

STATE OF FLORIDA
AGENCY FOR HEALTH CARE ADMINISTRATION

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STATE OF FLORIDA, AGENCY FOR
HEALTH CARE ADMINISTRATION,

DOAH CASE NO. 22-2684
AHCA NO. 2022007752
RENDITION NO.: AHCA-23 540 -FGF-OLC

Petitioner,

v.

CENTER OF ORLANDO FOR WOMEN,
LLC d/b/a CENTER OF ORLANDO FOR
WOMEN,

Respondent.

FINAL ORDER

This case was referred to the Division of Administrative Hearings (DOAH) where the assigned Administrative Law Judge (ALJ), J. Bruce Culpepper, conducted a formal administrative hearing. At issue in this proceeding is whether Respondent committed the violations alleged in the Agency for Health Care Administration's ("Agency" or "AHCA") Administrative Complaint, and, if so, what penalty should be imposed. The Recommended Order entered on April 7, 2023 is attached to this final order and incorporated herein by reference, except where noted infra.

RULINGS ON EXCEPTIONS

Petitioner filed exceptions to the Recommended Order and Respondent filed a response to Petitioner's exceptions.

In determining how to rule upon the Petitioner's exceptions and whether to adopt the ALJ's Recommended Order in whole or in part, the Agency must follow section 120.57(1)(f), Florida Statutes, which provides in pertinent part:

The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. . . .

§ 120.57(1)(l), Fla. Stat. Additionally, “[t]he final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record.”

§ 120.57(1)(k), Fla. Stat. In accordance with these legal standards, the Agency makes the following rulings on the Petitioner’s exceptions:

In Exception One, Petitioner takes exception to Paragraph 32 of the Recommended Order, arguing it is a mere recitation of testimony. The findings of fact in Paragraph 32 of the Recommended Order are based on competent, substantial record evidence in the form of Julie Murano and Turiya Velez’s testimony. See Transcript, Volume 1, Page 103; Transcript, Volume 2, Pages 167-168. Petitioner is essentially asking the Agency to re-weigh the evidence presented in this matter to make findings of fact that are favorable to its position. However, the Agency cannot do so. See Heifetz v. Department of Business Regulation, 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985) (“The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion.”); Stinson

v. Winn; 938 So. 2d 554 (Fla. 1st DCA 2006) (“Credibility of the witnesses is a matter that is within the province of the administrative law judge, as is the weight to be given the evidence.”). Therefore, the Agency must deny Exception One.

In Exception Two, Petitioner takes exception to Paragraph 35 of the Recommended Order, arguing the findings of fact therein omitted other evidence. The findings of fact in Paragraph 35 of the Recommended Order are based on competent, substantial record evidence. See Transcript, Volume 1, Pages 92-97. Thus, the Agency is not permitted to reject or modify them. See § 120.57(1)(f), Fla. Stat.; Hejifetz, 475 So. 2d at 1281. Therefore, the Agency must deny Exception Two.

In Exceptions Three and Four, Petitioner takes exception to Paragraphs 41, 51 and 52 (and, by extension, Paragraph 54) of the Recommended Order, arguing the ALJ’s recommended penalty should be increased. The Agency agrees.

To increase the ALJ’s recommended penalty, the Agency must first review the complete record of the case and state with particularity its reasons for increasing or decreasing the recommended penalty by citing specific portions of the record. See § 120.57(1)(f), Fla. Stat.; Criminal Justice Standards and Training Commission v. Bradley, 596 So. 2d 661, 664 (Fla. 1992). Here, the Agency believes the record supports an increase in the recommended penalty.

First, as the ALJ found in Paragraph 18 of the Recommended Order, the Agency considers violations at issue to be a “quality of care” violation and “a significant deficiency.” See also Transcript, Volume 1, at Page 63. Second, as the ALJ found in Paragraph 24, Respondent’s office manager admitted she knew about the law, yet did not change Respondent’s operating procedures to comply with it. See also Transcript, Volume 1, at Pages 131. Third, the record is devoid of any reasons why Respondent could not comply with the law prior to May 9,

2022, which was the date it first began complying with it. These reasons outweigh the “mitigating factors” listed in Paragraph 52 of the Recommended Order

Therefore, in accordance with Bradley, the Agency grants Exceptions Three and Four, rejects Paragraph 52 in its entirety, and modifies Paragraphs 41 and 51 (and, by extension, Paragraph 54) of the Recommended Order as follows:

41. The undersigned finds that the Center, through Ms. Loaiza, Ms. Velez, and Ms. Murano, presented credible testimony regarding the extenuating and mitigating circumstances surrounding its violation. ~~However, even taking this testimony into account, the undersigned finds that \$193,00067,550 (\$1,000350 times each of the 193 separate violations) is still the reasonable and appropriate fine for the Center's violation of section 390.0111(3).~~

51. The facts and circumstances found in this matter indicate that AHCA should impose ~~a fine that is less than~~ the maximum amount that is authorized under section 390.018. ~~The evidence and testimony presented during the final hearing includes certain extenuating and mitigating facts that should be considered when assessing the gravity of the Center's violation of section 390.0111(3)(a)1., and in turn, the appropriate and reasonable fine to levy upon the Center.~~

54. ~~In light of the above facts and circumstances established in this case, the undersigned concludes that a~~ fine in the amount of ~~\$1,000350~~ for each of the 193 violations, for a total of ~~\$193,00067,550~~, is the appropriate and reasonable fine in this matter.

