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IN THE SUPREME COURT OF FLORIDA

Case No. SC20-1814
Lower Tribunal No. 2D20-2750

THE STATE OF FLORIDA, AGENCY FOR HEALTH CARE ADMINISTRATION,

Petitioner,

vs.

YBOR MEDICAL INJURY & ACCIDENT CLINIC, INC.,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW FROM THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

APPENDIX TO PETITIONER'S BRIEF ON JURISDICTION

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

SECOND DISTRICT

YBOR MEDICAL INJURY & ACCIDENT CLINIC, INC.,

Appellant,

v.

AGENCY FOR HEALTHCARE ADMINISTRATION,

Appellee.

Case No. 2D20-2750

Opinion filed November 13, 2020.

Appeal from the Agency For Health Care Administration.

Frank Bane of the Law Office of Frank Bane, St. Petersburg, for the Appellant.

Tracy Cooper George, Chief Appellate Counsel, Tallahassee, for Appellee.

ORDER ON APPELLANT'S MOTION FOR STAY OF FINAL ORDER

ROTHSTEIN-YOUAKIM, Judge.

Previously in this appeal, we issued an unpublished order granting the motion for stay filed by Ybor Medical Injury & Accident Clinic, Inc. ("Clinic"). We now write to explain our reasoning for granting the stay and to certify conflict with the First

District Court of Appeal. The issues before us are (1) how to categorize this administrative proceeding—the categorization determines the stay procedure and the standard that applies—and (2) whether a stay should be granted under that standard. We express no opinion as to the merits of the appeal itself.

The Clinic submitted an application to the Agency for Health Care Administration ("AHCA") to renew its license to operate. AHCA notified the Clinic that there were omissions in the application. The Clinic failed to timely respond,[1] and AHCA sent the Clinic a notice of its intent to deem the application incomplete and withdrawn from further consideration ("notice of intent"), consistent with the governing statute. See § 408.806(3)(b), Fla. Stat. (2019) ("Requested information omitted from an application for . . . license renewal . . . must be filed with the agency within 21 days after the agency's request for omitted information or the application shall be deemed incomplete and shall be withdrawn from further consideration . . . ."). After an informal hearing on the notice of intent, the hearing officer recommended that AHCA uphold the notice, such that the Clinic's license should lapse. In the final order on appeal, AHCA adopted the hearing officer's recommended order, upheld the notice of intent, and "withdr[ew]" the Clinic's licensure renewal application. The final order also extended the license period for thirty days to allow the Clinic to wind up its operations. Shortly after filing its notice of appeal, the Clinic moved for this court to stay the order. For the reasons explained below, we granted the Clinic's motion for stay pending final disposition of the appeal or until further order of this court.

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[1]The Clinic asserted that it had never received AHCA's notice of omissions.

The Clinic sought its stay pursuant to Florida Rule of Appellate Procedure 9.190(e)(2)(C) and section 120.68(3), Florida Statutes (2020). The statute provides that if an

> agency decision has the effect of suspending or revoking a license, supersedeas shall be granted as a matter of right upon such conditions as are reasonable, unless the court, upon petition of the agency, determines that a supersedeas would constitute a probable danger to the health, safety, or welfare of the state.

§ 120.68(3). In practice, however, the agency does not initiate an objection to the stay by filing a "petition"; pursuant to the procedural rule, after the appellant seeks a stay in the appellate court by motion, the court directs a response (which functions as the statutory "petition") from the agency. See Fla. R. App. P. 9.190(e)(2)(C) ("When an agency has suspended or revoked a license other than on an emergency basis, a licensee may file with the court a motion for stay on an expedited basis. The agency may file a response within 10 days of the filing of the motion, or within a shorter time period set by the court. Unless the agency files a timely response demonstrating that a stay would constitute a probable danger to the health, safety, or welfare of the state, the court shall grant the motion and issue a stay.").

The Clinic's stay motion assumes that the order on appeal "has the effect of suspending or revoking [its] license," see § 120.68(3), and that was this court's initial view when we ordered a response from AHCA. AHCA, however, contests this assumption, citing Beach Club Adult Center, LLC v. Agency for Health Care Administration, 43 Fla. L. Weekly D1493 (Fla. 1st DCA June 28, 2018). The appellant in that case was in the same administrative posture as the Clinic is here. The First District denied the appellant's motion to stay, ruling that

> Appellant is not entitled to a stay under section 120.68(3) and rule 9.190(e)(2)(C) because the final order does not revoke Appellant's license. Instead, the final order deemed the application withdrawn. Section 120.68(3) and rule 9.190(e)(2)(C) only apply "if the agency decision has the effect of suspending or revoking a license."

