IN THE FIFTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO.: 5D17-1673

EPOC CLINIC, LLC,
A Nevada Limited Liability Company,
FORT LAUDERDALE WOMEN'S CENTER, LLC,
A Nevada Limited Liability Company,
OCALA WOMEN'S CENTER, LLC,
A Nevada Limited Liability Company, and
ORLANDO WOMEN'S CENTER, LLC,
A Nevada Limited Liability Company,

Appellants,

v.

STATE OF FLORIDA, AGENCY FOR
HEALTH CARE ADMINISTRATION,

Appellees,
_____/

ON APPEAL FROM THE STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION

INFORMAL HEARING OFFICER THOMAS J. WALSH II, presiding

INITIAL BRIEF OF APPELLANTS, ORLANDO WOMENS CENTER, LLC, ET AL.,

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PRELIMINARY STATEMENT

Appellants, EPOC CLINIC, LLC, FORT LAUDERDALE WOMEN'S CENTER, LLC, OCALA WOMEN'S CENTER, LLC, and ORLANDO WOMEN'S CENTER, LLC, shall be referred collectively referred to as "Appellants" or "OWC." Appellee, STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION shall be referred to as "Appellee" or "AHCA." AHCA and OWC shall be collectively referred to as (the "Parties"). All references to the Record shall be as follows (R. at ____). All references to the transcript of the informal hearing which has been filed with this Court shall be as follows (Tr. at ___ ¶ __).

STATEMENT OF THE CASE AND FACTS

I. Proceedings from January 2016 through September 2016

In 2016, the AHCA filed an agency complaint against OWC because an individual who was registered as the financial officer was allegedly arrested. The AHCA alleged in its complaint that said individual "was required at all times to maintain a satisfactory level two background screening" pursuant to section 408.809, Florida Statutes. (R. at 18, 31, 44 & 56). As punishment for such a violation, and for failing to take action, the AHCA sought license revocation for all four clinical licenses. The complaint alleged the agency may revoke a license pursuant to section 408.813, 408.815, 483.201, 483.221 and 390.018, Florida Statutes; however, of the aforementioned statutes, only 408.815 authorizes the AHCA to revoke a license, any potential violation of the remaining statutes may only result with a reasonable civil penalty. (R. at 38). Section 408.815, Florida Statutes only authorizes license revocation for actions that violate a statute taken by a controlling interest holder, but does not authorize revocation for nonfeasance of OWC. Pursuant to OWCs' election of rights, OWC requested a formal hearing pursuant to section 120.57(1), Florida Statutes. (R. at 62-63). On or around August 26, 2016, OWCs' counsel, Fredrick Lowe, made a unilateral decision, unbeknownst to OWC, to relinquish jurisdiction back to the AHCA for an informal proceeding pursuant to section 120.57(2) Florida

Statutes. (R. at 260-261). On August 4, 2016 an order outlining the same was rendered. (R. at 264). Around this time counsel for OWC was very ill.

II. Proceedings since September 11, 2016

A. Trial counsel's death

On September 11, 2016, counsel for OWC Frederick Timothy Lowe died, leaving behind no file, electronic or otherwise, on which OWC could rely. (R. at 273-274). Eventually, OWC received notice of informal hearing pursuant to section 120.57(2), Florida Statutes presided by the AHCA's informal hearing Officer Thomas J. Walsh II. On or around January 4, 2017 the law firm of Widerman Malek entered this matter. On January 4, 2017 OWC filed a Motion for Continuance which was granted. An amended notice of hearing was filed on February 1, 2017, changing the informal hearing date from January 25, 2017 to February 16, 2017. (R. at 366). Prior to the informal hearing, the Parties submitted a joint pre-hearing stipulation. OWC also filed a Supplemental Statement.

III. Proceedings since February 16, 2017

On February 16, 2017, the AHCA held an informal hearing presided by the AHCA's informal hearing Officer Thomas J. Walsh II. During said hearing, OWC emphasized its right to a formal hearing and requested the same. At the beginning of the informal hearing, OWC also emphasized material facts in dispute which require a formal hearing. (Tr. at 10-12 & Tr. at 16). OWC even required the Parties to submit

memorandums on one such issue. (Tr. at 23 ¶ 8-11). Despite all these events, the AHCA did not terminate the informal hearing, and order a formal hearing, it instead proceeded with the informal hearing.

On or around April 6, 2017, the AHCA's informal hearing officer issued a recommended order. (R. at 442). On April 14, 2017, OWC filed a Motion for Formal Hearing and Motion for Reconsideration and/or Motion to Dismiss the AHCA's complaint. On April 25, 2017 the AHCA's informal hearing officer denied Respondents Motion for Reconsideration and/or Motion to Dismiss the Agency Complaint. (R. at 453, 459 & 473). The AHCA ignored Respondents Motion for Formal Hearing.

On May 5, 2017 a final order was rendered by the AHCA. Said order was not sent to OWC until about May 10, 2017. Said order revoked OWCs' clinical licenses. (R. at 476). Said order stated that OWCs' license revocation was based on section 408.815, Florida Statutes. (R. at 491 ¶ 17). Said order was based on OWCs' alleged nonfeasance in failing to comply with Florida Statutes. (R. at 490 ¶ 13). On May 9, 2017, OWC filed a second Motion for Reconsideration requesting a formal hearing pursuant to section 120.57(2), Florida Statutes. Said motion was improperly removed from the record. The AHCA continues to ignore OWCs' request for a formal hearing.

SUMMARY OF THE ARGUMENT

The AHCA's actions were improper for four reasons. First, the AHCA final order must be reversed because the AHCA is unauthorized to revoke OWCs' clinical licenses as the statute does not authorize such an action. Second, the AHCA committed error because OWC is entitled to a formal hearing pursuant to Florida law. Third, assuming the AHCA was authorized to revoke the clinical licenses, they could not do so under the circumstances because the controlling interest holder did not violate any statutes. Fourth, the final order issued by the AHCA is improper in that, if taken as true, Appellants would not be in violation of the statute. For the aforementioned reasons, the AHCA's final order must be reversed.

JURISDICTION & VENUE

Actions taken by the State of Florida, Agency for Healthcare Administration are governed by Florida's Administrative Procedure Act, chapter 120, Florida Statutes. Pursuant to said chapter the AHCA issued a final order after conducting an informal hearing pursuant to section 120.57(2), Florida Statutes. Chapter 120.68(2)(a) Florida Statutes states, "Judicial review shall be sought in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law." Section 120.68(2)(a), Florida Statutes. Because OWC resides in Orlando, Florida, this Court has jurisdiction to review the AHCA's final order.

STANDARD OF REVIEW

The AHCA's final order must be reviewed utilizing a mixed standard of review. The fifth district court of appeals reviews all agency conclusions of law de novo. *Madison Highlands, LLC v. Florida Housing Finance Corporation*, 2017 WL729535 (Fla. 5th Dist. 2017). Review of the AHCA's findings of fact are reviewed under the competent substantial evidence test as stated in section 120.68(b)(7)(b), Florida Statutes; however, arguments made pursuant to section 120.68(b)(7)(a,c,d,e), Florida Statutes have varying standards of review as outlined prior to each argument within this brief.

a. Standard of Review Under Section 120.68(b), Florida Statutes

Generally, section 120.68, Florida Statutes, states in its pertinent part,

> "(b)If the court sets aside agency action or remands the case to the agency for further proceedings, it may make such interlocutory order as the court finds necessary to preserve the interests of any party and the public pending further proceedings or agency action. (7) The court shall remand a case to the agency for further proceedings consistent with the court's decision to set aside agency action, as appropriate, when it finds that:
>
> (a) There has been no hearing prior to agency action and the reviewing court finds that the validity of the action depends upon disputed facts;
>
> (b) The agency's action depends on any finding of fact that is not supported by competent substantial evidence in the record of a hearing conducted pursuant to ss. 120.569 and 120.57; however, the court shall not substitute its judgment for that of the agency as to the weight of the evidence on any disputed finding of fact;

(c) The fairness of the proceedings or the correctness of the action may have been impaired by a material error in procedure or failure to follow prescribed procedure;

(d) The agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action; or

(e) The agency's exercise of discretion was… inconsistent with agency rule… inconsistent with officially stated agency policy or a prior agency practice, if deviation therefrom is not explained by the agency; or… otherwise in violation of a constitutional or statutory provision." [Emphasis added].