FINDINGS OF FACT

The Agency hereby adopts the findings of fact set forth in the Recommended Order.

CONCLUSIONS OF LAW

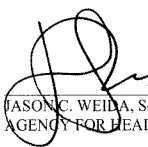
The Agency hereby adopts the conclusions of law set forth in the Recommended Order, except where noted supra.

ORDER

A \$193,000 fine is hereby imposed on Respondent for the 193 separate violations of section 390.0111(3)(a)1, Florida Statutes. The parties shall govern themselves accordingly.

Unless payment has already been made, payment in the amount of \$193,000 is now due from Respondent because of the agency action. Such payment shall be made in full within 30 days of the filing of this Final Order of Dismissal with Prejudice unless other payment arrangements have been made. The payment shall be made by check payable to Agency for Health Care Administration and shall be mailed to the Agency for Health Care Administration, Attn. Central Intake Unit, 2727 Mahan Drive, Mail Stop 61, Tallahassee, Florida 32308.

DONE AND ORDERED in Tallahassee, Florida, on this 14th day of August, 2023.



JASON C. WEIDA, Secretary
AGENCY FOR HEALTH CARE ADMINISTRATION

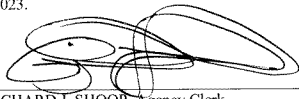
NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW, WHICH SHALL BE INSTITUTED BY FILING THE ORIGINAL NOTICE OF APPEAL WITH THE AGENCY CLERK OF AHCA, AND A COPY, ALONG WITH THE FILING FEE PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE AGENCY MAINTAINS ITS HEADQUARTERS OR WHERE A PARTY RESIDES. REVIEW PROCEEDINGS SHALL BE CONDUCTED IN ACCORDANCE WITH THE FLORIDA APPELLATE RULES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF THE RENDITION OF THE

ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of this Final Order was served on the below-named persons by the method designated on this 14th day of August, 2023.



RICHARD J. SHOOP, Agency Clerk
AGENCY FOR HEALTH CARE ADMINISTRATION
2727 Mahan Drive, MS #3
Tallahassee, Florida 32308
Telephone: (850) 412-3630

Copies furnished to:

Honorable J. Bruce Culpepper
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(via electronic filing)

Thomas J. Walsh II, Esquire
Belisa M. Oliveira, Esquire
Assistant General Counsels
(via electronic mail)

Julie Gallagher, Esquire
Grossman, Furlow & Bayó, LLC
2022-2 Raymond Diehl Road
Tallahassee, Florida 32308
(via electronic mail to j.gallagher@gfblawfirm.com
and t.castano@gfblawfirm.com)

Jack Plagge, Unit Manager
Hospital and Outpatient Services Unit
Agency for Health Care Administration
(Electronic Mail)

Mino Hasani
Facilities Intake Unit
Agency for Health Care Administration
(Electronic Mail)

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AGENCY FOR HEALTH CARE
ADMINISTRATION,

Petitioner,

Case No. 22-2684

vs.

CENTER OF ORLANDO FOR WOMEN, LLC,
D/B/A CENTER OF ORLANDO FOR WOMEN,

Respondent.

RECOMMENDED ORDER

The final hearing in this matter was conducted before J. Bruce Culpepper, Administrative Law Judge of the Division of Administrative Hearings, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2022),¹ on December 15, 2022, and January 13, 2023, by Zoom video conference, from Tallahassee, Florida.

APPEARANCES

For Petitioner: Thomas J. Walsh, II, Esquire
Agency for Health Care Administration
525 Mirror Lake Drive North, Suite 330H
St. Petersburg, Florida 33701

Belisa M. Oliveira, P.A.
Agency for Health Care Administration
15500 Lightwave Drive, Suite 100
Clearwater, Florida 33760

For Respondent: Julie Gallagher, Esquire
Grossman, Furlow & Bayo, LLC
2022-2 Raymond Diehl Road
Tallahassee, Florida 32308

¹ All statutory references are to Florida Statutes (2022), unless otherwise noted.

STATEMENT OF THE ISSUES

The issues in this matter are whether Respondent, Center of Orlando For Women, LLC, d/b/a Center of Orlando For Women, violated section 390.0111(3), Florida Statutes, by failing to timely implement of the statutorily-required 24-hour waiting period, and, if so, what is the appropriate penalty.

