IN THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO

McKinney Homes, Inc.,	*	Case No. CI 0201703041
Appellant,	*	Honorable Dean Mandros
vs.	*	**OPINION AND JOURNAL ENTRY**
Ohio Department of Developmental Disabilities,	*	
	*	
Appellee.		

This cause is before the Court upon Appellee's Request for Reconsideration of the Court's June 23, 2017, Order granting Appellant's Emergency Motion for Suspension of the Execution of Appellee's Order revoking Appellant's certifications. For the reasons that follow, the Court finds Appellee's Request for Reconsideration well-taken.

I. FACTS AND PROCEDURAL BACKGROUND

Appellant McKinney Homes, Inc. ("MHI") is an agency provider, certified to provide homemaker personal care, non-medical transportation, and other services under the Individual Options, Level One, Self-Empowered Life Funding, and Supported Living Waiver programs for developmentally disabled individuals. MHI currently provides services for four such individuals.

As an agency provider, MHI was subject to periodic compliance inspections by Appellee Ohio Department of Developmental Disabilities ("DODD"). On December 16, 2015, the DODD

conducted a compliance review during which MHI was cited for twelve violations of the administrative rules governing agency providers. Three of the twelve violations were immediate citations, requiring immediate corrective actions while the reviewers were on site, and six were repeat citations from a regular compliance review conducted in July 2011. The violations included, among others, failing to adequately track the dosages of medication which were given to individuals in its care, allowing employees to work without first completing background checks and drug tests or being cleared by a physician, allowing employees to work without first checking the Sex Offender Registry, failing to evidence completion of daily vehicle inspections, failing to evidence a system to record any financial transactions, and failing to evidence any service delivery documentation for individuals in its care.

An administrative hearing in this matter was held May 31 and June 1, 2016, during which LaVina McKinney, MHI's CEO, conceded that the citations in the December 16, 2015 review were accurate, but stated that she was prevented during the review from retrieving documents responsive to many of the deficiencies cited due to a broken ankle. She also testified that no harm came to any of the individuals in her care as a result of the rule violations cited and that her agency was making improvements in document maintenance. The Hearing Officer filed a written report on July 29, 2016, setting forth findings of fact, conclusions of law, and recommendations that MHI's certifications be revoked. On October 12, 2016, the Director of DODD issued his Adjudication Order approving and adopting the findings of fact and conclusions of law set forth in the Hearing Officer's Report and Recommendation and ordering that MHI's certifications as an Individual Options Waiver, Level One Waiver, Self-Empowered Life Funding Waiver, and Supported Living provider be revoked.

On November 2, 2016, MHI timely filed its Notice of Appeal of the Adjudication Order with Lucas County Common Pleas Court where it was docketed as Case No. CI 0201604946. On April 17, 2017, this Court issued an order reversing and remanding the case for further proceedings to consider the objections to the Hearing Officer's Report and Recommendations filed by LaVena and Gilbert McKinney.

DODD's Director reconsidered the case, including the McKinneys' objections, and issued on May 30, 2017, a new Adjudication Order again revoking MHI's certifications. On June 22, 2017, MHI timely filed the instant appeal of the new Adjudication Order.

MHI thereafter filed an Emergency Motion for Suspension of the Execution of the new Adjudication Order, which was granted on June 23, 2017. This cause is now before the Court upon DODD's Request for Reconsideration of the Court's Order granting suspension.

II. DISCUSSION

A. Evidentiary Matters

MHI relies on the following affidavits attached to its Motion and Reply briefs to support its arguments therein: June 21, 2017 affidavit of LaVina McKinney; November 8, 2016 affidavit of Gilbert McKinney; November 8, 2016 and July 5, 2017 affidavits of Lin Van Nest; November 8, 2016 and July 5, 2017 affidavits of Annette Baker; November 7, 2016 and July 5, 2017 affidavits of Marilyn Osenbaugh; and the November 8, 2016 and July 5, 2017 affidavits of John Grant. Since these affidavits were executed subsequent to the Director of DODD's Adjudication Order, they are not part of the record below and, thus, are not admissible in this administrative appeal. *County Med, Inc. v. Ohio Department of Developmental Disabilities*, 8th Dist. Cuyahoga No. 104921, 2017-Ohio-5745.

