STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JESSE BRANCALEONE, N.C.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 97-5276F
	)	
DEPARTMENT OF HEALTH, BOARD OF MEDICINE,	)	
	)	
Respondent.	)	
_____	)	

FINAL ORDER

Pursuant to notice, a formal hearing was held in this case on February 10, 1998, at Tallahassee, Florida, before Claude B. Arrington, a duly designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: E. Renee Alsobrook, Esquire
Alsobrook and Dove, P.A.
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Tallahassee, Florida 32302-2426

For Respondent: John E. Terrel, Esquire
Senior Attorney
Agency for Health Care Administration
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STATEMENT OF THE ISSUES

Whether Petitioner is entitled to an award of attorney's fees and costs under the Florida Equal Access to Justice Act, Section 57.111, Florida Statutes.

PRELIMINARY STATEMENT

Petitioner was the prevailing party in DOAH Case No. 96-3354, a proceeding to discipline Petitioner's licensure as a nutritional counselor. When the underlying matter was initiated by the filing of the Administrative Complaint on April 25, 1996, the agency responsible for the discipline of nutritional counselors was the Agency for Health Care Administration (AHCA). On July 1, 1997, those responsibilities were transferred to the Department of Health (DOH). The Recommended Order in the underlying proceeding was issued by the undersigned to AHCA on June 5, 1997. The Final Order in the underlying proceeding, issued by the DOH on September 8, 1997, adopted the findings of fact contained in the Recommended Order. The Final Order also determined that there was competent, substantial evidence to support the conclusions of law of the Recommended Order and, consistent with the recommendation, dismissed the Administrative Complaint.

On November 7, 1997, Mr. Brancaleone filed a timely Application for Award of Attorney's Fees and Costs pursuant to Florida Equal Access to Justice Act, Section 57.111, Florida Statutes. DOH contested the application on the grounds that Mr. Brancaleone was not a small business party when the agency action was initiated against him, and asserted the statutory defense that the agency action had substantial justification at the time it initiated the disciplinary action.

At the formal hearing, the only witness for either party was Mr. Brancaleone, who testified on his own behalf. Mr. Brancaleone presented two exhibits, both of which were admitted into evidence. DOH presented five exhibits, each of which was accepted into evidence. The parties also stipulated to certain facts, which will be reflected in the Findings of Fact portion of this Final Order. At the request of the parties, official recognition was taken of Chapters 120, 455, and 468, Florida Statues; Section 57.111, Florida Statutes; Chapter 60Q-2, Florida Administrative Code; Rule 64B8-43.002, Florida Administrative Code; and the pleadings of DOAH Case No. 97-5276.

A transcript of the proceedings has been filed. At the request of the parties, the time for filing post-hearing submissions was set for more than ten days following the filing of the transcript. Consequently, the parties waived the requirement that a Final Order be rendered within thirty days after the transcript is filed. Rule 60Q-2.031, Florida Administrative Code.

The parties filed proposed final orders, which have been duly considered by the undersigned in the preparation of this Final Order. On March 30, 1998, DOH moved to strike the portion of Mr. Brancaleone's Proposed Final Order that attacks the qualifications of the probable cause panel. No response to that motion has been filed by Mr. Brancaleone. Mr. Brancaleone's argument that the probable cause panel was not properly

constituted was raised for the first time in his post-hearing brief and has not been considered by the undersigned in resolving this matter.

FINDINGS OF FACT

1. By letter dated November 9, 1995, Dr. Francisco Belette, an oncologist, filed a complaint with the Department of Professional Regulation pertaining to Mr. Brancaleone's dealings with Christine B., a cancer patient who was being treated by Dr. Belette. That letter describes the unfortunate progression of his patient's breast cancer and includes the following:

> It was decided to start Christine on Tamoxifen therapy on 10/18/95. This therapy is being given in conjunction with aggressive chemotherapy and ultimately a stem cell transplant. It is my intention to offer Christine a chance at long term survival.
>
> Christine returned on 10/24/95 for f/u (a follow up visit). At this time she informed me of her conversations with Mr. Jesse Brancaleone. This gentlemen is a "nutritionist" who works at the Palm Lakes Natural Food Market. According to Christine this "nutritionist" advised her to stop taking the Tamoxifen immediately since he feels "Tamoxifen like other drugs we administer, are poisons." He claims that he "has treated thousands of cancer patients and that what we doctors do to patients is a travesty. We poison them without research." On the contrary, Tamoxifen has more than proven its role in the treatment of breast cancer.
>
> I am deeply troubled by what this gentlemen has said to my patient. He has jeopardized my patient/doctor relationship. I feel he is giving false information to patients and therefore practicing medicine without a license.
>
> I would appreciate your immediate intervention and investigation into this matter. . . .