PRELIMINARY STATEMENT

On July 14, 2022, the Agency for Health Care Administration ("AHCA") issued to Respondent, Center of Orlando For Women, LLC, d/b/a Center of Orlando For Women (the "Center"), an Administrative Complaint charging that the Center violated section 390.0111(3)(a)1. by failing to provide its patients statutorily-required information at least 24 hours before the Center performed the procedure to terminate a pregnancy. AHCA seeks to impose an administrative fine on the Center for its alleged violation.

The Center timely filed a request for an administrative hearing to challenge the issues raised in the Administrative Complaint.

On September 6, 2022, AHCA referred this matter to the Division of Administrative Hearings ("DOAH") for assignment of an Administrative Law Judge to conduct a chapter 120 evidentiary hearing.

The final hearing was held on December 15, 2022, and January 13, 2023, by Zoom video conference, from Tallahassee, Florida. At the final hearing, AHCA called Gayle Ray and Jack Plagge as witnesses. The Center offered the testimony of Julie Murano, Alicia Loaiza, and Turiya Velez. AHCA Exhibits 1 through 8 were admitted into evidence. Center Exhibits 1 through 3 were also admitted.

A two-volume Transcript of the final hearing was filed with DOAH on January 20, 2023. At the close of the hearing, the parties were advised of a ten-day timeframe to file post-hearing submittals. The parties moved for additional time to file their post-hearing submittals, which was granted.² Respondent subsequently moved (twice) for an extension of time to file its proposed recommended order, which was granted. Both parties timely submitted Proposed Recommended Orders, which were duly considered in preparing this Recommended Order.

FINDINGS OF FACT

1. AHCA is the state agency responsible for licensing and regulating abortion clinics in the State of Florida. As part of its duties, AHCA serves as the enforcement arm regarding unauthorized activity and operation of abortion clinics. § 408.802(3), Fla. Stat.; Ch. 390, Fla. Stat.; and Fla. Admin. Code Ch. 59A-9.

2. The Center is licensed by AHCA to operate an abortion clinic in Florida. The Center is located in Orlando, Florida. The Center offers procedures to terminate pregnancies, as well as provides resources to expectant mothers, including birth control and counseling.

3. On July 14, 2022, AHCA filed an Administrative Complaint against the Center. In the Complaint, AHCA alleges that the Center violated the provisions of section 390.0111. Section 390.0111(3) establishes that a pregnancy may not be terminated except with the voluntary and informed consent of the pregnant woman. Section 390.0111(3)(a)1. further directs that a physician must inform the woman of certain information regarding the nature and risks of the procedure, as well as the probable gestational age of the fetus, prior to performing the termination. Key to these provisions,

² By requesting a deadline for filing post-hearing submissions beyond ten days after the filing of the hearing Transcript, the 30-day time period for filing the Recommended Order was waived. See Fla. Admin. Code R. 28-106.216.

section 390.0111(3)(a)1. also requires the physician to supply this information "at least 24 hours before the procedure" (the "24-hour Wait Period").

4. Based on the alleged violations, AHCA seeks to impose an administrative fine on the Center in the amount of \$193,000, which is the maximum fine AHCA can levy under section 390.018. This figure consists of \$1,000 for each of the 193 patients who reportedly were not given 24 hours between the initial physician counsel and the termination procedure.

Background of the 24-hour Wait Period:

5. The Florida Legislature enacted section 390.0111(3) under the moniker the "Woman's Right to Know Act." In 2015, the Legislature amended section 390.0111(3) to modify what constitutes the "voluntary and informed" consent that a physician is required to obtain from a pregnant woman prior to performing the termination of a pregnancy. As amended, section 390.0111(3)(a)1., the physician is now directed to provide certain information regarding the nature and risks of the procedure, as well as the age of the fetus, a minimum of 24 hours before the termination procedure is performed.

6. Shortly after the 2015 amendment was signed into law, litigation ensued in the Circuit Court for the Second Judicial Circuit, in and for Leon County. During this litigation, the plaintiffs moved for entry of a temporary injunction to prevent the amendment from going into effect. The court granted the plaintiffs' motion, thereby blocking the enforceability of the 24-hour Wait Period.

7. Following a number of years of active litigation in several different judicial forums, on April 8, 2022, Leon County Circuit Court Judge Angela Dempsey issued an Order Granting Defendant's Motion for Summary Final Judgment, which dissolved the court-imposed stay.³ On April 25, 2022, Judge Dempsey entered a Final Judgment, which formally gave effect to the 24-hour waiting period requirement.

³ *Gainesville Woman Care, LLC, et. al., v. State of Florida, et. al.*, Case No. 2015 CA 1323, Second Judicial Circuit in and for Leon County, Florida.

