges that, on or about August 8, 2018, the Department of Children and Families (DCF) verified that Ms. Griffith was a person responsible for the financial exploitation[2] of several residents at Respondent's group home facility (Verified Report). Count I alleges that Petitioner may revoke a license, pursuant to section 393.0673, if DCF has verified "that the licensee is responsible for the ... abuse, neglect, or exploitation of a vulnerable adult."

Count II alleges that, in November 2018, Ms. Griffith submitted an application to renew the License (Application). Under oath, Ms. Griffith allegedly answered "no" to the question, "Have you or ownership controlling entity affiliated with this application ever been identified as responsible for [financial exploitation]?" Count II alleges that "Respondent's 'no' answer" was a "willful or intentional misstatement regarding the health, safety, welfare, abuse, neglect exploitation, abandonment or

[1] All references to "section" or "chapter" are to Florida Statutes.

[2] The sole form of maltreatment relevant to the present case is the exploitation of a vulnerable adult. However, references to a "verified report" include, when necessary, references to the abuse or neglect of such a person, or the abuse, neglect, or abandonment of a child.

location of numerous residents," which is a Class I violation, pursuant to Florida Administrative Code Rule 65G-2.007 (Rule), (20)(a), and a "falsely represented material fact in Respondent's license application" that was submitted pursuant to section 393.067. Count II concludes that Petitioner may deny the renewal of a license "if the licensee has falsely represented or omitted a material fact in its license application," pursuant to "section 393.0673."

Count III alleges that Respondent employed at the group home facility (Group Home) an unscreened person in a position that required background screening, but, as noted below, the ALJ has already ruled that Respondent may not recover its attorney's fees for defending Count III.

Following the hearing in DOAH Case 19-1812FL, the ALJ issued a recommended order on November 26, 2019 (Recommended Order), effectively recommending the dismissal of all claims against Respondent. Petitioner issued a final order on January 29, 2020 (Final Order) substantially adopting the Recommended Order and did not appeal the Final Order.

As required by section 57.105(1) and (5), the Recommended Order reserves jurisdiction on the issue of whether Petitioner was liable for Respondent's attorney's fees. On May 1, 2020, the ALJ opened the present case and issued a notice of hearing on Petitioner's liability for attorney's fees.

Prior to the hearing in the present case, Respondent filed a Motion for Summary Final Order as to all issues. An order granted the motion as to Count III and limited the claims at issue in Counts I and II to one factual claim[3] and two legal claims:

[3] The order identifies two factual issues, but, at the conclusion of the May 28 hearing, the ALJ amended the order to preclude the award of attorney's fees on the factual claim in Count II that Ms. Griffith knew of the Verified Report when she completed and signed the license renewal application.

1. As to Count I, whether Petitioner's attempted discipline of Respondent's License on the ground of the Verified Report was[4] supported by the law.

2. As to Count II, whether Petitioner's claim of a material nondisclosure of the Verified Report in the Application was itself supported by the material facts.

3. As to Count II, whether Petitioner's attempted discipline of Respondent's License on the ground of the nondisclosure of the Verified Report in the Application was supported by the law.

At the May 28 hearing, Petitioner called three witnesses and Respondent called one witness. Exhibits were admitted as indicated in the transcript. Over Petitioner's objection,[5] the ALJ took official notice of the Final Order and, thus, the Recommended Order.

The ALJ had intended to hear evidence of Petitioner's liability for attorney's fees and the amount of such fees at the May 28 hearing. However, Petitioner timely objected to uncorroborated evidence as to the amount of such fees, and the ALJ sustained the objection, based on *Rakusin v. Christiansen & Jacknin, P.A.*, 863 So. 2d 442, 444 (Fla. 4th DCA 2003). Because Respondent was unprepared to call a corroborating witness, the ALJ bifurcated the case, so the May 28 hearing was limited to determining Petitioner's liability for fees, and, if necessary, a later hearing would take place to determine the amount of such fees.

[4] At all material times, the applicable law has remained unchanged.