ARGUMENT

1. THE AHCA WAS UNAUTHORIZED TO ISSUE LICENSE REVOCATION

The Fifth District Court of Appeal reviews all agency conclusions of law de novo. *Madison Highlands, LLC v. Florida Housing Finance Corporation*, 2017 WL729535 (Fla. 5th Dist. 2017).

As a fundamental matter, the AHCA's final order revoking OWCs' clinical licenses for OWCs' failure to comply with section 435.04, Florida Statutes is improper because the statute relied on by the AHCA does not authorize license revocation. The AHCA revoked OWCs' clinical licenses is, "…based upon Respondents' [OWC] failure to comply with Florida law related to criminal history background screening for personnel associated with health care facilities regulated by the Agency." (R. at 485 ¶ 2). The final order's conclusion of law made it clear, "This action addresses Respondents' [OWC] compliance with statutory mandates,

not Dr. Pendergraft[1] as an individual." (R. at 488 ¶ 4). Additionally, "it is the Respondents' [OWC] failure to demonstrate it took action to meet its statutory obligations that constitute the non-compliance cited by the Agency [AHCA]…" (R. at 490 ¶ 13). In essence, the AHCA revoked OWCs' clinical license for failing to take action with regards to an employee who allegedly failed to maintain level two background screening pursuant to section 435.04, Florida Statutes, which states, "

> "If an employer becomes aware that an employee has been arrested for a disqualifying offense, the employer must remove the employee from contract with any vulnerable person that places the employee in a role that requires background screening until the arrest is resolved in a way that the employer determines that the employee is still eligible for employment under this chapter." Section 435.06(b), Florida Statutes (2016). (R. at 489 ¶ 6).

The AHCA's alleged non-feasance which was a violation of Florida Statutes was for OWCs' failure to act with regards to a certain employee[2]; however, OWCs' failure to act cannot be a basis of revocation pursuant to section 408.415, Florida Statutes, as relied upon by the AHCA.[3] (R. at 491 ¶ 17).

> Section 408.415, Florida Statutes governs license revocation and states, "(1) In addition to the grounds provided in authorizing statutes, grounds that may be used by the agency for denying and revoking a license or change of ownership application include any of the following

[1] This alleged employee is the subject at issue. He is both a controlling interest holder as defined by statute and he previously maintained the title of "financial officer".

[2] The employee is alleged to be a financial officer and a controlling interest holder; however, actions by a majority interest holder as an individual are different from actions or inactions taken by OWC as an entity.

[3] The AHCA's final order states, ""The Agency has the discretion to revoke licensure under this statutory provision. The Agency's denial action is not mandatory. ("…grounds that may be used by the agency for denying and revoking a license or change of ownership application include…" Section 408.815(1), Florida Statutes (2016) (emphasis added""

> actions by a controlling interest[4]:… (c) A violation of this part, authorizing statutes, or applicable rules."[Emphasis added]. Section 408.815, Fla. Stat. (2016).

As explained above, OWCs' license revocation was based on OWC, as a corporate entity's', failure to act; not because of any action or inaction taken by the alleged employee/controlling interest holder as an individual. The statute relied upon by the AHCA only allows license revocation for actions violating "this part, authorizing statutes, or applicable rules" taken by the controlling interest holder as an individual. Because this was not the case herein, the AHCA was unauthorized to issue license revocation; rather, at the most, the AHCA's allegations of OWCs' nonfeasance can only be met with a civil penalty. Section 408.813 states, "As a penalty for any violation of this part, authorizing statutes, or applicable rules, the agency may impose an administrative fine." Section 408.813, Fla. Stat. (2016). The AHCA is not authorized to revoke OWCs' license based on the final order; therefore, the AHCA's final order must be reversed as a matter of law.

2. THE AHCA ERRED BY NOT COMPLYING WITH FLORIDA LAW AND PROCEDURE IN FAILING TO GRANT APPELLANTS A FORMAL HEARING.

The AHCA's final order must be reversed and remanded for a formal hearing because the AHCA improperly issued a final order for license revocation without

[4] A "controlling interest" means a person or entity that has a 5-percent or greater ownership interest. Section 408.803(7), Fla. Stat. (2015).

conducting a formal hearing, a violation of 120.68(b)(7)(c), Florida Statutes. The AHCA affected substantial interests of OWC by revoking its clinical licenses. In doing so it was required to give OWC a formal hearing pursuant to section 120.57(1), Florida Statutes. Formal hearings are a procedural requirement and their occurrence is guided by section 120.569, Florida Statutes. Instead, of conducting a formal hearing, the AHCA conducted an informal hearing; as such, the AHCA's informal hearing officer took the AHCA's complaint as true and rendered a recommended order based on the allegations in said complaint without evidence regarding the same. These acts are a violation of section 120.68, Florida Statutes and 120.569, Florida Statutes.

I. THE AHCA ERRED IN NOT STOPPING THE INFORMAL HEARING & IMMEDIATELY ORDERING A FORMAL HEARING

The AHCA final order should be reversed and remanded because the OWC is entitled to a formal hearing pursuant to chapter 120.569, Florida Statutes.

a. STANDARD OF REVIEW

The AHCA conducted unfair, procedurally improper proceedings, which requires its final order be reversed and remanded for a formal hearing pursuant to section 120.68(b)(7)(c), Florida Statutes which states in its pertinent part,

> "The court shall remand a case to the agency for further proceedings… when it finds that... (c) The fairness of the proceedings or the correctness of the action may have been impaired by a material

error in procedure or failure to follow prescribed procedure." Section 120.68(b)(7)(c), Florida Statutes.

The standard of review pursuant to this section is de novo and should be guided based on principles of equity and fairness. Under this section, the Court determinations whether the AHCA committed a procedural error. As such it is a question of law which must be reviewed de novo. *Madison Highlands, LLC v. Florida Housing Finance Corporation*, 2017 WL729535 (Fla. 5th Dist. 2017). Naturally, if the procedure in creating the underlying findings of facts and conclusions of law in the AHCA's final order were improper, then the conclusions of fact and law contained said order are also improper and therefore the Court should not rely upon such findings when making its determination as to the procedural error.

b. THE AHCA ERRED IN NOT GRANTING OWC A FORMAL HEARING WHEN THERE WAS A DISPUTE IN MATERIAL FACT

Section 120.569, Florida Statutes applies "in all proceedings in which the substantial interests of a party are determined by an agency" Because the AHCA is attempting to revoke clinical licenses of OWC, this section applies.

Section 120.569, Florida Statutes states, "Unless waived by all parties, s. 120.57(1) [formal hearings] applies whenever the proceeding involves a disputed issue of material fact. Unless otherwise agreed, s. 120.57(2) [informal hearings] applies in all other cases. If a disputed issue of material fact arises during a proceeding under s. 120.57(2), then, unless waived by all parties, the proceeding

under s. 120.57(2) [informal hearing] shall be terminated and a proceeding under s. 120.57(1) [formal hearing] shall be conducted.