B. Suspension of DODD Order Pending Appeal

Pursuant to R.C. 119.12(E), the filing of an appeal to the common pleas court does not automatically operate as a stay of the administrative order. In an appeal from an order of the DODD, the Court may stay an administrative order "if it appears to the court that an unusual hardship to the appellant will result from the execution of the agency's order pending determination of the appeal and the health, safety, and welfare of the public will not be threatened by suspension of the order." Id.

The Tenth District Court of Appeals, pursuant to federal caselaw, set forth the following factors as logical considerations when determining whether it is appropriate to stay an administrative order pending judicial review: (1) whether appellant has shown a strong or substantial likelihood or probability of success on the merits; (2) whether appellant has shown that it will suffer irreparable injury; (3) whether the issuance of a stay will cause harm to others; and (4) whether the public interest would be served by granting a stay. *Bob Krihwan Pontiac-GMC Truck, Inc.*, 141 Ohio App.3d 777, 783, 753 N.E.2d 864 (10th Dist. 2001). However, the same court recently emphasized that "[w]hile those factors may be helpful in directing the trial court's analysis in these cases, * * * their express consideration is not required, because the ultimate questions to be answered in these cases are set forth in the statute: whether the appellant demonstrates an unusual hardship as a result of the Board's order and, if so, whether the health, safety, and welfare of the public will be threatened by suspension of the order." *de Bourbon v. State Medical Board of Ohio*, 10th Dist. Franklin No. 16AP-669, 2017-Ohio-5526, fn.3.

1. **Unusual Hardship**

MHI argues that denial of the requested stay will irreparably harm MHI and the McKinneys as they will have to close down their business in its entirety, MHI is the sole source of income for the McKinneys, and the cost of starting over would be enormous. DODD counters that the only potential loss alleged is a financial one and that is insufficient to constitute "unusual hardship". Furthermore, the fact that MHI would be forced to close its doors is an expected result of failure to comply with DODD standards and losing one's license, citing *Gill v. State Medical Board of Ohio*, Franklin C.P. No. 07 CVF-09-11839 (Sept. 14, 2007) ("[l]oss of income, property, clients, employees, and reputation are inherent results of loss of license and do not constitute unusual hardship") and *Dolce v. State Board of Chiropractic Examiner*, Franklin C.P. No. 92CVF-11-9231 (Mar. 10, 1993) ("loss of practice, building, and equipment does not constitute unusual hardship"). *See also*, *de Bourbon, supra*, 2017-Ohio-5526, ¶¶ 9-10 (appellant's claims of economic hardships were assumed with the loss or suspension of a license and, therefore, did not constitute an unusual hardship); *Osei-Bonsu v. Ohio Board of Nursing*, Franklin C.P. No. 14CV-06708, 2014 Ohio Misc. LEXIS 17537 (Aug. 1, 2014) (stay denied where appellant failed to demonstrate that she would suffer a hardship other than her loss of income, which is an inherent result of the revocation of any medical license); *AM Mart, LLC v. Ohio Department of Commerce*, Franklin C.P. No. 13CV-09777, 2013 Ohio Misc. LEXIS 11870 (Sept. 19, 2013) (stay denied where the only potential harm to appellant was substantial financial damage); *Brown Motor Sales Co. v. Hyundai Motor American*, Franklin C.P. No. 10-CVF-02-2816, 2010 Ohio Misc. LEXIS 20449 (Feb. 23, 2010) (loss of dealership is not an unusual hardship).

MHI relies on *Inrex Home Care, LLC v. Ohio Department of Developmental Disabilities*, 2016-Ohio-7986, ¶ 13, 76 N.E.3d 681 (10th Dist.) which held "[a] risk of loss or damage to a business entity qualifies as irreparable harm," quoting *Franks v. Rankin*, 10th Dist. Franklin No. 11AP-962, 2012-Ohio-1920, ¶ 36. Nevertheless, the majority of similar cases involving the DODD found that the potential harm to the providers was solely financial in nature and thus did not constitute unusual hardship where the appellants argued they would sustain substantial financial damage if the court did not suspend the department's actions pending appeal. *See, e.g., Thomas Ministries v. Ohio Department of Developmental Disabilities*, Lucas C.P. No. CI 201605075 (Nov. 30, 2016); *Hearts of Hope Institute, Inc. v. Ohio Department of Developmental Disabilities*, Franklin C.P. No. 13-CV-04-4236 (May 2, 2013) (noting that "this Court and many other Ohio Courts have consistently held that a finding of unusual hardship under R.C. 119.12 requires more than loss of income, clients, employees, and reputation.")