Facts Found During the Final Hearing:

8. AHCA initiated this action following a site visit on May 11, 2022. That day, Gayle Ray, a Registered Nurse Specialist for AHCA, appeared unannounced at the Center to conduct a "survey." Ms. Ray explained that a survey is a "monitoring" visit typically for the purpose of gathering data, reviewing records, and interviewing clinic staff. Ms. Ray expressed that the primary purpose of a survey is to evaluate a facility's compliance with applicable state laws and regulations.

9. During her testimony, Ms. Ray also advised that the Florida law regarding the 24-hour Wait Period (section 390.0111(3)(a)1.) became effective on April 25, 2022. Therefore, for her survey of the Center, she was specifically tasked with reviewing the Center's patient records regarding the time periods involved in termination of pregnancy procedures from April 26, 2022, through May 11, 2022 (the date of her survey). Ms. Ray voiced that her primary focus was to evaluate the Center's compliance with the 24-hour Wait Period, informed consent requirement.

10. Ms. Ray testified that when she arrived at the Center, she was met by Alicia Loaiza, the Center's Manager. Ms. Ray requested that the Center (Ms. Loaiza) pull its patient records from April 26, 2022, through May 11, 2022. Ms. Ray and Ms. Loaiza then proceeded to walk through the documentation together. Ms. Ray specifically looked for information regarding the time the pregnant woman arrived at the Center, and when a Center physician initiated the termination procedure.

11. Upon reviewing the records, Ms. Ray identified a total of 217 women who received services from the Center between April 26, 2022, and May 11, 2022. Of these patients, Ms. Ray found that 193 women underwent a termination procedure on the same day they were admitted to the Center. With this information, Ms. Ray prepared a "Statement of Deficiencies" in which she concluded that the Center "failed to assure that 193 of 217 patients

who entered the clinic for termination of pregnancy received the required 24-hour wait time following the physician visit to the time of the procedure."

12. Ms. Ray specifically noted that the Center's patient records established the following violations of section 390.0111(3):

- April 26, 2022: Twenty-four (of 25) procedures were performed within the 24-hour Wait Period;
- April 27, 2022: Nineteen (of 21) procedures were performed within the 24-hour Wait Period;
- April 28, 2022: Nineteen (of 19) procedures were performed within the 24-hour Wait Period;
- April 29, 2022: Seventeen (of 20) procedures were performed within the 24-hour Wait Period;
- April 30, 2022: Thirteen (of 13) procedures were performed within the 24-hour Wait Period;
- May 3, 2022: Twenty (of 20) procedures were performed within the 24-hour Wait Period;
- May 4, 2022: Sixteen (of 19) procedures were performed within the 24-hour Wait Period;
- May 5, 2022: Eighteen (of 19) procedures were performed within the 24-hour Wait Period;
- May 6, 2022: Twenty-one (of 21) procedures were performed within the 24-hour Wait Period;
- May 7, 2022: Twenty-six (of 26) procedures were performed within the 24-hour Wait Period.

13. Ms. Ray further divulged that she and Ms. Loaiza discussed the Center's failure to wait 24 hours before performing the termination procedure. Ms. Ray testified that Ms. Loaiza told her that the Center staff was aware of the existence of the 24-hour Wait Period statute, but was unaware when the law had actually gone into effect.

14. Ms. Ray also relayed that the patient records showed that the Center began complying with the 24-hour Wait Period several days prior to her survey. Center documentation demonstrated that beginning on Monday, May 9, 2022, the Center conducted patient "first visits" in the morning, then performed all termination procedures the following afternoon. (The first patient who experienced the Center's new process met with a physician on Monday, May 9, 2022; then left the Center and returned on the afternoon of Tuesday, May 10, 2022, after the 24-hour Wait Period had concluded.) Ms. Ray was not aware of any violations of the 24-hour Wait Period by the Center after May 7, 2022.

15. Jack Plagge, a Health Administration Service Manager, also testified for AHCA. Mr. Plagge works as a Unit Manager for the licensing unit that includes abortion clinics. Among his duties, Mr. Plagge oversees license application processing for abortion clinics. He is also responsible for assessing fines in cases related to abortion providers.

16. During his testimony, Mr. Plagge explained that, once the Florida court system lifted the injunction on enforcing the 24-hour Wait Period, AHCA initiated surveys on all 55 licensed abortion clinics in the state. Mr. Plagge relayed that AHCA found 14 of the 55 clinics had failed to comply with the revised consent law.

17. Mr. Plagge further stated that he personally determined the amount of the administrative fine AHCA seeks to impose on the Center for its deficient practice. Mr. Plagge explained that section 390.018 authorizes AHCA to impose a fine up to a maximum of \$1,000 for each violation of chapter 390. Based on the nature of the violation, he determined that the Clinic should be sanctioned the maximum amount (\$1,000) for each of the 193 patients for which the Center did not wait 24 hours before terminating the pregnancy.