[5] The grounds for Petitioner's objection were not entirely clear. The admission of the Final Order and Recommended Order establishes for the present case the findings of fact and conclusions of law contained in these documents, but does not constrain Petitioner's ability to present its case as to its liability for fees. Notwithstanding the evidentiary ruling, no principle, such as estoppel or the law of the case, has prevented Petitioner from litigating in the present case such issues as the liability of Respondent for Ms. Griffith's being named as a person responsible for the exploitation of a vulnerable adult and the materiality of the nondisclosure of the Verified Report in the Application.

The court reporter filed the transcript on June 18, 2020. Petitioner and Respondent filed proposed final orders by June 24, 2020.

FINDINGS OF FACT

1. At all material times, Respondent, a not-for-profit Florida corporation, has held the License to operate the Group Home, which serves several intellectually disabled persons. At all material times, Ms. Griffith has served as an officer and a director of Respondent and the onsite manager of the Group Home.

2. DCF conducted an adult protective investigation and issued the Verified Report on August 8, 2018. The Verified Report determined that Ms. Griffith had financially exploited several residents of the Group Home, but did not recommend additional services.

3. The DCF investigation resulted from findings of financial exploitation in Petitioner's earlier audit of the Group Home. Among other things, the audit found itemized charges for nonemergency transportation, which constituted duplicate billings because the applicable Medicaid Waiver Handbook requires that all nonemergency transportation charges be included in the facility's base fee. The audit findings of financial exploitation were more detailed and comprehensive than the DCF findings of financial exploitation, so the Verified Report included no information not already contained in Petitioner's audit report.[6]

4. After the issuance of the Verified Report, several employees of Petitioner from the state and regional levels, including one of Petitioner's State Office Licensing Liaisons (Liaison) and at least one other manager, met with Ms. Griffith in mid-October 2018 to discuss the findings of financial exploitation. At the time of the meeting, the DCF investigator had informed Ms. Griffith and Respondent only that the investigation had been closed with no recommendation of further services, but

[6] As explained below, the financial exploitation found in the audit and protective investigation was not addressed in DOAH Case 19-1812FL, so the Recommended Order and this final order do not address the merits of these findings.

not that the investigation had verified that Ms. Griffith was responsible for the exploitation of the residents. Petitioner's employees informed Ms. Griffith and Respondent of the adverse finding against Ms. Griffith, whom they found uncooperative when they tried to discuss with her operational changes at the Group Home.

5. Three weeks after the October meeting, Respondent filed the Application, which responds negatively to a question asking, "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?" The application form defines neither "you" nor "ownership controlling entity affiliated with this application," but, it is likely that the question was at least partly directed to Ms. Griffith, so the answer was inaccurate. However, the omission of any mention of the Verified Report in the Application was not material: the mention of the Verified Report would not have provided Petitioner with any information that it did not already have, as evidenced by Petitioner's informing Ms. Griffith and Respondent about the Verified Report at the October 2018 meeting.

6. The Administrative Complaint was prepared by the Liaison, who has considerable knowledge of the law governing group home facilities, but is not an attorney. As she candidly testified, the Liaison knew that charging Respondent for the acts and omissions of its employee, Ms. Griffith, such as double charging residents for transportation, would not support as severe a penalty as charging Respondent in Count I as the responsible person in the Verified Report and charging Respondent in Count II for omitting a material fact from the Application in terms of the Verified Report.

7. Petitioner knew or should have known, when initially presented in the Administrative Complaint, that Count I was legally groundless because it failed to state a claim on which relief could be granted and Count II was factually groundless because the omission of the Verified Report was not material.

CONCLUSIONS OF LAW

8. DOAH has jurisdiction over the subject matter. §§ 120.569, 120.57(1), and 57.105(1) and (5), Fla. Stat.

9. Section 57.105 provides:

> (1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, including prejudgment interest, to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:
>
> (a) Was not supported by the material facts necessary to establish the claim or defense; or
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> (b) Would not be supported by the application of then-existing law to those material facts.
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> * * *
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> (5) In administrative proceedings under chapter 120, an administrative law judge shall award a reasonable attorney's fee and damages to be paid to the prevailing party in equal amounts by the losing party and a losing party's attorney or qualified representative in the same manner and upon the same basis as provided in subsections (1)-(4). Such award shall be a final order subject to judicial review pursuant to s. 120.68. If the losing party is an agency as defined in s. 120.52(1), the award to the prevailing party shall be against and paid by the agency… .