Pursuant to the statute, OWC is entitled to a formal hearing as long as it either asks for said hearing or alleges that it is in disaccord with one of the material facts stated by the AHCA. By its very nature, the informal hearing assumes all allegations of the AHCA as true, without proof thereof. The biased nature of informal hearing prejudices OWC and therefore, the AHCA and the AHCA's informal hearing officer, cannot make its own unilateral determination as to whether or not material facts are in dispute. Rather, once a fact is in dispute, the AHCA must send the case to the Department of Administrative Hearings ("DOAH").

After OWC received the agency complaint, OWC formally requested, a formal hearing pursuant to 120.57(1), Florida Statutes causing the case to be transferred to DOAH. OWCs' counsel, prior to his death, made a unilateral decision, unbeknownst to OWC, and without authority, stipulating jurisdiction back to the AHCA for an informal hearing pursuant to section 120.57(2), Florida Statutes. (R. at 259 & 273). Said unauthorized stipulation stated that there were no material facts in dispute. Said stipulation was contrary to OWC's position. OWC opposed the AHCA's Motion to relinquish jurisdiction and said order was previously denied. (R. at 142). Said stipulation is also contrary to OWC's response to the AHCA's First Request for Admissions. OWC denied each admission. (R. at

180). Upon the unauthorized execution of the stipulation, OWCs' counsel died and the DOAH relinquished the matter to the AHCA. An informal hearing was eventually scheduled for February 16, 2017.

As a fundamental matter, in equity and fairness, OWC should not be injured by the unauthorized and improper actions of deceased counsel because he was not authorized to make such a stipulation that would affect OWC's case. Section 120.68(b)(7)(c), Florida Statutes, states that the AHCA can be reversed if, "The fairness of the proceedings or the correctness of the action may have been impaired by a material error." It's inequitable for the AHCA to rely upon such an unauthorized stipulation.

> "The employment of an attorney does not, of itself, give the attorney authority to compromise the client's cause of action or settle the client's claim. Lechuga v. Flanigan's Enterprises, Inc., 533 So.2d 856 (Fla. 3d DCA 1988); Sockolof v. Eden Point North Condominium Association, Inc., 421 So.2d 716 (Fla. 3d DCA 1982); and Rushing v. Garrett, 375 So.2d 903 (Fla. 1st DCA 1979)." *Colombia County Sheriff's Office v. Florida Dept. of Law Enforcement*, 574 So.2d 234, 237 (Fla. 1st Dist. 1991); see also *Rushing v. Garrett*, 375 So.2d 903, 905 (Fla. 1st Dist. 1979) ("a party seeking judgment on compromise and settlement has the burden of establishing assent by the opposing party. Unauthorized assent manifested by a party's attorney is insufficient. Goff v. Indian Lakes Estates, Inc., 178 So.2d 910 (Fla. 2nd DCA 1965). This is so because an attorney employed merely to handle a litigated cause is not authorized to stipulate for the entry of a final decree on the merits. Goff v. Indian Lakes Estates, Inc., supra, footnote 2, citing Kramer v. City of Lakeland, 38 So.2d 126 (Fla.1948); Bursten v. Green, 172 So.2d 472 (Fla. 2nd DCA 1965). See also Cross-Arrow Corp. v. Cross-Arrow Service Corp., 326 So.2d 249 (Fla. 3rd DCA 1976").

Because prior counsel had no authority to make a stipulation on OWC's behalf, compromising the client's case, as a court of equity, this alone should be enough for this Court to reverse the AHCA's final order and remand the matter, ordering a formal hearing to be conducted pursuant to section 120.57(1), Florida Statutes.

Second, the AHCA's actions must be reversed and remanded for a formal hearing because the AHCA was required to terminate the informal hearing and immediately order a formal hearing upon the request of OWC or once an issue of material facts arose during the informal hearing. See *Mixon v. Dept. of State Div. of Licensing*, 686 So.2d 755, 756 (Fla. 1st Dist. 1997).

> ("Anthony Mixon appeals the revocation of his professional license, contending that the agency erred in denying him a formal administrative hearing. We agree and reverse and remand. Notwithstanding Mixon's written election for an informal hearing, the law is clear that if, during the course of informal proceedings, it becomes apparent that material facts are in dispute, a formal hearing should be convened… *See New v. Department of Banking & Fin.*, 554 So.2d 1203 (Fla. 1st DCA 1989); *Village Saloon, Inc. v. Division of Alcoholic Beverages & Tobacco*, 463 So.2d 278 (Fla. 1st DCA 1984) (on reh'g); *United Tel. Co. of Fla. v. Mann*, 403 So.2d 962 (Fla.1981)… Accordingly, the agency erred in revoking Mixon's license without furnishing him a formal hearing.")

See also *Meller v. Florida Real Estate Com'n*, 902 So.2d 325 (Fla. 5th DCA 2005).

> (If the Agency's action will determine the substantial interests of a party and there are disputed issues of material fact, a party is entitled to a formal proceeding under section 120.57(1). *See* § 120.569(1), Fla. Stat. (2003); *Spuza v. Department of Health*, 838 So.2d 676 (Fla. 2d DCA

> 2003); *Buchheit v. Department of Bus. & Prof'l Regulation, Div. of Fla. Land Sales, Condos. & Mobile Homes,* 659 So.2d 1220 (Fla. 4th DCA 1995); *Foreman v. Columbia County Sch. Bd.*, 408 So.2d 653 (Fla. 1st DCA 1981)… Absent a waiver, an informal proceeding under section 120.57(2) is appropriate when the substantial interests of a party are determined but no material facts are in dispute. § 120.569(1), Fla. Stat. (2003); *see also Weiss v. Department of Bus. & Prof'l Regulation*, 677 So.2d 98, 99 (Fla. 5th DCA 1996) ("[W]hen no material facts are in dispute, an Agency is not required to hold a formal hearing."). However, if it becomes apparent during the course of an informal hearing under section 120.57(2) that material facts are in dispute, a formal hearing should be convened, and evidence that may have been obtained during the informal hearing may be considered in the formal proceeding. *Spuza; Village Saloon, Inc. v. Division of Alcoholic Beverages & Tobacco,* 463 So.2d 278, 285 (Fla. 1st DCA 1984); *E.M. Watkins & Co. v. Board of Regents*, 414 So.2d 583 (Fla. 1st DCA), *review denied,* 421 So.2d 67 (Fla.1982). "Here, there is nothing in the record to indicate that any party waived the right to a formal proceeding under section 120.57(1), and it is evident that whether the property was licensed under Chapter 509 is a disputed issue of material fact. Therefore, the Mellers were entitled to a formal hearing. Even if it had been appropriate to commence informal proceedings, it surely became apparent that a disputed issue of material fact emerged, triggering the need for a formal proceeding. Thus, it was error to enter the order under review without first conducting a formal hearing in accordance with section 120.57(1). We, therefore, reverse the order under review and remand for proceedings pursuant to section 120.57(1).")

During the informal hearing, OWC requested a formal hearing. After explaining the disputes of material fact, Attorney Ippoliti, representing OWC, stated, "in the event that the court [AHCA] is not willing to stay these proceedings…we would ask that they accept our claims that there are now material

issues of fact. We have not waived those rights [the AHCA should] accept our request and demand for a formal hearing." (Tr. at 16 ¶ 19-25).