18. Mr. Plagge commented that his "standard operating procedure" is to fine abortion clinics the maximum authorized amount for violations of a statutory requirement. Mr. Plagge testified that he considers a clinic's failure

to comply with section 390.0111 a "quality of care" violation and a "significant" deficiency in the services that clinics are licensed to provide. He further expressed that each clinic is responsible for knowing and complying with the law.

19. Mr. Plagge acknowledged that AHCA has not adopted any standard guidelines or written criteria to use when calculating the amount of a fine for failure to comply with the 24-hour Wait Period. He also conceded that he did not consider any mitigating factors in deciding that AHCA should levy the maximum fine on the Center. Mr. Plagge testified that he used this same approach to determine the amount of the fine for all 14 clinics that AHCA found to be out of compliance with section 390.0111(3).

20. At the final hearing, the Center admitted that it did not provide the 193 patients that Ms. Ray identified in its records the statutorily-required information at least 24 hours prior to performing the termination procedure. During the hearing, Center witnesses primarily presented mitigating and extenuating circumstances behind the Center's failure to timely implement the 24-hour Wait Period. The Center further urged that its noncompliance was not entirely its fault.

21. The Center offered the testimony of Alicia Loaiza. Ms. Loaiza is the Center's Office Manager.

22. Ms. Loaiza confirmed that she was the individual who met with Ms. Ray during her unannounced survey and agreed with Ms. Ray's account of the site visit. Ms. Loaiza conveyed that, upon entering the clinic, Ms. Ray courteously explained that she was there to gather information regarding compliance with the 24-hour Wait Period from April 26, 2022, through May 11, 2022. Ms. Loaiza then gathered the relevant patient records, and they reviewed them together.

23. Regarding the allegations at issue in this matter, Ms. Loaiza did not dispute that from April 26, 2022, through May 7, 2022, the Center provided services to 193 patients who did not receive the prescribed information from

the physician at least 24 hours before the procedure to terminate the pregnancy. Ms. Loaiza explained that the Center offers its patients two options to terminate a pregnancy, either surgically or through medication. Ms. Loaiza expressed that, prior to the 24-hour Wait Period going into effect, the Center's standard practice was to offer this treatment on the same day the patient entered the clinic.

24. Despite this routine process, Ms. Loaiza was mindful that Florida enacted a law in 2015 requiring physicians to wait at least 24 hours before performing the termination procedure. However, Ms. Loaiza was also aware that, shortly after the law was passed, a state court issued an injunction, which stopped the law from going into effect. Therefore, prior to the date of Ms. Ray's survey, while Center physicians comprehensively discussed the termination procedure with their patients, the Center had not changed its customary policy of offering its services on the same day the patient was admitted.

25. That being said, Ms. Loaiza expressed that in April 2022, Center staff became aware that the court-ordered injunction might be resolved imminently, in which case the 24-hour Wait Period would become the law. For this reason, in early May 2022, the staff discussed, then ultimately adopted, a new timeframe for processing its patients. Ms. Loaiza represented that starting on the week of Monday, May 9, 2022, the Center put the new policy into place. From that day forward, when a pregnant woman arrives at the Center, she meets with a physician who counsels her regarding the information listed in section 390.011(3). The woman is then instructed to return to the Center the next day when the procedure will actually be performed. Ms. Loaiza stated that the Center schedules counseling appointments in the morning, then performs the termination procedure the following afternoon thereby ensuring their services comply with the mandated waiting period.

26. Ms. Loaiza urged that the Center implemented this new process two days before Ms. Ray's survey, which was Wednesday, May 11, 2022.

27. Turiya Velez also testified for the Center. Ms. Velez is the Center's Director of Administration. As part of her responsibilities, Ms. Velez is tasked with overseeing the Center's compliance with state laws and regulations.

28. Ms. Velez reaffirmed Ms. Loaiza's account regarding the Center's decision to change its notification practice to allow 24 hours to pass between the time a pregnant woman consults with a physician and the termination procedure. Ms. Velez explained that, currently, patients participate in an initial physician consultation during which the patient is provided the mandated statutory information regarding her pregnancy, as well as given the opportunity to complete any preliminary medical or laboratory work. Thereafter, the patient is advised to return "at her leisure" for the actual termination procedure. Ms. Velez represented that the Center has also created forms and paperwork to specifically record and track the time between the preliminary consultation and the follow-up procedure.