10. For Count I, section 393.0673(1)(b) authorizes discipline, including revocation, if "[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. Section 393.0673(2)(b) contains the identical provision as a ground for the denial of an application for a license. If the Verified Report had named

Respondent, rather than Ms. Griffith, as the responsible person, Petitioner would have prevailed by introducing into evidence the Verified Report.

11. However, the Verified Report named Ms. Griffith, not Respondent. As explained in the Recommended Order, Respondent and Ms. Griffith are distinct entities, *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), and, absent statute or case law, an agency lacks the power to impose on a licensee vicarious liability for the wrongdoing of its officer, director, or manager. *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).

12. Count I is unsupported by the law because it claims a false equivalence between Ms. Griffith and Respondent--without which, the Verified Report, per se, cannot support discipline against Respondent. This simple statement does not preclude a claim alleging--and proving--the underlying financial exploitation by Respondent's employee and Respondent's disciplinary liability: after all, a corporation necessarily acts through its agents. *See, e.g.*, *All Saints Early Learning & Cmty. Care Ctr., Inc. V. Dep't of Child. & Fam.*, 145 So. 3d 974 (Fla. 1st DCA 2014). But this is not the theory of Count I, which treats Respondent and Ms. Griffith as interchangeable.

13. Petitioner understandably struggles to justify its seizure of this powerful attribution tool of interchangeability. Its argument is essentially that, "[a]lthough the license may have been issued to [Respondent, Ms.] Griffith is the applicant."[7] The threshold problem with this argument is that Count I seeks to revoke the License, not deny the Application. It appears that Petitioner ignores this fact because it has no way of distorting the meaning of "licensee," as it does the meaning of "applicant."

[7] Petitioner's proposed final order, para. 24.

14. Petitioner's misfocus on the Application is not a problem of mere form. In its argument directed to the meaning of "applicant," it is obscuring the disciplinary nature of the underlying proceeding, in which the statute must be construed strictly in favor of Respondent and may never be extended by construction. *Holmberg v. Dep't of Nat. Res.*, 503 So. 2d 944, 947 (Fla. 1st DCA 1987). It is axiomatic in Florida that an agency may not discipline a license for a reason not clearly within the meaning of the applicable statute. *See, e.g.*, *Griffis v. Fla. Fish & Wildlife Conserv. Comm'n*, 57 So. 3d 929, 931 (Fla. 1st DCA 2011). Of particular interest to the present case is *Volusia Jai-Alai, Inc. v. Brd. of Bus. Reg.*, 304 So. 2d 473 (Fla. 1st DCA 1974), in which two corporations held two permits to conduct jai-alai matches. Although neither permittee corporation had been convicted of a felony, a corporation that was the sole shareholder of one corporate permittee and majority shareholder of the other corporate permittee had been convicted of a felony. The disciplinary statute authorized the revocation of the permits upon the conviction of a felony by an officer, director, or employee of the permittee--as well as, one assumes, the permittee itself--but not a shareholder of the permittee. Rejecting the agency's argument that discipline based on the wrongdoing of a shareholder was "within the spirit of legislative intendment," the court, expressing no view on the legislative issue as to whether the statute should so provide, cited the following from a Florida supreme court decision:

> In *Osborne v. Simpson et al.*, 94 Fla. 793, 114 So. 543, 544, we held: "It is not allowable to bend the terms of an act of the Legislature to conform to our view as to the purpose of the act where its terms are expressed in language that is clear and definite in meaning. Certainly it is not permissible to strike out words of plain, definite meaning and substitute others in order that the purpose of the act after such remodeling may more nearly conform to our notions as to its purpose and be congruent with our views as to what language should have been used to accomplish such purpose of the statute."

In re Weathers, 31 So. 2d 543, 544 (Fla. 1947).