Id. at D1493.[2]

Although we acknowledge that the order on appeal in the present case does not "suspend or revoke" the Clinic's license per se, we conclude that it does "*ha[ve] the effect of* suspending or revoking [that] license." See § 120.68(3) (emphasis added). The word "effect" may be defined as "[s]omething brought about by a cause or agent; a result . . . [p]roduction of a desired impression . . . [t]he basic or general meaning; import." Effect, The American Heritage Dictionary of the English Language, https://ahdictionary.com/word/search.html?q=effect (last visited Oct. 13, 2020) (emphasis added); cf. effectively, The American Heritage Dictionary of the English Language, https://ahdictionary.com/word/search.html?q=effectively (last visited Oct. 13, 2020) ("For all practical purposes; in effect"). The Clinic wants to maintain its license and continue its operations; that is why it submitted a renewal application and contested AHCA's notice of intent. AHCA's final order "withdraw[s]" the Clinic's renewal application. We view that act as "ha[ving] the effect of," i.e., producing the same "result" as, a revocation. Alternatively, and to the extent that AHCA argues in response to the Clinic's motion that the Clinic can, after its current license lapses, apply for a new

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[2]If an order does anything other than "ha[ve] the effect of suspending or revoking a license," § 120.68(3), the procedures delineated in rules 9.190(e)(2)(A) and 9.310 apply. Cf. Fla. Dep't of Health v. Mendelsohn, 150 So. 3d 1285, 1285–86 (Fla. 1st DCA 2014) (reading these two rules in pari materia and contrasting them with rule 9.190(e)(2)(C)).

license, the order on appeal can be seen as "ha[ving] the effect of" suspending the Clinic's license to operate.

Moreover, if the legislature had intended to limit the availability of a stay to situations in which an agency order revokes or suspends a license, it easily could have employed more restrictive wording. Instead, however, the legislature used the phrase "has the effect of" suspension or revocation, which contemplates something broader than suspension or revocation alone. Finally, to the extent that the legislature has provided an opportunity for a licensee to maintain its license pending appeal in the face of agency action as serious as revocation or suspension of its license, it seems reasonable that the same opportunity would be available when the agency takes some lesser action against the licensee that, as here, "has the effect of" a suspension or revocation.

In denying relief in this same circumstance, the First District in Beach Club relied specifically on Terrell Oil Co. v. Department of Transportation, 541 So. 2d 713 (Fla. 1st DCA 1989), and Silver Show, Inc. v. Department of Business & Professional Regulation, 763 So. 2d 348 (Fla. 4th DCA 1998). See Beach Club, 43 Fla. L. Weekly at D1493. In Terrell Oil, 541 So. 2d at 715, the court observed that there is "a qualitative difference between the type of order . . . that denies renewal of [a] license that has expired or is about to expire and one which suspends or revokes an active license." We do not dispute that there is a "qualitative difference" between an order that denies or withdraws a license renewal application and an order that outright suspends or revokes a license. That difference, however, does not necessarily inform whether the former "*has the effect of*" the latter. As discussed above, we conclude that it does.

To the extent that Beach Club relies on Silver Show, the agency in that case had denied the appellant's *initial* applications for a liquor license. Silver Show, 763 So. 2d at 349. The appellants sought a stay under section 120.68(3), which the court correctly denied on the ground that "[t]here is nothing in the statutory scheme that would suggest" that the denial of an initial application for a license "has the effect of suspending or revoking a license." Silver Show, 763 So. 2d at 349. Beach Club emphasizes Silver Show's explanation that an agency's decision to deny a license application is not a sanction, which revocation is, but regulatory, such that the denial of an initial license application is not equivalent to a license revocation for purposes of section 120.68(3). Beach Club, 43 Fla. L. Weekly at D1493 (citing Silver Show, 763 So. 2d at 349). But again, that distinction, although true, is not pertinent to determining whether section 120.68(3) applies.[3] By applying to orders that have the effect of "suspending or revoking" a license, section 120.68(3) necessarily presupposes that a license already exists, and by definition, a license that does not yet exist cannot be "suspended or revoked." Thus, section 120.68(3) by its terms does not apply to an order denying an initial application for a license, and Silver Show is inapposite to a licensee in the Clinic's administrative posture.

Having determined that section 120.68(3) and rule 9.190(e)(2)(C) govern this appeal, we further conclude that AHCA has failed to demonstrate that a stay of the order on appeal, i.e., that allowing the Clinic to continue to operate under its current license, "would constitute a probable danger to the health, safety, or welfare of the

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[3]Indeed, to a going concern ordered to close its doors, it matters little whether the order effecting that result is characterized as a "sanction" or merely "regulatory."

state." § 120.68(3). We therefore granted the Clinic's motion for stay, on the condition that AHCA would retain all statutory and regulatory authority to regulate the Clinic.

We certify conflict with the First District in Beach Club.

Motion granted; conflict certified.

CASANUEVA and STARGEL, JJ., Concur.

CERTIFICATE OF SERVICE

I CERTIFY that the foregoing document has been furnished by Electronic Mail to Counsel for Appellant, Frank Bane, Esquire, frankbanelaw@gmail.com, 605 75th Avenue, St. Petersburg, Florida 33706, on December 28, 2020.

/s/ *Nicholas A. Merlin*
Nicholas A. Merlin