Even if the affidavits attached to MHI's briefs are considered, they merely assert a potential loss of income to the McKinneys and harm to their reputation if the request for a stay is denied. For example, LaVina and Gilbert McKinney attest that MHI is their sole source of income, the financial expenditures and commitments by MHI will be impossible to keep if MHI can no longer stay in business, continuing to make payments on three vans will present an additional serious hardship, and the immediate revocation of MHI's license would make it difficult to find work in their field of experience. The economic harms MHI predicts will result if the stay is not issued do not rise to the level of extraordinary circumstances; rather, they are unfortunate but predictable harms that would result whenever any provider has its certifications revoked. The Court, therefore, finds that this is

insufficient evidence that an unusual hardship to MHI will result from the execution of DODD's order pending determination of the appeal.

2. **Harm to Others**

MHI maintains that the requested stay will not cause any harm to others because (1) there is no evidence that any of the deficiencies identified in the 2015 review has ever caused harm to any person under the care of MHI or its employees, (2) failure to obtain criminal background checks on the two employees presents little threat of harm because one is the long-time husband of the CEO of MHI and the other is an experienced direct care provider long known and observed professionally by the CEO, (3) at no time was R.M. ever double dosed, and (4) the McKinneys have taken important steps toward resolving their documentation problems which comprise the great bulk of the deficiencies raised against them.

On the other hand, DODD stresses that an agency provider is responsible for taking care of a largely dependent and vulnerable population and the only way DODD can ensure they are protected is to enforce its rules and regulations governing certified agency providers. In addition, MHI was issued a citation in both 2011 and 2015 for failure to document medication dosages. It is clearly dangerous for a provider to fail to properly record dosages of medication because it could result in overdosing or not providing medication to disabled individuals who require it. Finally, DODD argues that it is immaterial that the two employees at issue have histories with the CEO Ms. McKinney as MHI was given ample time to make the corrections.

According to his July 29, 2016, Report and Recommendation, the Hearing Officer expressly held that the deficiencies could be harmful to others:

> Respondent failed to continue to meet (or meet in the first instance) applicable certification standards, that failure was systemic in nature, and that failure created substantial risks to the health and safety of individuals who received or would receive services from Respondent. In particular, Respondent failed to show that it met the applicable certification standards with respect to required database and criminal background checks, physician's examinations and drug screening of employees, and incident reporting. All of these deficiencies have the potential to cause harm to the individuals in Respondent's care.

The Director of DODD issued an Adjudication Order approving and adopting the Hearing Officer's findings of fact and conclusions of law. When asked to stay an administrative order, courts must give significant weight to the expertise of the administrative agency, as well as to the public interest served by the proper operation of the regulatory scheme. *Bob Krihwan Pontiac-GMC Truck, supra,* 141 Ohio App.3d at 782; *AM Mart, supra,* 2013 Ohio Misc. LEXIS 11870, at *10. Moreover, MHI has presented no evidence that the issuance of a suspension will not cause harm to others.

3. **Public Interest**

According to MHI, the failure to grant the requested stay will harm the very people that the law was intended to protect, as well as their families, because change is hard for these individuals and they have developed a trusting relationship with the MHI employees. This same argument was rejected in *Thomas Ministries, supra,* where the court noted that "Ohio law expressly provides for the protection of the rights of individuals with developmental disabilities to obtain qualified services from the providers of their choice or to obtain assistance in choosing such providers." In addition, the DODD correctly stated that these individuals benefit from receiving services from providers that comply with the certification standards. Consequently, the Court finds that the public interest in granting a stay carries little weight under these circumstances.

4. **Likelihood of Success on the Merits**

As MHI points out, courts are reluctant to accord much weight to this factor, since that is a determination to be made after a full review of the record.

In conclusion, after considering the factors expressed in *Krihwan*, the Court finds that execution of the DODD Order pending MHI's appeal will not result in unusual hardship to MHI, will not harm the public health, safety, and welfare, and will serve the public interest. Accordingly, MHI is not entitled to a suspension of the DODD's Order.

JOURNAL ENTRY

It is **ORDERED** that Appellee's Request for Reconsideration is **GRANTED** and Appellant's Emergency Motion for Suspension of the Execution of Appellee's Order is **DENIED**.

Date: 8-1-17

Dean Mandros, Judge