

**BEFORE THE ALASKA OFFICE OF ADMINISTRATIVE HEARINGSON REFERRAL  
FROM THE COMMISSIONER OF HEALTH AND SOCIAL SERVICES**

In the Matter of: )  
 )  
SHIRLEY AGCAOILI )  
d/b/a AUBREY’S ASSISTED LIVING HOME ) OAH No. 12-0173-ALH  
\_\_\_\_\_ )

**MODIFICATION AND ADOPTION OF PROPOSED DECISION**

The undersigned, by delegation from the Commissioner of Health and Social Services, adopts the proposed decision with the following modification:

The proposed decision would hold that a substantiated finding is potentially true, but not proven to be more likely than not true. The proposed decision is hereby modified to reject this “substantiated findings” analysis.

In the day-to-day operations of the Division of Health Care Services, Division staff need to know whether they can rely on investigative findings. Knowing that the findings are only potentially true, as suggested in the proposed decision, is too imprecise. The ultimate result flowing from that definition would be that the findings could not be relied on at all. Therefore, if an investigation results in a substantiated finding, the Division should continue with its standard practices of relying on the finding as more likely than not true.

The proposed decision, as modified above, is adopted.

Judicial review of this decision may be obtained by filing an appeal in the Alaska Superior Court in accordance with Alaska R. App. P. 602(a)(2) within 30 days after the date of this decision.

DATED this 23<sup>rd</sup> day of May, 2013.

By: Signed \_\_\_\_\_  
Jared C. Kosin  
Executive Director  
Office of Rate Review

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d/b/a AUBREY’S ASSISTED )  
LIVING HOME ) OAH No. 12-0173-ALH  
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**DECISION**

**I. Introduction**

Shirley Agcaoili previously operated assisted living homes (ALH) licensed by the Division of Health Care Services, Certification and Licensing (division). However, she had no current license to operate an ALH in 2012 when she applied for a license to operate Aubrey’s Assisted Living Home. The division denied her application based on Ms. Agcaoili’s prior licensing history. The division subsequently amended the basis for denial to more fully describe the reasons for denial and to include an allegation that Ms. Agcaoili’s application was incomplete.

After pre-hearing motion practice, a hearing was held on March 7 and April 3, 2013. Based on the evidence in the record, the division’s determination to deny Ms. Agcaoili’s application is affirmed.

**II. Facts**

In 2008, Ms. Agcaoili was the owner and licensee of two ALHs, Shirley’s ALH and Galactica ALH, as well as the owner of a third ALH licensed to her daughter.<sup>1</sup> Shirley’s ALH was investigated by the division in January and February of 2007.<sup>2</sup> That investigation concluded that there was “reasonable cause to believe” several violations had occurred.<sup>3</sup> The division proposed converting Ms. Agcaoili’s license to provisional status, requiring a Plan of Correction, and proposed a fine of \$5,050.<sup>4</sup> In September of 2007, Ms. Agcaoili and the division entered into a Memorandum of Agreement (2007 MOA) settling the disputed findings and sanctions.<sup>5</sup>

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<sup>1</sup> Exhibit 2, page 3.  
<sup>2</sup> Exhibit 2, page 43.  
<sup>3</sup> Exhibit 2, page 46.  
<sup>4</sup> *Id.*  
<sup>5</sup> Exhibit 2, page 34.

In November and December of 2007, Shirley’s ALH and Galactica ALH were investigated by the division and the Office of Long Term Care Ombudsman.<sup>6</sup> That investigation concluded that there was “reasonable cause to believe” several violations had occurred at each home.<sup>7</sup> The division proposed revoking Ms. Agcaoili’s licenses to operate both homes, and also proposed a suspended fine.<sup>8</sup>

The parties entered into another Memorandum of Agreement (2008 MOA).<sup>9</sup> Among other provisions, this MOA provided for relinquishing the license for Galactica ALH, and converting the license for Shirley’s ALH to provisional status.<sup>10</sup> The MOA also stated:

Respondent acknowledges that nothing in the terms of this Agreement preclude the Division, now or in the future, from utilizing information contained in Respondent’s licensing files for purposes of administering the provisions of AS 47.32 or regulations adopted under authority of AS 47.32.<sup>[11]</sup>

It is undisputed that Ms. Agcaoili continued to operate Shirley’s ALH for more than six months after the 2008 MOA without any further negative licensing history.<sup>12</sup> When it was time for her to renew her license, Ms. Agcaoili decided to take a break from the ALH business, and allowed her license to expire.<sup>13</sup>

In late 2011 or early 2012, Ms. Agcaoili decided to renew her license.<sup>14</sup> Based on conversations she had with Ray Collins, who was previously her licensing contact at the division, she thought she could simply renew or reinstate her prior license without completing all of the paperwork that is required for an initial application.<sup>15</sup> However, she was subsequently told by the division that she would need to submit a complete application for a new license.<sup>16</sup> Ms. Agcaoili did submit that application.<sup>17</sup>

The application form asked whether Ms. Agcaoili holds, or ever previously held, other licenses issued by the Department of Health and Social Services. Ms. Agcaoili did not answer

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<sup>6</sup> Exhibit 2, page 14.