29. Ms. Velez urged that the Center started its new notification process on Monday, May 9, 2022, which was two days before Ms. Ray's survey. Ms. Velez testified that, on or about Thursday, May 5, 2022, she personally made the decision to institute the new admission process, which she determined to put in place on the following Monday (May 9, 2022). As addressed further below, Ms. Velez had been preparing to incorporate a 24-hour waiting period since mid-April 2022. After multiple inquiries, when the Center was unable to obtain a satisfactory explanation from AHCA, or any other source, regarding the date the 24-hour Wait Period was to go into effect, she independently decided to start the new informed consent policy. (Ms. Ray verified that Saturday, May 7, 2022, was the last day the Center admitted patients and performed a termination procedure on the same day.) During the final hearing, Ms. Velez maintained that the Center never intentionally delayed or

failed to comply with the 24-Wait Period. She insisted that the Center's staff simply was not aware of the date the law became effective.

30. Ms. Velez also reiterated Ms. Loaiza's representation that the Center, which did not participate in the state court action, never received any direct information when the court actually lifted the injunction. Ms. Velez stated that the Center first heard about a possible decision by the court through local news sources. Upon learning that the injunction might have been lifted, Ms. Velez testified that the Center immediately began calling AHCA "on a daily basis" to gather any information regarding the status of the court case. Ms. Velez voiced that she personally spoke with an AHCA representative who told her that she was not aware of any change in the applicable law. Ms. Velez further remarked that she also searched the internet, including the AHCA website, for any pertinent news. However, she found nothing indicating that the law was updated to effectuate the 24-hour Wait Period.

31. Ms. Velez declared that the Center was not able to confirm that the 24-hour Wait Period was in effect until Ms. Ray imparted the information on May 11, 2022, during her survey. By that date, however, the 24-hour Wait Period had been in effect for over two weeks. Ms. Velez added that the Center did not receive any official notice from AHCA regarding the law until AHCA circulated an informational email entitled "Abortion Clinic Reminder" on June 9, 2022, which stated, "On April 8, 2022, the Second Judicial Circuit Court affirmed the constitutionality of this law which then took effect upon entry of final judgment on April 25, 2022."⁴

32. Finally, Ms. Velez voiced that the imposition of the maximum fine for the alleged violation (\$193,000) would place a huge financial burden on the Center. Ms. Velez voiced that such a large fine might possibly shut down or bankrupt the Center.

⁴ AHCA concedes that it did not send out an official notification to abortion providers about the April 8, 2022, ruling until June 9, 2022. AHCA maintains, however, that it had no statutory or regulatory duty to alert abortion providers to changes in the law or an update regarding the legal challenge in Leon County Circuit Court.

33. The Center also provided the testimony of Julie Murano. Ms. Murano works as the Center's Human Resources Director.

34. Ms. Murano relayed that, around April 12, 2022, she began hearing reports from local news outlets that a court had ruled in favor of the 24-hour Wait Period. She expressed, however, that the media coverage contained conflicting information regarding when the waiting period was to go into effect. Ms. Murano explained that the Center was not involved in the underlying lawsuit. Therefore, it had no direct access to details regarding the case status or the judge's order.

35. Consequently, upon hearing that the 24-hour Wait Period might now be the overarching law in Florida, Ms. Murano declared that she promptly took steps to determine when the Center was required to modify its admission policy. Beginning on April 14, 2022, Ms. Murano called AHCA 14 times between April 14 and May 4, 2022, requesting information regarding the date the 24-hour Wait Period was to go into effect. Ms. Murano remarked that no one at AHCA was able to answer her questions.

36. Ms. Murano also actively searched the internet for any news on the 24-hour Wait Period or the lawsuit. Ms. Murano relayed that the AHCA website contains general information covering the operation of abortion clinics in Florida, and is a common resource for compliance and licensing issues. Once again, however, she had no success finding up-to-date information from the AHCA website, or the websites for the Department of Health or the Leon County Circuit Court. Similar to Ms. Velez, Ms. Murano stated that the Center did not receive any official notice from AHCA regarding the change in the law until the "Abortion Clinic Reminder" email on June 9, 2022, which was well after Ms. Ray had surveyed the Center.

37. In addition, during her testimony, Ms. Murano discussed how the Center changed its policy to incorporate the 24-hour Wait Period. Ms. Murano explained that currently, when a pregnant woman arrives at the Center, she sees a physician who provides her with the information required

by statute. Then, the woman is instructed to return the next day for the procedure to actually be administered.

38. Finally, Ms. Murano, who believes that the Center provides vital women's health services, lamented what she perceives to be the disadvantageous burden the 24-hour Wait Period has placed on pregnant women seeking access to care. Ms. Murano stated that the two-day process essentially doubles the cost of the procedure on Center patients due to the fact that women must now arrange to travel to the facility twice, instead of once, and must miss two days of work, instead of just one. In addition, women are now forced to contend with additional daycare and transportation challenges.

39. Based on the competent substantial evidence in the record, the facts establish that the Center failed to comply with section 390.0111(3)(a)1. Specifically, the clear and convincing evidence presented during the final hearing establishes, and the Center concedes, that the Center terminated the pregnancies of 193 women, between April 26, 2022 and May 7, 2022, without obtaining the required consent of those women by providing the statutorily-required information at least 24 hours before performing the termination procedure.