15. Returning to Petitioner's mischaracterization of Count I as an application-denial claim, Petitioner contends that Ms. Griffith is the applicant because she completed and submitted--i.e., mailed--the Application, and she is an officer and shareholder[8] of Respondent.

16. The latter argument is better addressed first. As *Volusia Jai-Alai* holds, a shareholder and its corporation are not interchangeable and, for the same reason, neither are a corporation and its officer. Respondent lacks the authority to ignore the corporate form that Respondent's organizers chose for conducting the business of operating the Group Home. It appears that, at one time, Petitioner may have considered addressing this deficit in authority through rulemaking, as evidenced by its adoption of Rule 65G-2.001(8), which defines a "[c]ontrolling entity" as the applicant or licensee and a "person or entity" that serves as an "officer [or director] or [owns] a 5-percent or greater ownership interest in the applicant or licensee." This defined term does not appear in any of the other rules applicable to this case, although it may have inspired the Application's unwieldly phrase, as mentioned above, "ownership controlling entity affiliated with this application." More importantly, no statute authorizes Petitioner to treat an officer, director, or five-percent owner as the corporate licensee or applicant--a crucial omission highlighted by the fact, as discussed in the Recommended Order,[9] that the legislature has provided precisely such authority to the Agency for Health Care Administration (AHCA).[10]

17. In focusing on Ms. Griffith's role in preparing and mailing the Application, Petitioner distorts the meaning of Rule 65G-2.001(2), which defines an "[a]pplicant" as a "person or entity that has submitted a written application to [Petitioner] for the

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[8] Not-for-profit corporations do not have shareholders. Recommended Order, endnote 14.

[9] Recommended Order, para. 41.

[10] *Compare* § 408.803(7)(a) and (b) (same language as found in Rule 65G-2.001(8)(a) and (b)) and § 408.815(1) *with* § 393.0673(1) and (2) (language restricted to a "licensee" or an "applicant").

purposes of obtaining an initial . . . license or renewing an existing . . . license." The rule sensibly authorizes a natural person or entity to apply for a license, as section 393.067(4)(a) unsurprisingly recognizes that an applicant may be an "individual" or a "firm, partnership, . . . association, . . . [or] corporation." In defiance of this straightforward, logical scheme, Petitioner claims that the rule means that, even when the licensee is to be a corporation or other entity, the applicant is the natural person who mails the application on behalf of the entity--i.e., who performs the physical tasks on behalf of the entity that are necessary to submit the application. This strained interpretation either precludes the possibility of a corporate licensee or, at minimum, creates co-applicants whenever a corporation applies for a license--the corporate applicant and the natural person who happens to complete and mail the corporation's application. This argument is, at best, fanciful.

18. Petitioner argues that any other reading of section 393.0673(2)(b) and Rule 65G-2.001(2) "would lead to an absurd result" because Petitioner "could not deny licensure for the most heinous of offenses, even those committed against [Petitioner's] clients, so long as a corporation was formed for the purpose of licensure."[11] Petitioner adds, "[i]f the word 'applicant' was limited only to the company submitting the application, [Petitioner] would be obligated to ignore the past conduct of officers of the corporation . . ., potentially leaving vulnerable persons in the care of unstable or unsafe group homes."[12] The short response to this argument is that, as acknowledged in *Volusia Jai-Alai* and *Sbordy*, Petitioner needs to obtain from the legislature the authority that it has conferred upon AHCA.

19. Although not especially significant, the more limited grant of authority that the legislature has made to Petitioner does not leave Petitioner powerless when confronted with an application from a corporation, despite the "most heinous of offenses"--which Petitioner's argument wisely leaves undefined in terms of how the offenses are established, the identity of the perpetrators, and the relationship of the

[11] Petitioner's proposed final order, para. 25.

[12] Petitioner's proposed final order, para. 27.

perpetrators to the corporate license.[13] Section 393.0673(2)(a)3. vests Petitioner with the authority to deny a license for the failure of the applicant to comply with chapter 393 or the rules applicable to the applicant. One statute and three or four rules are of some relevance in this case.