As for the material facts, OWC disputes, (1) the factual circumstances as to whether the individual was an employee, (2) the factual circumstances which would make section 408.809 applicable to the alleged employee and (3) whether there was an actual arrest and (4) the change in material facts in that the alleged employee was indeed no longer financial officer of OWC (Tr. at 10-12 & R. at 379-386, 454-457 & 460-472). OWC raised these issues prior to the informal hearing, during the informal hearing and after the informal hearing in various motions to be given a fair and equitable formal hearing. Pursuant to section 120.569, Florida Statutes, once OWC brought up disputes of material facts during the informal hearing, the AHCA was required to terminate said hearing ordering instead, a formal one; however, the AHCA did not do so constituting a procedural error pursuant to section 120.68(b)(7)(c), Florida Statutes. As in the *Meller* case, that failure is reversible error. As the *Meller* court pronounced, it was error to enter the order under review without first conducting a formal hearing in accordance with section 120.57(1). As such, Appellants in this case were also entitled to a formal hearing, which was not provided. As such, this Court must now reverse the AHCA's final order and remand the matter for a formal hearing.

c. THE AHCA ERRED BY FAILING TO RULE ON OWCS' MOTION

The AHCA erred by failing to rule on OWCs' various motions requesting a formal hearing after the AHCA failed to follow section 120.569, Florida Statutes.

Section 120.569(2)(a) Florida Statutes states, "… a petition or request for a hearing under this section shall be filed with the agency. . . A request for a hearing shall be granted or denied within 15 days after receipt…" 120.569(1)-(2)(a), Florida Statutes.

Additionally, see *Simmons*, where the court found that Agency for Health Care Administration had statutory duty to enter order granting or denying doctor's petition for formal administrative hearing regarding denial of request to enroll as provider in Medicaid Program, and thus Agency could not simply respond that no action would be taken on petition.

> **"**Although the parties have argued extensively concerning the question of whether Dr. Simmons is entitled to administrative proceedings concerning the denial of his application, we decline to reach that issue at this point. The question of whether Dr. Simmons is entitled to administrative hearing and the form thereof are matters that should be addressed on appeal from a final agency order. What seems apparent at this point, however, is that AHCA has a clear legal duty under section 120.569(2)(a), Florida Statutes, to enter an order granting or denying the petition for formal administrative hearing. An agency is not entitled to ignore a properly filed request for hearing, and if it determines that the petitioner is not entitled to a hearing, it is obligated to issue an order to that effect. *See Global Water Conditioning v. Dep't of Agriculture and Consumer Serv.*, 521 So.2d 126 (Fla. 1st DCA 1987); *See*

> *also Teachers Educators Ass'n, Inc. v. Duval County Sch. Dist.*, 763 So.2d 1265 (Fla. 1st DCA 2000). Here, AHCA has not discharged its duty in this regard, and instead has simply responded that "no action" will be taken on Dr. Simmons' petition. Accordingly, we grant the petition for writ of mandamus to the extent of directing AHCA to enter an appropriate order disposing of the petition for formal administrative hearing within 15 days of the date of mandate herein. If the agency elects to deny the petition, its reasons for doing so can be fully explicated in the agency's order, which is then subject to appeal to this court. On the other hand, if the agency grants the request for administrative proceedings in some form, its final order entered at the conclusion of those proceedings will likewise be subject to appeal.**"** *Simmons v. State, Agency for Health Care Admin.*, App. 1 Dist., 950 So.2d 431 (2007).[Emphasis added].

After the AHCA failed to terminate the informal hearing and failed to order a formal hearing, OWC preserved its right to a formal hearing by stating so on the record. "So, again, we do reserve the right to bring these material facts into question which would entitle us to a formal hearing under the rules." (Tr. at 12 ¶ 25- 13 ¶ 1-2). On April 14, 2017 OWC timely filed a Motion for Formal Hearing and a Motion for Reconsideration prior to the AHCA's recommended order. These motions outlined additional material facts in dispute and various issues with the recommended order. Although the AHCA denied OWCs' unopposed Motion for Reconsideration, they ignored, and refused to rule on OWCs' Motion for Formal Hearing, a procedural violation of 120.569(2)(a), Florida Statutes.

As in the *Simmons* case referenced above, because the nature of the proceeding was with regards to substantial interests of OWC [license revocation],

the AHCA had a duty to render an order as to OWCs' motions. By failing to deny OWCs' request for formal hearing, OWC's motion should be deemed granted and therefore a formal hearing should be ordered.

OWC also made other efforts, on May 5, 2017, the AHCA rendered its final order although OWC had pending motions. Upon receipt of said order, on May 19, 2017, OWC filed a second Motion for Reconsideration so that the AHCA would order a formal hearing pursuant to statute. Again, this motion has not been ruled on and remains pending in front of the AHCA. Based on the aforementioned procedural errors OWC requests this Court reverse and remand this case pursuant to section 120.68(b)(7)(c), Florida Statutes, ordering the AHCA to conduct a formal hearing as to the allegations contained in the complaints.

d. THE AHCA CANNOT ALLEGE A LACK OF DISPUTE IN MATERIAL FACTS

Aside from the aforementioned disputes of material facts raised by OWC, such as whether there was a true arrest, whether the individual in question was an employee and whether given the facts of the situation the statutes were applicable to OWC, the AHCA's hearing officer recognized one such dispute through its request that both parties prepare memorandums with regards to the arrest. (Tr. at 23 ¶ 8-11. R. at 389-392). Additionally, prior to the issuance of either a recommended order or a final order there was a material change in fact in that the individual in question gave up the symbolic title of "financial officer". (R. at 393-394). Several motions

and filings were submitted arguing these disputes of fact. However, the AHCA held an informal hearing, where the AHCA's informal hearing officer sided with the AHCA and refused to immediately render an order for a formal hearing, contrary to law.

e. WAIVER OF RIGHTS HAS NOT OCCURRED

The AHCA may attempt to argue that OWC has waived its rights to a formal hearing by signing a stipulation; however, this argument must fail for the following reasons: 1) OWC originally asked for a formal hearing, 2) a waiver of rights cannot be determined without a hearing in front of the DOAH and 3) a stipulation is not a waiver.

First, OWC originally asked for a formal hearing and the case was sent to the DOAH. OWCs' counsel, without authority, signed a stipulation to transfer the case a few weeks before his death. As argued further in section I (b) Pg. 11 above, Said stipulation was unknown to OWC and it would therefore be unequitable to bind them to such a document.

Second, a waiver of rights cannot be determined without a formal hearing in front of the DOAH. "Waiver" means a decision by an agency not to apply all or part of a rule to a person who is subject to the rule. Any waiver shall conform to the standards for waivers outlined in this chapter and in the uniform rules adopted

pursuant to s. 120.54(5), Florida Statutes. A waiver, never occurred in the case herein. Additionally, the 5th DCA has held that a hearing is required before an administration could vote on a waiver. The *Nicks* court stated,

> "Below, the Board granted the motion to find waiver without offering an evidentiary hearing, and even before allowing argument from Nicks' attorney. After voting to find a waiver, Nicks' counsel made some arguments in support of Nicks' position. However the Board's chairman repeatedly reminded counsel that the Board had already voted on the issue, before allowing her to speak. Because the resolution of Nicks' equitable tolling claim requires credibility and factual determinations, we must remand this matter to the Board for an evidentiary hearing. *See* § 120.68(7)(a), Fla. Stat.; *Brown v. State, Dep't. of Financial Services,* 899 So.2d 1246 (Fla. 4th DCA 2005)." *Nicks v. Dept. of Bus. And Prof. Reg.* 957 So.2d 65, 68 (Fla. 5th Dist. 2007).

Clearly, in the case herein, no hearing was conducted and therefore there has been no waiver of OWCs' right to a formal hearing.