40. As a result of the Center's violation of section 390.0111(3)(a)1., section 390.018 authorizes AHCA to impose an administrative fine upon the Center in an amount not to exceed \$1,000 for each violation, or a maximum fine of \$193,000.

41. The undersigned finds that the Center, through Ms. Loaiza, Ms. Velez, and Ms. Murano, presented credible testimony regarding the extenuating and mitigating circumstances surrounding its violation. Taking this testimony into account, the undersigned finds that \$67,550 (\$350 times each of the 193 separate violations) is the reasonable and appropriate fine for the Center's violation of section 390.0111(3).

CONCLUSIONS OF LAW

42. DOAH has jurisdiction over the parties and subject matter of this proceeding pursuant to sections 120.569 and 120.57(1).

43. AHCA initiated this action against the Center alleging that, between April 26, 2022, and May 7, 2022, the Center violated the provisions of section 390.0111(3)(a)1. Specifically, AHCA asserts that the Center failed to wait 24 hours after informing the pregnant woman of the statutorily-required information before performing the termination of pregnancy procedure for 193 women. AHCA seeks to impose a fine upon the Center based on its deficient practice.

44. AHCA is responsible for regulating abortion clinics in the State of Florida pursuant to chapter 390 and part II of chapter 408, Florida Statutes.

45. Section 390.0111, entitled "Termination of Pregnancies," states, in pertinent part:

(1) TERMINATION AFTER GESTATIONAL AGE OF 15 WEEKS; WHEN ALLOWED.—A physician may not perform a termination of pregnancy if the physician determines the gestational age of the fetus is more than 15 weeks unless one of the following conditions is met:

* * *

(3) CONSENTS REQUIRED.—A termination of pregnancy may not be performed or induced except with the voluntary and informed written consent of the pregnant woman or, in the case of a mental incompetent, the voluntary and informed written consent of her court-appointed guardian.

(a) Except in the case of a medical emergency, consent to a termination of pregnancy is voluntary and informed only if:

1. The physician who is to perform the procedure, or the referring physician, has, at a minimum, orally, while physically present in the same room,

and at least 24 hours before the procedure, informed the woman of:

a. The nature and risks of undergoing or not undergoing the proposed procedure that a reasonable patient would consider material to making a knowing and willful decision of whether to terminate a pregnancy.

b. The probable gestational age of the fetus, verified by an ultrasound, at the time the termination of pregnancy is to be performed.

* * *

c. The medical risks to the woman and fetus of carrying the pregnancy to term.

The physician may provide the information required in this subparagraph within 24 hours before the procedure if requested by the woman at the time she schedules or arrives for her appointment to obtain an abortion and if she presents to the physician a copy of a restraining order, police report, medical record, or other court order or documentation evidencing that she is obtaining the abortion because she is a victim of rape, incest, domestic violence, or human trafficking. (emphasis added).

46. AHCA's intended action to impose a fine on the Center is penal in nature. Accordingly, AHCA bears the burden of proof to demonstrate the grounds for doing so by clear and convincing evidence. *Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern & Co.*, 670 So. 2d 932, 935 (Fla. 1996); and *Chappell Sch., LLC v. Dep't of Child. & Fams.*, 332 So. 3d 1060, 1063 (Fla. 1st DCA 2021); see also *Fla. Dep't of Child. & Fams. v. Davis Fam. Day Care Home*, 160 So. 3d 854, 856 (Fla. 2015) ("an agency must prove its reasons for revoking a professional license by clear and convincing evidence because such a proceeding is penal in nature and implicates significant property rights.").

47. Clear and convincing evidence is a heightened standard that "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" Clear and convincing evidence is defined as an intermediate burden of proof that:

[R]equires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

S. Fla. Water Mgmt. Dist. v. RLI Live Oak, LLC, 139 So. 3d 869, 872-73 (Fla. 2014) (quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

48. Based on the competent substantial evidence in the record, AHCA demonstrated, by clear and convincing evidence, sufficient grounds to discipline the Center. Ms. Ray persuasively explained (and the Center did not dispute) the basis for her determination that from April 26, 2022, to May 7, 2022, the Center performed termination of pregnancy procedures on 193 patients without waiting 24 hours after the pregnant woman first consulted with a Center physician. Ms. Ray credibly supported her finding with information documented in the Center's patient records during the subject time period. Accordingly, AHCA established the requisite justification to sanction the Center for failure to comply with section 390.011(3)(a)1.

Recommended Penalty:

49. Pursuant to section 390.018, entitled "Administrative Fine," AHCA: may impose a fine upon the clinic in an amount not to exceed \$1,000 for each violation of any provision of this chapter.