20. Section 393.067(5) requires, as a condition of licensure or relicensure, that "the applicant, and any manager, supervisor, and staff member of the direct service provider[14] of a facility or program" must pass the background screening required by section 393.0655(4)(a). Section 393.067(5) authorizes Petitioner to revoke or deny a license for a failure of "direct service providers" to undergo a level 2 background screening for a wide range of felonies and misdemeanors, as set forth in section 435.04 or 393.0655(5)--neither of which includes a verified report of financial exploitation. Of course, this provision would not justify the denial of the Application because, notwithstanding the Verified Report, Ms. Griffith's financial exploitation has not been prosecuted as a crime, so, on its account, she would not fail a level 2 background screening.

21. Rule 65G-2.012(1)(a) requires each group home facility to designate a "facility operator" onsite or on-call at all times. Rule 65G-2.012(1)(b) requires the "facility operator" to be a person of "responsible character and integrity," among other things, although "direct service providers" hired by the licensee prior to the adoption date of the rule are exempt from "this requirement." If applicable to Ms. Griffith, this rule might justify the denial of the Application--if Petitioner proved the financial exploitation that was unilaterally determined in DCF's Verified Report[15] and likely was unilaterally determined in Petitioner's audit.

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[13] As always, the devil is in the details.

[14] Section 393.063(13) defines a "[d]irect service provider" as an adult with "direct face-to-face contact with a client while providing services to the client or has access to a client's living areas or to a client's funds or personal property."

[15] Recommended Order, endnotes 20 and 21.

22. Rule 65G-2.009(14)(a) requires the "facility"--presumably, the licensee--to provide or arrange for routine transportation for residents, including medical appointments--at no cost to the residents, unless the destinations are more than 25 miles from the facility. Clearly, Petitioner could deny the Application for a violation of this provision, provided, again, that Petitioner could prove the violation.

23. Rule 65G-2.009(4) provides that "[n]either the licensee nor staff employed by the licensee may receive any financial benefit by charging a fee against . . . or otherwise using the personal funds of a client for their personal benefit." Assuming that this language would prohibit the transportation charge that Respondent, through Ms. Griffith, improperly imposed, Petitioner could deny the Application for a violation of this provision, provided, again, that Petitioner could prove the violation.

24. Rule 65G-2.0041(1) addresses the possibility of disciplinary action "in response to" verified findings of financial exploitation "involving the licensee or direct service providers rendering services on behalf of the licensee." This opaque rule does not appear to provide for discipline based exclusively on proof of such verified findings, likely for two reasons: constitutional problems due to the lack of a hearing prior to DCF's issuance of verified findings[16] and explicit statutory authority for discipline on the ground of a verified report only as to the licensee, not also a "direct service provider."[17] Also, the rule requires consideration of the licensee's corrective action plan and numerous other factors, so its applicability to the present case would be questionable and is not considered further.

25. The violation of the above-discussed rules would unlikely support a nonrenewal of a license because Rule 65G-2.0041(4)(b) provides that Respondent may nonrenew a license only for four or more Class II violations within one year. Returning to the actual purpose of Count I, which was to revoke the License, the underlying problem with these rules, consistent with the testimony of the Liaison,

[16] Recommended Order, endnotes 20 and 21.

[17] § 393.0673(1)(b).

is that their violation constitutes only Class II offenses. R. 65G-2.012(1)(d), 65G-2.009(14)(f), and 65G-2.009(4)(g). As such, each of these violations, if uncorrected, would support no more than a $500 fine per day. R. 65G-2.0041(4)(b) and 65G-2.004(1).

26. Although somewhat of a patchwork, the above-described statute and rules provide Petitioner with some means to prevent perpetrators of heinous crimes from working in sensitive roles for--though likely not from organizing--corporate licensees.[18] Stepping back from Petitioner's heinous hypothetical, there is ample authority for Petitioner to have addressed any financial exploitation by Ms. Griffith, notwithstanding its dissatisfaction with the relatively modest penalties that Petitioner itself has adopted for the violations of these rules and the burden imposed upon Petitioner actually to prove up the financial exploitation.