<sup>7</sup> Exhibit 2, pages 25 and 26.

<sup>8</sup> Exhibit 2, page 26.

<sup>9</sup> Exhibit 2, page 3.

<sup>10</sup> Exhibit 2, page 4.

<sup>11</sup> Exhibit 2, page 7.

<sup>12</sup> Testimony of Ms. Agcaoili.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* Mr. Collins denied that he would have told her that. It is unnecessary to determine what Ms. Agcaoili was told because she did submit an application for a new license.

<sup>16</sup> Testimony of Ms. Agcaoili.

<sup>17</sup> Agency Record 0006.

that question.<sup>18</sup> The application asks for a list of any other ALHs she had previously been involved with. Ms. Agcaoili answered that question “N/A.”<sup>19</sup> Finally, the application asked her to attach information concerning any voluntary termination of a license during an investigation. Ms. Agcaoili did not provide any information in response to this request.<sup>20</sup>

### **III. Discussion**

#### **A. *Reliance on Licensing File***

Prior to the hearing, Ms. Agcaoili filed a motion which she characterized as a motion to enforce her prior settlement agreement. She noted that the division had investigated her ALHs, and made several factual allegations, but that the accuracy of those allegations was disputed. Rather than litigate the truth of those allegations, both parties agreed to a settlement reflected in the 2007 and 2008 MOAs. Ms. Agcaoili argued that the underlying facts were never proven and therefore could not be used as the basis for denying her application.

The division argued that the 2008 MOA specifically allowed reliance on the licensing file in the future. Thus, according to the division, it was appropriate for the division to rely on the contents of that file. The parties briefed this issue and an initial ruling was issued holding that the division could rely on the existence of the MOA, but could not rely on the underlying conditions at her ALHs as the basis for denying the application.<sup>21</sup> This ruling was then modified on reconsideration. The extent to which the division could rely on the prior investigations would be determined based on the parties’ intent when entering into the settlement agreements.

There still remains the question as to what extent the division can rely on previously settled allegations. The prior order did not fully address that issue. Whether the division can rely on those allegations will depend in part on whether the parties, through their prior settlement, intended to preclude reliance on facts alleged in the prior investigation report. While licensees would be hesitant to enter into any settlement agreement with the division if the allegations could later be used against them, this settlement agreement does specifically say the division can rely on the contents of its licensing file in the future. The parties should be prepared to present at the hearing any additional evidence that may exist as to the parties’ intent regarding the subject matter of their settlement agreement being used in the future.<sup>22</sup>

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<sup>18</sup> Agency Record 0008.

<sup>19</sup> Agency Record 0009.

<sup>20</sup> Agency Record 0010; Testimony of Ms. Agcaoili.

<sup>21</sup> Order dated December 3, 2012.

<sup>22</sup> Order dated December 11, 2012 (internal footnote omitted).

The parties presented evidence and legal argument on this issue on March 7, 2013. After considering that evidence and argument, a written ruling was issued:

When parties settle allegations, they are in a position to decide the terms of their settlement. Ms. Agcaoili decided to give up her right to contest the accuracy of the allegations in exchange for an agreement by the division not to revoke her license for Shirley's I. She did so while acknowledging that the licensing file might be used against her at some later date. If she wanted to place greater restrictions on the use of the information in that file, the time to do so was when she was negotiating the terms of the memorandum. In the alternative, she could have insisted on a hearing in which the division would have had the burden of proving any violation.

Similarly, the division gave up the right to prove the accuracy of the findings in its investigative reports in exchange for various agreements from Ms. Agcaoili. If the division wanted an agreement that the findings were accurate, the time to do so was when the memorandum was signed. In the alternative, the division could have refused any final settlement that did not include an admission that the findings were accurate.

This means that witnesses to establish the accuracy of the investigative findings will not be permitted; those witnesses are not contained in the licensing file. It also means that Ms. Agcaoili cannot show that the findings were incorrect. The licensing file must stand or fall on its own. The contents either support denial of a license, or they don't. Of course, both parties may present evidence or argument as to how much weight should be given to the contents of the licensing file. It is ultimately up to the final decisionmaker to determine whether Ms. Agcaoili is eligible for a license taking into consideration all relevant evidence, including any relevant admissible evidence contained in the licensing file.<sup>[23]</sup>

Based on this ruling, the division was allowed to present evidence of what was in the licensing file, including the statements made in the investigative reports. Neither party was allowed to prove or disprove the factual accuracy of the statements in those reports.