Therefore, AHCA may levy an administrative fine on the Center in an amount not to exceed \$1,000 for each of the 193 violations of section 390.0111(3)(a)1. AHCA seeks to impose the maximum fine of \$193,000.

50. The Center does not dispute AHCA's charge that it violated section 390.0111(3)(a)1. The Center primarily challenges the fairness of the amount of the fine AHCA seeks to impose. Neither chapter 390 nor Florida Administrative Code Chapter 59A-9 sets forth aggravating or mitigating factors or penalty guidelines to weigh when determining a suitable fine for a breach of the provisions of chapter 390. Section 390.018 simply directs that AHCA "may" impose a fine "not to exceed \$1,000" for each violation. The Center correctly points out that this language indicates that the amount of the fine is permissive, not mandatory. *See The Florida Bar v. Trazenfeld*, 833 So. 2d 734, 738 (Fla. 2002) ("The word 'may' when given its ordinary meaning denotes a permissive term rather than the mandatory connotation of the word 'shall.'") Therefore, by giving AHCA a range to consider when determining an appropriate penalty (\$0 to \$1,000), section 390.018 signals that AHCA should take into account the facts and circumstances of the particular violation.

51. The facts and circumstances found in this matter indicate that AHCA should impose a fine that is less than the maximum amount that is authorized under section 390.018. The evidence and testimony presented during the final hearing includes certain extenuating and mitigating facts that should be considered when assessing the gravity of the Center's violation of section 390.0111(3)(a)1., and in turn, the appropriate and reasonable fine to levy upon the Center.

52. The competent substantial evidence in the record establishes the following:

a. Information regarding Judge Dempsey's April 2022 ruling in Leon County Circuit Court was not readily available to the Center. As a result, the evidence does not show that the Center had direct, contemporaneous

knowledge that the 24-hour Wait Period went into effect on April 25, 2022. Accordingly, the evidence does not prove that the Center intentionally violated section 390.0111(3)(a)1. for the termination procedures performed on 193 patients between April 26, 2022, and May 7, 2022;

b. The Center independently modified its admission policy to ensure that pregnant women wait 24 hours between their initial physician consultation and the termination procedure itself. Ms. Velez, as supported by Ms. Loaiza and Ms. Murano, credibly testified that she decided to incorporate the 24-hour Wait Period into the Center's in-processing protocol before the Center received any direction from AHCA;

c. The Center integrated the 24-hour Wait Period into its patient admission policy on May 9, 2022 (with the first procedure under this policy performed on May 10, 2022), which was before AHCA (Ms. Ray) conducted its unannounced site visit at the Center on May 11, 2022;

d. Upon learning that the injunction in Leon County Circuit Court might be lifted, the Center was proactive and took repeated steps to ascertain the effective date of the 24-hour Wait Period. The Center's efforts were reasonable under the circumstances, and included contacting the agency that regulated it (AHCA), as well as other likely sources of information such as the Department of Health and the Leon County Circuit Court websites;

e. No evidence shows that the Center has violated the 24-hour Wait Period since May 7, 2022, after it put its new admission policy in place on May 9, 2022; and

f. Section 390.0111(3)(a)1. was amended in 2015 to ensure that abortion providers verify that a woman's choice to have an abortion is voluntary and informed.⁵ No evidence produced during the final hearing established that

⁵ See Final Bill Analysis, HB 633 (2015), June 12, 2015.

any of the 193 women who received services from the Center between April 26, 2022, and May 7, 2022, would not have provided their voluntary and informed consent to the termination procedure if they had been told to wait 24 hours to proceed. Neither does any evidence in the record show that any of the 193 pregnant women would have changed their minds if they were instructed to return for the procedure 24 hours after they first arrived at the Center.

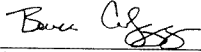
53. Conversely, the Center's assertion that AHCA should bear some of the blame for the Center's failure to timely implement the 24-hour Wait Period in determining the amount of the fine is not persuasive. Instead, AHCA presents the more sound argument that the entities it licenses are responsible for operating lawfully and knowing and complying with the applicable laws and regulations. Section 408.803(9) clearly directs that an entity licensed by AHCA "is legally responsible for all aspects of the provider operation." Plainly stated, the Center, as a matter of law, is charged with the knowledge of the provisions of law regulating its duties and responsibilities.

54. In light of the above facts and circumstances established in this case, the undersigned concludes that a fine in the amount of \$350 for each of the 193 violations, for a total of \$67,550, is the appropriate and reasonable fine in this matter.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that AHCA enter a final order finding that the Center committed 193 separate violations of the provisions of section 390.0111(3)(a)1. and imposing an administrative fine on the Center in the amount of \$350 times 193 for a total penalty of \$67,550.

DONE AND ENTERED this 7th day of April, 2023, in Tallahassee, Leon County, Florida.



J. BRUCE CULPEPPER
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
This 7th day of April, 2023.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.