27. Interestingly, Petitioner also cites as supporting law for Count I the recommended orders in four DOAH cases. In DOAH Case 18-6496FL, which is the most extensive of the four recommended orders, a corporation applied for a license to operate a group home facility. Denying the application, Petitioner relied on section 393.0673(2)(b). Four times, DCF had verified an officer, director, and lone shareholder of the applicant as responsible for abuse, neglect, or exploitation. In the hearing, the applicant's principal testified about the four incidents and admitted that she had relinquished to DCF her licenses to operate group homes.[19] The ALJ accepted Petitioner's argument that a natural person who completes and mails an application on behalf of a corporate applicant is herself an applicant, under Rule 65G-2.001(2), and concluded that the legislature intends for Petitioner's discretion in considering license applications to extend to the wrongdoing of the applicant's

[18] This distinction may not be inadvertent. Section 393.062 states: "Finally, it is the intent of the Legislature that all caretakers unrelated to individuals with developmental disabilities receiving care shall be of good moral character." The legislative focus here is on caregivers, as opposed to officers, directors, or owners of a corporate licensee or applicant.

[19] Section 393.0673(2)(a)4. provides that Petitioner may deny a license if the applicant has had a license revoked by Petitioner, AHCA, or DCF.

principal. The ALJ also adopted the argument of Petitioner that a literal reading of section 393.0673, so as not to allow Petitioner to pierce the corporate veil, would lead to an "unreasonable result or a manifest incongruity." Notably, the ALJ did not comment on the authority explicitly conferred upon AHCA to regulate the very situation that he addressed, nor *Volusia Jai-Alai*, *Sbordy*, or similar cases.

28. In DOAH Case 19-4018FL, Petitioner relied on section 393.0673(1)(b) to revoke the group home facility license of a corporate licensee. An "own[er] and operat[or]" of the corporate licensee was verified by DCF to be a person responsible for abuse, neglect, or exploitation. In the hearing, the applicant's apparent principal testified about the underlying abuse of a vulnerable adult. Noting that the accuracy of the verified report was not at issue, in a brief recommended order, the ALJ relied on the "plain language" of section 393.0673(1)(b), without any discussion of the interchangeability of the corporate licensee and its evident principal, to sustain the proposed revocation.

29. In DOAH Case 15-0034,[20] Petitioner relied on section 393.0673(1)(b) to deny a renewal of a group home facility license of a corporate licensee. The administrative complaint contained 12 counts, of which only two mentioned a verified report of abuse, neglect, or exploitation. Count VII alleged that DCF had found verified indicators of physical injury to a vulnerable adult, but did not identify a responsible person, and Count IX alleged that DCF had verified abuse, neglect, or exploitation against the owner and sole managing member of the corporate licensee. Finding that the verified report that allegedly did not identify a responsible person actually named the facility--presumably, the licensee--the ALJ stated that both verified reports justified the denial of the license renewal, without discussing, as to Count IX, the interchangeability of the corporate licensee and its managing member. In any event, a verified report against the corporate licensee and various other violations amply justified the proposed denial.

[20] Petitioner's proposed final order miscites this case as DOAH Case 15-0003.

30. In DOAH Case 17-4824FL, Petitioner relied on section 393.0673(2)(b) to deny an application for a group home facility license by a corporate applicant. An "owner and principal" of the corporate licensee was verified by DCF to be a person responsible for abuse or neglect of three children. The ALJ found the "owner and principal" had been arrested for domestic violence while the application was pending, and DCF verified that he was a person responsible for the abuse of neglect of his three children. In another brief recommended order, the ALJ seems to have found that the owner and principal was also a direct service provider, as the ALJ relied on section 393.067(5), which, as noted above, requires background screening of an applicant and any direct service provider.[21] Additionally, without discussion as to the interchangeability of the corporate licensee and the owner and principal, the ALJ sustained the denial on the independent ground of section 393.0673(2) due to the verified finding against the licensee's owner.

31. After duly considering the analysis of the four esteemed colleagues in the four recommended orders discussed immediately above, this ALJ respectfully concludes that Count I is unsupported by the law for the reasons discussed above. Perhaps the applicable law could use a reworking to better protect these vulnerable persons, as well as responsible licensees, but the proper role of DOAH and Petitioner is to apply the law that the legislature has enacted, not to extend the law to fill perceived gaps in Petitioner's regulatory reach.