3. ASSUMING LICENSE REVOCATION WAS BASED ON ACTS OF A CONTROLLING INTEREST HOLDER, SAID CONTROLLING INTEREST HOLDER DID NOT VIOLATE ANY STATUTE

Although this was not the basis of the final order, AHCA cannot revoke OWCs' clinical license based on the controlling interest holders' alleged violation of section 408.809 because he did not violate said statute. [Emphasis added]. The AHCA is confusing both legislative intent and Florida law. Section 408.809(1) states, "Level 2 background screening pursuant to chapter 435 must be conducted through the agency on each of the following persons…" Section 408.809(1), Florida Statutes

(2016). Pursuant to said statute the following individuals require level two screening "(c) The financial officer or similarly titled individual who is responsible for the financial operation of the licensee or provider," and "(d) Any person who is a controlling interest if the agency has reason to believe that such person has been convicted of any offense prohibited by s. 435.04."[Emphasis added]. Section 408.809(1)(c-d), Florida Statutes (2016). Section 408.809(4) also states, "In addition to the offenses listed in s. 435.04, all persons required to undergo background screening pursuant to this part or authorizing statutes [as stated in section (c) and (d) above] must not have an arrest awaiting final disposition for..." In essence, if the level two background screening requirements apply, the employee "must not have had an arrest…" for a disqualifying offense.

In the case herein, the controlling interest holder is also the financial officer.[5] The AHCA alleged, "Mr. Pendergraft was arrested… As… controlling interest holder of the Respondent [OWC], Mr. Pendergraft was required at all times to maintain a satisfactory Level 2 background screening result. [R. at 44 ¶ 13-15]. This is improper because the individual is not required to maintain level two background screening as a controlling interest holder. The statute does require it for a financial officer; however, the analysis varies depending on which hat the individual is

[5] As argued later in this brief, although the employee has the title of financial officer, OWC argues that the individual had nothing to do with OWC and was in fact, not the financial officer and therefore section 408.809(1)(c) does not apply to said individual.

wearing when acting. Section 408.809(1) (c) requires a different analysis from section 408.809(1) (d). This analysis depends on whether the statute applies to the controlling interest holder or the financial officer. In the case herein section (d) applies specifically to the controlling interest holder, and section (c) applies to the financial officer. If the controlling interest holder acted in violation of section 408.809(1) (d) which specifically applies to a controlling interest holder, the AHCA may have authority for license revocation pursuant to section 408.815(1), Florida Statutes; however, in the case herein, the controlling interest holder is not in violation of said section.

A controlling interest holder is governed by section 408.809(1)(d), Florida Statutes, which states, "Level 2 background…must be conducted…on… Any person who is a controlling interest if the agency has reason to believe that such person has been convicted of any offense prohibited by s 435.04." Section 435.04, Florida Statutes (2016).

The AHCA believes that because the controlling interest holder was allegedly arrested, they can revoke OWCs' clinical licenses; however, the mere act of being arrested as a controlling interest holder does not trigger a violation of the statute and therefore cannot trigger punishment only applicable to acts taken by a controlling interest holder. As referenced above, being arrested for a disqualifying event is not enough for a controlling interest holder; rather level two background screening is

only required if the controlling interest holder is convicted of a disqualifying event. In the case herein, it is undisputed that the controlling interest holder has not been convicted of a disqualifying event pursuant to either section 408.809 or 435.04, Florida Statutes, therefore, the employee in question did not violate the statute as a controlling interest holder and therefore the AHCA lacks authority to punish OWC pursuant to section 408.815(1)(c)[6] which only applies to actions committed by a controlling interest holder.

The AHCA's only alternative position must fail because it is contrary to statutory intent. The AHCA may argue that because the controlling interest holder and the financial officer are the same person, because the financial officer is required to maintain level two background screening and because as a financial officer the employee was arrested, the employee who is both the financial officer and the controlling interest holder is violating the statute and can therefore be punished as a controlling interest holder; however this is improper.

First, the alleged employee has two hats. One hat is that of financial officer, the other hat is that of controlling interest holder. The roles cannot be blended, the duties

[6] Section 408.815(1)(c) states, "In addition to the grounds provided in authorizing statues, grounds that may be used by the agency for denying and revoking a license… include any of the following actions by a controlling interest… (c) A violation of this part, authorizing statutes, or applicable rules." Section 408.815, Florida Statutes (2016).

and responsibilities under the statute govern accordingly depending on whether the statute specifically relates to the financial officer or the controlling interest holder. The act of being arrested and the requirement for background screening pursuant to section 408.809(1)(c) applies only to financial officers. The AHCA cannot take a violation for a pending arrest of a financial officer, which would not apply to the controlling interest holder, and attempt to apply a punishment which applies only to acts taken by the controlling interest holder. After all, pursuant to that same statute, a controlling interest holder is only in violation of the statute if they are convicted. If the legislature's intent was to allow the AHCA to punish a controlling interest holder by revoking the clinic's license for merely having an arrest, it would have made section 408.809 generally applicable to controlling interest holders, in the same manner which it made that section of the statute applicable to multiple other roles within a clinic's structure including the financial officer; rather, the legislature emphasized and made it so the controlling interest holder, is not acting and is not violating the statute and does not require level two background screening, and therefore cannot be punished as a controlling interest holder i.e. cannot be punished by license revocation through section 408.815, Florida Statutes, unless they are convicted. Therefore, assuming the employee was arrested, he would at most be violating the statute as a financial officer alone and not as a controlling interest

holder, and therefore the AHCA could not revoke the clinical licenses pursuant to 408.815, Florida Statutes. (R. at 487 & 488 (1)).

4. ASSUMING LICENSE REVOCATION WAS BASED ON ACTS OF A CONTROLLING INTERST HOLDER AND THE AHCA CAN PUNISH OWC BASED ON THE EMPLOYEES TITLE OF FINANCIAL OFFICER, THE AHCA'S FINAL ORDER MUST BE REVERSED BECAUSE OWC HAS NOT VIOLATED ANY FLORIDA STATUTES

Assuming the aforementioned arguments fail, the AHCA's final order must still be reversed because OWC did not violate the statute by allegedly failing to comply with said statute after the individual was allegedly arrested in that competent substantial evidence was not provided to establish cause for action. Even if evidence was presented, the alleged employee in question maintained adequate screening pursuant to statute as argued in this brief and in OWC's Motion for Reconsideration denied by the AHCA. (R. at 459-471). Again, all the proceeding arguments were based on assumptions which do not apply. The AHCA ultimately revoked the licenses based on OWC's failure to act. This is improper because the AHCA does not have the authority to revoke OWC's license for its failure to act based on 408.815, as explained in the very first argument of this brief.

I. OWC IS NOT IN VIOLATION OF SECTION 408.809, FLORIDA STATUTES AS ALLEGED

The AHCA's final order is based on OWCs' alleged violation of section 435.06, Florida Statutes which states, "If an employer becomes aware that an employee has been arrested for a disqualifying offense, the employer must remove the employee

from contact with any vulnerable person that places the employee in a role that requires background screening…" Section 435.06, Florida Statutes (2016). OWC did not violate the statute for the following reasons: (1) competent substantial evidence was not established, rather, the AHCA's hearing officer took matters alleged in the complaint as true. And (2) assuming matters were true as alleged, OWC was not in violation of the statute because the AHCA failed to properly interpret the statute.

a. STANDARD OF REVIEW

The Fifth District Court of Appeal reviews all agency conclusions of law de novo. *Madison Highlands, LLC v. Florida Housing Finance Corporation*, 2017 WL729535 (Fla. 5th Dist. 2017).

A review of final agency action pursuant to 120.68(b)(7)(b), Florida Statutes should be reviewed under the competent substantial evidence standard. Said provision states, "(b) The agency's action depends on any finding of fact that is not supported by competent substantial evidence in the record…" Section 120.68(b)(7)(b), Florida Statutes. The phrase "competent substantial evidence" has been defined by the Florida Supreme Court as follows:

> "We have used the term 'competent substantial evidence' advisedly. Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a

> reasonable mind would accept as adequate to support a conclusion. In employing the adjective 'competent' to modify the word 'substantial,' we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed." *De Groot v. Sheffield*, 95. So.2d 912, 916 (Fla. 1957).

Reversal under this standard is appropriate when the evidence presented does not support the AHCA's findings.