Michelle Zeimer was the division's Program Manager at the time Ms. Agcaoili's application was denied. She testified that she relied on the entire licensing file in deciding whether to approve the application. Ultimately, Ms. Zeimer denied the application.<sup>24</sup> She testified that the division investigates many complaints, and often those complaints are not substantiated. She believes that means that whatever was alleged in the complaint did not happen.<sup>25</sup> On the other hand, if a complaint is substantiated through an investigation, she

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<sup>23</sup> Order dated March 7, 2013.

<sup>24</sup> Testimony of Ms. Zeimer.

<sup>25</sup> *Id.*

believes that means the allegations in the complaint are more likely than not true.<sup>26</sup> She denied the application in part because she believed the substantiated findings to be true.

Ms. Zeimer placed too much reliance on the findings in the prior investigations when she assumed that, because the allegations were substantiated, the allegations were more likely true than not true. A substantiated finding is not an established fact.<sup>27</sup> Instead, “substantiation” of an allegation means the investigator has reasonable cause to believe<sup>28</sup> the allegation is true, but it is not yet known whether the allegation is actually true. Because there was no evidentiary hearing, Ms. Zeimer should not have treated the allegations as actually true when she decided to deny Ms. Agcaoili’s application.

The prior investigative reports contain multiple allegations. Unlike allegations that are not substantiated – and therefore are likely not true – allegations that are substantiated might be factually correct. Because the settlement agreement specifically allows the division to consider her licensing history, the division could consider these allegations. In doing so, it could also acknowledge that the allegations might be true.<sup>29</sup>

***B. No Deference is Given to the Agency’s Determination***

The division argues that deference should be given to its interpretation of applicable regulations as well as to its expertise in how best to enforce those regulations. From this, the division argues that its decision to deny the license application should be upheld by the commissioner as long as that decision was reasonable.

Reviewing courts will often defer to an agency’s interpretation of a regulation or statute. In addition, deference may be given to an agency’s expertise in a particular area. During an administrative appeal however, the agency, through the commissioner, is still in the process of reaching the final agency decision. The commissioner may exercise his independent judgment as to questions of law, including regulatory interpretation.<sup>30</sup> In exercising that independent

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<sup>26</sup> *Id.*

<sup>27</sup> *See Hill v. Giani*, \_\_\_ P.3d \_\_\_, Slip Op. No. 6756 (Alaska March 8, 2013) at 29 n. 1 (Stowers, J., concurring).

<sup>28</sup> Reasonable cause to believe is the phrase used in the investigation reports. *See Exhibit 2*, page 25; *Exhibit 3*, page 9.

<sup>29</sup> This is something less, however, than a determination that they are true by a preponderance of the evidence.

<sup>30</sup> This principle has previously been applied in a variety of contexts. *See, e.g., Quality Food Service v. Dept of Corrections*, OAH No. 06-0400-PRO (Commissioner of Administration 2006); *In re Rockstad*, OAH No. 08-0282-DEC (Commissioner of Env. Conservation 2008); *In re Providence Health & Services*, OAH No. 11-0045-DHS (Commissioner of Health & Soc. Serv. 2011). *See also, Austin v. Office of Public Advocacy*, OAH No. 11-

judgment, it may be good management practice to take advantage of the division's experience and expertise in a given area, but there is no requirement that the commissioner do so.

In this case, no deference is given to the prior decision because the agency assumed that substantiated findings are probably true. That assumption was incorrect, and placed too much emphasis on the investigative findings. Accordingly, the application and licensing file is analyzed independently. This analysis treats the substantiated allegations as potentially true, but not proven to be more likely true than not true.

**C. Ms. Agcaoili's Application is Denied**

Licensure of assisted living homes is intended

to promote safe and appropriate services by setting standards for licensure that will reduce predictable risk; improve quality of care; foster individual and patient rights; and otherwise advance public health, safety, and welfare.<sup>[31]</sup>

The December 2007 investigative report lists multiple findings concerning Shirley's ALH and possible violations:

1. AS 47.33.300(a)(1) as evidenced by lack of general monitoring and supervision of residents as well as assistance and monitoring during meals, unexplained bruising and compromised resident skin integrity
2. AS 47.33.330(c) as evidenced by lack of appropriate payee representation
3. AS 47.33.020(e)(2) as evidenced by insulin being injected by Ms. Agcaoili
4. 7 AAC 75.310(a)(2) as evidenced by unauthorized management of resident money
5. 7 AAC 75.210(c) as evidenced [by] residents['] needs not being met
6. 7 AAC 10.1040(a)(4) as evidenced by soiled mattress and rail
7. 7 AAC 10.1070(c)(2) as evidenced by unlocked pantry being accessed by children<sup>[32]</sup>

This report also listed potential violations at Galactica ALH

1. AS 47.33.020(e)(2) as evidenced by insulin being injected by Sheralyn Agcaoili
2. 7 AAC 75.210(c) as evidenced by residents needs not being met in their own home
3. AS 47.05.310(a)(3)(5) as evidenced by lack of background check application

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035-PRO (Commissioner of Administration 2012), page 3 ("The commissioner is not limited to simply correcting an abuse of discretion.").

<sup>31</sup> AS 47.32.010(a) (centralized licensing statute applicable to ALH licensure).

<sup>32</sup> Exhibit 2, pages 25 – 26.

4. 7 AAC 10.900(b)(3)(5) as evidenced by lack of background check application<sup>33]</sup>

Ms. Agcaoili has the burden of proving she should be granted a license.<sup>34</sup> The division's licensing file shows she was previously responsible for ALHs that had been investigated, and that the investigations resulted in substantiated findings. Those findings were not proven to be true, but they do exist in the licensing file as more than unfounded complaints. The division is entitled to place some weight on the existences of the substantiated findings when deciding whether to grant a license. Individually, each finding might not be sufficient to deny the license application, but taken together they raise a serious concern about Ms. Agcaoili's ability to properly run an ALH that will be a safe environment for vulnerable adults.

This concern could have been rebutted by Ms. Agcaoili. She could have argued that she has received additional training, or created procedures that would reduce the likelihood of any of the problems reoccurring.<sup>35</sup> She might have argued that findings were based on isolated incidents, or that the violations were relatively minor. The evidence she did present, however, was that she had provided good care to an older adult in the past, from which it could be inferred that she generally did provide good care.<sup>36</sup> In light of the fact that there were several substantiated findings at two different homes, this was insufficient to establish that her application should have been approved.

In addition, Ms. Agcaoili's application left out important information. She did not list either of her prior licenses or the prior ALH's she had been affiliated with. She also did not provide documents related to the prior voluntary termination of Galactica's license.<sup>37</sup> Knowing that Ms. Agcaoili had previously operated an ALH would help it evaluate her application, and inform the division's decision about whether to grant a new license.

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<sup>33</sup> Exhibit 2, page 26.

<sup>34</sup> *State v. Decker*, 700 P.2d 483, 485 (Alaska 1985) (the party seeking initial license has the burden of proving every fact necessary to show entitlement to that license). The burden of proof provisions in AS 44.62 and AS 44.64 do not apply. Although 7 AAC 75.120(b) states that an applicant may contest the denial of a license "as provided in the Administrative Procedure Act," AS 47.32.150(b) states that these hearings *may not* be conducted pursuant to either AS 44.62 or AS 44.64.

<sup>35</sup> Ms. Agcaoili could have done this without admitting that the allegations were true. She could have shown that even if there were reasons for concern in the past, she has taken steps to alleviate those concerns.

<sup>36</sup> Exhibit E.

<sup>37</sup> This was required by 7 AAC 75.080(b)(14).



Ms. Agcaoili explained that she overlooked question 12, asking whether she previously held any license. She further explained that she did not understand the other questions to be asking for information about prior ALH licenses or involvement.

It is possible to overlook a question. In addition, Ms. Agcaoili's first language is not English, so it is possible she did in fact misinterpret the other questions. But even if the failure to provide this information was inadvertent, that is not sufficient to meet Ms. Agcaoili's burden of proof. The division cannot monitor every ALH 24 hours per day. It needs to rely on the licensees to properly complete forms and submit required information. Ms. Agcaoili did not do that when she submitted her application, and the division could properly deny her application for that reason alone.

#### **IV. Conclusion**

Ms. Agcaoili previously operated assisted living homes for which there were substantiated findings of violations. Those findings were of sufficient quantity and severity to raise concerns about her ability to run a safe home. In addition, Ms. Agcaoili failed to submit with her application information requested by the division. Either one of these would be sufficient to deny an application. Accordingly, the division correctly denied Ms. Agcaoili's application for licensure.

This denial does not preclude Ms. Agcaoili from applying for a license in the future.

DATED this 16<sup>th</sup> day of April, 2013.

*Signed*  
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Jeffrey A. Friedman  
Administrative Law Judge

[This document has been modified to conform to the technical standards for publication.]