32. For Count II, the sole factual issue is the materiality of the omission of any mention of the Verified Report in the Application. Section 393.0673(1)(a)1. authorizes Petitioner to revoke a license if a licensee has "[f]alsely represented or omitted a material fact" in its application. Section 393.0673(2)(a)1. contains identical language for denying a license application. For Count II, Petitioner likewise chose the expedient path of treating the omission from the Application of

[21] A person fails background screening, as to a listed offense, by a conviction, entry of a plea of no contest or guilty, or arrest without final disposition. § 435.04(2). To simplify the presentation, this final order elsewhere omits the last condition. The ALJ did not find that the charges against the owner and principal had not been resolved, but this may be assumed.

the Verified Report as material and revoking the license on the authority of section 393.0673(1)(a)1., rather than litigating the issue of financial exploitation.

33. The omission of the Verified Report was not material because Petitioner knew all about the report and its contents when the Application was filed, and knowledge precludes materiality. An equitable claim based on a failure to disclose material facts is precluded by the failure of the complaining party to exercise due diligence to learn the material facts. *Steinberg v. Bay Terrace Apt. Hotel*, 375 So. 2d 1089, 1092 (Fla. 3d DCA 1979). Obviously, if the other party already knows the facts, they are not material when the first party fails to disclose them. *See Lapp v. Dep't of Bus. & Prof'l. Reg.*, 874 So. 2d 671 (Fla. 4th DCA 2004) (the court declined to sustain a denial of an application based, in part, on "technical" or "insignificant" misstatements whose insignificance evidently was such that the court elected not to identify them).[22] This case law applies with particular force due to the cases, discussed with regard to Count I, concerning the proper construction of disciplinary statutes in favor of Respondent.

34. Petitioner never proved that Ms. Griffith was less than candid in her answer. The question's use of "you" or "ownership controlling entity affiliated with this

[22] Case law concerning the materiality of a nondisclosure may state the test in different terms, but invariably assumes a lack of knowledge of the undisclosed information on the part of the other party. In a fraud action involving a residential real estate transaction, the test for whether a nondisclosure of a fact was material is whether the subject fact "materially affected the value of the property." *Johnson v. Davis*, 480 So. 2d 625, 629 (Fla. 1985). In a rescission action involving a commercial car loan transaction, the test for whether a misrepresentation of fact was material is whether the complaining party would have entered into the transaction in the absence of the misrepresentation. *Atlantic Nat'l Bank v. Vest*, 480 So. 2d 1328, 1332 (Fla. 2d DCA 1985). *But see Philip Morris USA, Inc. v. Duignan*, 243 So. 3d 426, 444 n.9 (Fla. 2d DCA 2017) (court questions the validity of a but-for test and suggests instead an objective test of "whether a misrepresented or omitted fact would have taken on significance in the mind of a reasonable person" or whether "a reasonable person would attach importance [to the fact] in determining a course of action"). In a securities fraud action, the test for whether a misrepresentation or omission is material is whether "a reasonable investor [would have found the fact 'important'] in deciding whether to invest." *J.P. Morgan Secs., LLC v. Geveran Invs. Ltd.,* 224 So. 3d 316, 324-25 (Fla. 5th DCA 2017).

application" is confusing as to whether it even applies to Ms. Griffith.[23] The immateriality of the subject omission is underscored by the fact that this information about Ms. Griffith could not drive a denial of the Application or discipline of the License for the reasons discussed in connection with Count I.

ORDER

Based on the foregoing, it is

ORDERED that:

1. Petitioner is liable for Respondent's attorney's fees under Count I, pursuant to section 57.105(1)(b) and (5), and under Count II, pursuant to section 57.105(1)(a) and (5).

2. The Administrative Law Judge will issue a second final order following a hearing on the amount of reasonable attorney's fees for Respondent's defense of Counts I and II.

DONE AND ORDERED this 29th day of June, 2020, 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 29th day of June, 2020.

[23] Recommended Order, paras. 38-40.

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