Additionally, a review of final agency action pursuant to an argument made under 120.68(b)(7)(d), Florida Statutes should also be reviewed de novo. Said provision states, "The agency has erroneously interpreted a provision of law and a correct interpretation compels a particular action…" Although the statute references the erroneous nature of events, it refers to provisions of law. Interpretation and the conclusions of law are always reviewed de novo. Second, where an agency has erroneously interpreted a provision of law, an agency's construction is not entitled to deference. *Headley v. City of Miami*, 2017 WL 819740 (Fla. 2017). Additionally, "a court need not defer to an agency's construction or application of a statute if special agency expertise is not required, or if the agency's interpretation conflicts with the plain and ordinary meaning of the statute." *Florida Hosp. v. AHCA*, 823, So.2d 844, 847 (Fla. 1st Dist. 2002).

Reversal under this standard is appropriate when the AHCA's statutory interpretation of the law and its applicability are improper.

b. THE AHCA MUST BE REVERSED BECAUSE ITS FINAL ORDER WAS NOT BASED ON COMPETENT SUBSTANTIAL EVIDENCE

On February 16, 2017, the AHCA conducted an informal hearing. During said hearing, the record was composed of the agency complaints filed against OWC and the pretrial stipulation. Because of the nature of the informal hearing allegations in the complaint were taken as true without any evidence, circumstantial or otherwise. Florida law requires the AHCA's final order be rendered with competent substantial evidence. The Florida Supreme Court stated,

> "We have used the term 'competent substantial evidence' advisedly. Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. In employing the adjective 'competent' to modify the word 'substantial,' we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed." *De Groot v. Sheffield,* 95. So.2d 912, 916 (Fla. 1957).

In the case herein, there was no evidence proffered or established by the AHCA. No evidence was submitted with regards to an alleged arrest. No evidence was submitted with regards to revocation of level two background screening. At no time was any evidence proffered. Rather, prior to the informal hearing the AHCA simply submitted their complaints against OWC, the pre-hearing stipulation and the prior joint stipulation which was unauthorized by OWCs' prior, deceased counsel. (R. at 309-360). OWC knew

the AHCA desired to revoke its clinical licenses. Based on the potential consequences alone, or the fact that OWC raised issues of material facts both during and after the informal hearing, shows that OWC disputed the allegations. The AHCA act of taking its own complaint as true cannot be considered competent substantial evidence and cannot be used to establish a violation of section 408.809, Florida Statutes or any other Florida Statute. Especially when, as argued earlier in this brief, OWC denied all the admissions propounded by the AHCA. (R. at 180-181).

On the other hand, OWC did proffer evidence by its counsel, Attorney Ippoliti, who argued and brought out facts in material dispute. By any definition, the AHCA lacked competent substantial evidence in issuing its final order revoking OWCs' clinical licenses; therefore, requiring a reversal of its final order.

c. ASSUMING THE AHCA HAD COMPETENT SUBSTANTIAL EVIDENCE, AND ASSUMING THE INDIVIDUAL WAS AN OWC EMPLOYEE, OWC WAS NOT IN VIOLATION OF SECTION 435.06, FLORIDA STATUTES.

Assuming that the AHCA had competent substantial evidence to revoke OWCs' clinical licenses, the individual in question, upon which the AHCA's entire complaint is based, currently maintains and satisfies the level 2 screening requirement. The Agency has yet to complete a re-screening which would act to negate the employees presently held, satisfactory level two background screening.

Additionally, although the employee at one point maintained the title of "financial officer", he was not responsible for the financial operation of the licensee or provider as required by the statute.

The AHCA alleges the employee violated section 408.809, Florida Statutes which states,

> "(1) Level 2 background screening pursuant to chapter 435 must be conducted through the agency on each of the following persons, who are considered employees for the purposes of conducting screening under chapter 435:…(c) The financial officer or similarly titled individual who is responsible for the financial operation of the licensee or provider." Section 408.809(1), Florida Statutes.

i. OWCs' Alleged Employee Maintained Satisfactory Level Two Background Screening.

OWC filed an unopposed Motion for Reconsideration, which was denied by the AHCA's informal hearing officer. In said motion OWC argues, briefly assuming, that the AHCA had competent substantial evidence to prove allegations contained in the complaint, OWC cannot be found in violation of the statute because its employee maintained satisfactory level 2 background screening. (R. at 459-472). The applicable statute states in its pertinent part, "The Agency shall require level 2 background screening for personnel as required in s. 408.809(1)(e) pursuant to chapter 435 and s. 408.809." Section 400.9065 Florida Statutes (2016). Pursuant to section 408.809 Fla. Stat., "Level 2 background screening pursuant to chapter 435 must be conducted through the Agency on each of the following persons… (c) The

financial officer or similarly titled individual who is responsible for the financial operation of the licensee or provider." Section 408.809(1), Florida Statutes. "Level 2 Screening" means an assessment of the criminal history record obtained through a fingerprint search through the FDLE and FBI to determine whether screened individuals have any disqualifying offenses pursuant to Sections 435.04 or 408.809(5), F.S." 59A-35.090(1)(g). "Chapter 435 creates an administrative process for handling all background screening for employment required by law." *Sledge v. Dept. of Children and Families*, 861 So.2d 1189, 1190 (Fla. 5th Dist. 2003). When the employee took on the title of "financial officer" he was cleared via a level 2 background screening. He also maintained said screening for all period relevant to this case. Since the alleged arrest, the AHCA has not completed a re-screening to determine its ability to revoke the employee's level 2 status, neither has it moved to actually terminate his satisfactory level two status. Because the AHCA has not completed a re-screening, OWCs' employee still maintains a satisfactory level 2 background screening as defined by 59A-35.090(1)(g) and therefore OWCs' employee cannot be found in violation of section 408.809, Florida Statutes or any other Florida Statute. As such, OWCs' licenses cannot be revoked for its nonfeasance of said employee, and the AHCA final order must be reversed.

In addition to the initial screening,

> "every 5 years following his or her licensure, employment, or entry into a contract in a capacity that under subsection (1) would require level 2 background screening under chapter 435, each such person must submit to level 2 background rescreening as a condition of retaining such license or continuing in such employment or contractual status. For any such rescreening, the Agency shall request the Department of Law Enforcement to forward the person's fingerprints to the Federal Bureau of Investigation for a national criminal history record check unless the person's fingerprints are enrolled in the Federal Bureau of Investigation's national retained print arrest notification program…" [Emphasis added]. Section 408.809(2), Florida Statutes (2016).

The Agency revoked OWCs' licenses for its nonfeasance with an employee who allegedly failed to maintain level 2 background screening; however, section 408.809 Fla. Stat. does not apply to the alleged employee because said statute deals with scenarios in which crimes are discovered during a re-screening. As argued earlier it is unrefuted that the alleged employee passed initial level 2 background screening. It is also unrefuted that the AHCA has since failed to re-screen said alleged employee. Pursuant to Section 408.809(2), Florida Statutes, "For any such rescreening, the Agency shall request…" The AHCA never requested rescreening to occur on the alleged employee. This rescreening was required for a formal evaluation to be conducted, in order for the AHCA to determine whether or not the alleged employee was arrested for a crime in violation of subsection 408.809, Florida Statutes and in order for OWC to have knowledge of any such arrest. OWC couldn't have acted if it didn't know about the arrest and there has been no evidence established to show it was aware. Additionally, section 408.809(4), Florida Statutes

states, “In addition to the offenses listed in section 435.04, all persons required to undergo background screening pursuant to this part…[initial screening or re-screening]… must not have an arrest awaiting final disposition for… any of the following offenses…” Section 408.809(4), Florida Statutes (2016). It then continues to state, “If, upon rescreening, a person who is currently employed or contracted with a licensee as of June 30, 2014, and was screened and qualified under ss. 435.03 and 435.04, has a disqualifying offense that was not a disqualifying offense at the time of the last screening, but is a current disqualifying offense and was committed before the last screening, he or she may apply for an exemption…” Section 408.809(4), Florida Statutes (2016). The plain language of section 408.809 makes it clear that the additional disqualifying offenses listed in section 408.809 Florida Statutes were meant to be applied upon discovery of a disqualifying event during re-screening of an individual required to maintain satisfactory level two background clearance. Because the alleged employee has yet to be re-screened, he still holds a satisfactory level 2 background status pursuant to Florida law and the AHCA’s complaint was therefore unfound as it was premature. This interpretation also follows the AHCA’s own interpretative guide which states, “Subsections 408.809(4) F.S. and 435.05(1)(a), F.S. require that a licensee with a newly employed laboratory director or financial officer notify the Agency and submit a request for Level 2 background screening or proof of compliance with background screening

requirements within five (5) working days of the individual starting to work. [Emphasis added]. AHCA ASPEN State Regulation Set: L 2.04 Clinical Laboratory Licensure, ST-L-0008 – Clinical Laboratory Licensure- Bkgrd Screening (pg. 2) (2016). Because the alleged employee was not new, had already passed level two background screening and still holds satisfactory level two status, the clinic's had no duty to act OWCs' licenses cannot be revoked and the AHCA's final order must be reversed.

Additionally, the aforementioned argument is a dispute of material fact for which OWC was required to have heard during a formal hearing pursuant to section 120.57(1), as argued earlier in this brief. During the AHCA hearing, the AHCA has the burden of proof by clear and convincing evidence of all matters alleged in the AHCA complaint. See *AHCA v. USA Rehab and Chiropractic Center*, 2015 WL 3539436 (2015),

> "This is a proceeding in which Petitioner [AHCA] seeks to suspend or revoke Respondent's license to operate as a health care clinic. Because disciplinary proceedings are considered to be penal in nature, Petitioner is required to prove the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987)… Petitioner [AHCA] is limited to proving the charges and allegations pled in the Administrative Complaint. Cf. Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005); Aldrete v. Dep't of Health, Bd. of Med., 879 So. 2d 1244 (Fla. 1st DCA 2004); Ghani v. Dep't of Health, 714 So. 2d 1113 (Fla. 1st DCA 1998); Willner v. Dep't of Prof'l Reg., Bd. of Med., 563 So. 2d 805 (Fla. 1st DCA 1990)… Disciplinary provisions such as the referenced sections

> [license revocation] must be strictly construed in favor of the licensee. Elamariah v. Dep't of Prof'l Reg., 574 So. 2d 164 (Fla. 1st DCA 1990); Taylor v. Dep't of Prof'l Reg., 534 So. 2d 782, 784 (Fla. 1st DCA 1988). Disciplinary statutes must be construed in terms of their literal meaning, and words used by the Legislature may not be expanded to broaden their application. Latham v. Fla. Comm'n on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997); see also Beckett v. Dep't of Fin. Servs., 982 So. 2d 94, 100 (Fla. 1st DCA 2008); Dyer v. Dep't of Ins. & Treas., 585 So. 2d 1009, 1013 (Fla. 1st DCA 1991)."

Based on the aforementioned, especially the fact that no evidence was presented by the AHCA during the hearing[78] and the fact that the employee maintained level two status until rescreening occurred, the AHCA's final order must be reversed.

ii. OWCs' Employee Was Not Required To Hold Level Two Background Screening.

Briefly assuming, that the AHCA's informal hearing officer's use of the its own complaint was competent substantial evidence, and it proved the AHCA's allegations by clear and convincing evidence and that OWC did commit nonfeasance, contrary to OWCs' position and argument during the informal hearing, OWC cannot be found in violation of the statute, in that the individual was not required to hold level two background screening. First, the AHCA misinterpreted the statute. Second, the AHCA failed to allege key statutory requirements and

[7] The AHCA presented its complaint, the prehearing stipulation and the unauthorized stipulation by OWCs' prior counsel. The informal hearing officer took allegations within the AHCA complaint as true in order to write the recommended order adopted by the AHCA.

[8] The AHCA presented no evidence to show and neither did they allege that: OWC knew the financial officer was arrested, that background screening was revoked, that OWC knowingly failed to follow the statutes, etc. Each of which are also material facts which require a formal hearing.

therefore said requirements could not have been proven. Third, statutory intent would not allow for license revocation in this instance.

First, the AHCA misinterpreted section 408.809, Florida Statutes. The AHCA revoked OWCs' clinical licenses for its failure to act based on an alleged employees disqualifying arrest; however, they did not construe the statute in favor of OWC as required by law. "Statutes providing for the revocation or suspension of a license to practice are deemed penal in nature and must be strictly construed, with any ambiguity interpreted in favor of the licensee. *State ex rel. Jordan v. Pattishall*, 99 Fla. 296, 126 So. 147, 148 (1930); Taylor v. Department of Professional Regulation, 534 So.2d 782, 784 (Fla. 1st DCA 1988); Lester v. Department of Professional and Occupational Regulations, 348 So.2d 923, 925 (Fla. 1st DCA 1977)." *Elmariah v. Dept. of Professional Regulation, Bd. Of Medicine*, 574 So.2d 164, 165 (Fla. 1st Dist. 1990). "'[o]ne of the most fundamental principles of Florida law is that penal statutes must be strictly construed according to their letter.' " Id. (quoting Perkins v. State, 576 So.2d 1310, 1312 (Fla.1991))." *State v. Weeks*, 202 So.3d 1, 9 (Fla. 2016). "Where a statute provides for revocation of a license the grounds must be strictly construed because the statute is penal in nature." *McClung v. Criminal Justice Standards and Training Com'n*, 458 So.2d 887, 888 (Fla. 5th Dist. 1984). Per law, section 408.809 should be taken as it reads and must be construed in favor of OWC.

Taking those factors into consideration, the statute reads as follows, level two background screening is required for "financial officers or similarity titled individuals," that are responsible for the financial operation of the licensee or provider. [Emphasis added]. The individual in question use to be titled as a financial officer; however, he was never responsible for the financial operation of the licensee or provider, therefore he was not required to have level two background screening. The alleged financial officer was not an employee of OWC, did not get paid by OWC, did not manage OWC, he had no responsibilities to OWC and he didn't even live in the same state as OWC. Additionally, prior to the issuance of either a recommended order or a final order there was a material change in fact in that the individual in question gave up the symbolic title of "financial officer". (Tr. at 12 ¶ 16-24, R. at 393-394). Because said individual was not responsible in any way for the financial operation of the licensee or provider, he was not required to hold a level two background screening, therefore OWC as a clinic, had no duty to act pursuant to section 435.06[9], Florida Statutes and therefore, the AHCA improperly revoked OWCs' clinical licenses.[10]

[9] Section 435.06, Florida Statutes states in its pertinent part, "If an employer becomes aware that an employee has been arrested for a disqualifying offense, the employer must remove the employee from contact with any vulnerable person…" Section 435.06, Fla. Stat. (2016).

[10] All these issues are disputes of material fact which should have required the AHCA to order a formal hearing as further argued earlier in this brief. Additionally, even if OWC failed to act, OWC maintains its prior position that the AHCA lacks authority to revoke its clinical license based on its failure to act. 408.815 only authorizes the AHCA to revoke clinical licenses based on a controlling interest holder's violation of statute; here, the AHCA has revoked clinical licenses based on OWCs' failure to act. This position is explained earlier in the brief.

Additionally, the licenses should not have been revoked because the AHCA complaint is factually deficient. The AHCA revoked the licenses based on an informal hearing which means they took the facts alleged in the complaints as true without any evidence. As explained above, the statute requires two findings. First, that the person is a financial officer of an individual with a similar title, and second, that the individual is responsible for the financial operation of the licensee or provider. The second aspect is key because it deals with the intent of the statute, protecting the public. This is why the statute constantly repeats the phrase, "vulnerable person" and states, "If an employer becomes aware that an employee has been arrested for a disqualifying offense, employer must remove the employee from contact with any vulnerable person…" Section 435.06(2), Florida Statutes. As explained above, the AHCA never alleged OWC had knowledge of any arrest, more importantly, the individual in question had nothing to do with OWCs' operation and therefore he could not have been in contact with any vulnerable people requiring OWC to take action.

With the aforementioned in mind, the AHCA had the burden of proving all allegations and elements of the statute by clear and convincing evidence. They also had to prove the individual would potentially put the public in harm's way. If AHCA was truly concerned about the public, they could have done an emergency suspension of OWCs' clinical licenses; however, this did not occur. Rather, the

AHCA filed an agency complaint and conducted an informal hearing, more than a year later and has failed to allege and prove key issues. As explained below, the aforementioned make both the AHCA complaints and the final order facially deficient and improper as a matter of law and equity.

The AHCA makes the following allegations against OWC, alleging in pertinent part:

1. Level 2 background screening pursuant to Chapter 435 must be conducted through the Agency on the financial officer or similarly titled individual who is responsible for the financial operation of the licensee or provider. Agency Complaint, ¶ 3.
2. Under FL Law, every 5 years the employee needs to be rescreened to continue employment. The Agency shall do said re-screening. Agency Complaint, ¶ 5.
3. If the screening process shows any grounds for denial or termination, the employer may not allow the employee to have contact with any vulnerable person that would place the employee in a role which requires background screening (unless granted an exemption). Agency Complaint, ¶ 7.
4. (b) If an employer becomes aware that an employee has been arrested for a disqualifying offense, the employer must remove the employee from contact with any vulnerable person that places the employee in a role that requires background screening until the arrest is resolved in a way that the employer determines that the employee is still eligible for employment under this chapter. Agency Complaint, ¶ 7.
5. (c) The employer must terminate the employment of any of its personnel found to be in noncompliance with the minimum standards of this chapter or place the employee in a position for which background screening is not required unless the employee is granted an exemption from disqualification pursuant to s. 435.07.c) Employer must terminate employment of any personnel found to be in noncompliance with the minimum standards in this chapter. Agency Complaint, ¶ 7.

6. Dr. Pendergraft owns more than 5% and is the financial officer. Agency Complaint, ¶ 11.
7. Dr. Pendergraft was arrested for a disqualifying event. Agency Complaint, ¶ 13.
8. Dr. Pendergraft is being prosecuted. Agency Complaint, ¶ 14.
9. Dr. Pendergraft is owns a controlling interest and was required to maintain level 2 background. Agency Complaint, ¶ 15.
10. Dr. Pendergrafts arrest is a disqualifying event making him in compliance with Florida law. Agency Complaint, ¶ 16. (R. at 55-56).

The AHCA took said allegation as true, clear and convincing evidence; however, the AHCA cannot seek license revocation based on said allegations because the AHCA has failed to allege numerous allegations required by statute such as:

1. that the employee was responsible for the financial operation of the licensee or provider;
2. that license revocation was due to any improper action taken by the controlling interest holder, which is required for license revocation based on section 408.815, Florida Statutes;
3. that the AHCA revoked the individual in questions level two background screening;
4. that OWC had knowledge of the pending arrest, etc.

First, as argued above and in OWC's Motion For Reconsideration to the AHCA; the AHCA alleges the individual had the title of "financial officer"; however, fails to allege that he was responsible for the financial operation of the licensee or

provider. As argued above, the statute must be construed in favor of the respondent. Because the AHCA failed to allege this point, even if the AHCA's informal hearing officer took all matters alleged, on its face, as competent substantial evidence, to make a determination by clear and convincing evidence, the AHCA could not have proven matters which were not alleged. Because the AHCA failed to allege and therefore prove that the individual was responsible for the financial operation of the licensee or provider, the AHCA could not have found OWC to be in violation of Florida Statutes and could not have revoked its clinical licenses for its failure to act.[11] See *Trevisani v. Dept. of Health*, 908 so.2d 1108, 1108 (Fla. 1st Dist. 2005)(Physician could not be disciplined by Department of Health for failing to retain medical records, even though administrative complaint made reference to statute containing the requirement to keep such records, where complaint only charged physician with failing to create records, and did not allege that he failed to retain records.); *Christian v. Dept. of Health*, 161 so.3d 416, 417 (Fla. 2nd Dist. 2014)(The administrative law judge (ALJ) could not impose professional discipline against chiropractor based on conduct not alleged in the administrative complaint; the ALJ found that chiropractor failed to accurately describe the hyperabduction test results, but that alleged violation was not charged in the administrative complaint.)

[11] Again, even if OWC failed to act, OWC maintains its prior position that the AHCA lacks authority to revoke its clinical license based on its failure to act. 408.815 only authorizes the AHCA to revoke clinical licenses based on a controlling interest holder's violation of statute; here, the AHCA has revoked clinical licenses based on OWCs' failure to act. This position is explained earlier in the brief

In the case herein, although the AHCA alleged that an employee had the title of financial officer, it never alleged that he was responsible for financial operation of the licensee or provider, a required element. Due to the AHCA's lack of factual allegations, even if the remaining allegations were taken as true, the complaint is facially deficient and the AHCA's final action must therefore be reversed.

Second, as argued further above in this brief, the AHCA is only authorized to revoke clinical licenses for improper actions taken by the controlling interest holder. The AHCA alleges no improper actions taken by the controlling interest holder; rather, it revokes OWCs' licenses based on OWC, as an entity's failure to act. Due to the AHCA's lack of factual allegations, even if the remaining allegations were taken as true, the complaint is facially deficient and the AHCA's final action must therefore be reversed and dismissed.

Third, as argued above, the AHCA never alleges or finds that the AHCA revoked the individual's level two background screening. Neither did it allege that OWC had knowledge of any pending arrest which would give OWC a duty to act. OWC is only able to discover an arrest through one of two ways. If the AHCA conducts rescreening and verifies an arrest truly occurred or if the individual admits to OWC that an arrest occurred. Herein, the alleged arrest occurred in another state. The AHCA never alleges and never did rescreen the individual in order for OWC to have knowledge of the arrest. Rather, the AHCA simply filed its factually deficient

agency complaint. Because no facts were alleged or proven to show OWC had knowledge and therefore a duty to act, even if the remaining allegations were taken as true, the complaint is facially deficient and the AHCA's final action must therefore be reversed.

CONCLUSION

OWC has been in operation since around 1997. The AHCA's license revocation was improper because: 1) the AHCA is unauthorized to revoke OWCs' clinical licenses as 408.815, Florida Statutes does not authorize such a punishment for OWC's alleged acts. 2) The AHCA was required to immediately order a formal hearing pursuant to Florida law. 3) Assuming the AHCA was authorized to revoke the clinical licenses, they could not do so under the circumstances because the controlling interest holder did not violate any statutes. 4) The final order issued by the AHCA is improper in that, if the allegations were taken as true, Appellants would not be in violation of the statute. For the aforementioned reasons, the AHCA's final order must be reversed.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that pursuant to Florida Rule of Appellate Procedure 9.210 this brief has been prepared in Times New Roman 14-point font.

[CERTIFICATE TO FOLLOW]

CERTIFICATE OF SERVICE

I HERBEY CERTIFY that on August 7, 2017, I e-served a copy of this Motion to Brad Herter, Esq. at Brad.Herter@ahca.myflorida.com and Tracy Cooper George, Esq. at Tracy.George@ahca.myflorida.com.

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