2. Thereafter, Daniel A. Pantano investigated the complaint on behalf of the agency and submitted an Investigative Report

that was made available to the probable cause panel when it considered this matter.

3. As part of his investigation, Mr. Pantano interviewed Dr. Belette and Christine B. by telephone. The Investigative Report reflected that Dr. Belette's telephone interview confirmed the allegations made in his letter of November 9, 1995. The Investigative Report reflected that the telephone interview of Christine B. confirmed that Mr. Brancaleone told Christine B. that she should stop taking the Tamoxifen medication that had been prescribed by Dr. Belette.

4. By letter dated January 10, 1996, Mr. Pantano advised Mr. Brancaleone of Dr. Belette's allegations and gave him an opportunity to respond.

5. By letter dated January 23, 1996, Mr. Brancaleone wrote the following letter in response to Mr. Pantano's letter of January 10, 1996:

> Please allow this letter to be my response to a complaint made by a Dr. Belette concerning one of his patients.
>
> Christine [B.] came to me for help due to her concerns over the failure of Dr. Belette in treating her breast cancer as her cancer markers continue to increase along with malignant cells over the past three years. She wanted me to build her immune system, nutritional status, and to supply her with information concerning the use of drugs and alternative methods of treatment.
>
> It was my intention to give Christine all of the information she desired concerning what nutrition and lifestyle changes have to offer her, the well known and documented side effects of taking drugs, alternative medical doctors and treatments she should consider in

order to make an informed and educated decision as to what treatment she deems best for herself.

I tell my clients only to be aware of the dangers and side effects of taking drugs as well as other chemicals. I do not give false information as Dr. Belette contends. The toxic reactions and side effects of drugs and other chemicals are stated in the Physicians Desk Reference, reported in prestigeous [sic] medical journals and institutions by research scientists and medical doctors throughout this country and world. This information is available to the general public.

As a professional, I have an obligation to my clients to make them aware of any substance that will retard their nutritional status and immunity.

I work with many wholestic [sic] medical doctors, knowledgable [sic] in the need to nutritionally support the body. They know the importance nutrition plays in their patients [sic] ability to recover.

In my twenty-five years as a practicing nutritionist and six years on the radio helping people recover form illness and educating them as to a healthy lifestyle, I have never hurt anyone or had a complaint such as this.

It is unfortunate that Dr. Belette is so ill-informed about orthomolecular [sic] medicine and nutritional biochemistry. Full disclosure, effects of treatments, success and failure rates, the right to a second opinion and alternative treatments are a basic right [sic] of all people.

Dr. Belette, in my opinion, has compromised his patient's ability to make an informed choice and his desire to keep her ill-informed is the basis of this complaint.

Please feel free to contact me at anytime.

6. At the times pertinent to this proceeding, the North Probable Cause Panel for the Board of Medicine consisted of Dr. George Slade, M.D., Fred Varn, and Dr. Georges El-Bahri. Randy Collette, Esquire, was the attorney representing the Agency

for Health Care Administration. Michael A. Mone', Esquire, was acting counsel for the Board of Medicine.

7. The North Probable Cause Panel of the Board of Medicine considered this matter at a meeting on April 24, 1996. At the beginning of the meeting, Mr. Varn, Mr. Mone', and Mr. Collette were physically present at the Northwood Center in Tallahassee, where the meeting took place. Dr. El-Bahir participated in the meeting by telephone. Also present were Jim Cooksey and Bob Gary. Mr. Cooksey identified himself as being with "investigations." Mr. Gary identified himself as "OMC manager for north Florida."

8. At the beginning of the meeting, certain precautionary instructions were given by the attorneys. Dr. Slade arrived at the meeting after the precautionary instructions were given but before the consideration of Mr. Brancaleone's case. Mr. Mone' advised Mr. Varn and Dr. El-Bahir that any questions concerning interpretation of the laws or rules, including the questions as to the duties of the probable cause panel, should be directed to him. Mr. Mone' also advised that Mr. Collette, as the attorney for the agency, had the responsibility of explaining the facts of the case, the reasons the agency was making its recommendation, and of answering any questions concerning the facts, the investigation, and the recommendation. Mr. Mone' further advised that the probable cause panel should not "rubber stamp" the proposed agency action, but that it should have a meaningful

discussion of the reasons why probable cause is found.

9. Both Mr. Varn and Dr. El-Bahir acknowledged they had the Investigative Report and the attachments, including the letters discussed above. Dr. Slade arrived after these acknowledgments were made.

10. The transcript of the Probable Cause Panel meeting reflects, in pertinent part, the following:

> MR. COLLETTE: A-15, Jesse Brancaleone, nutrition counselor 95-17792. In February of 1993 patient CB was diagnosed as suffering from breast cancer by physician [sic], the patient had stage-two invasive duct carcinoma and started on four cycles of admiacin (ph) and two cycles of Cytosan is that it? C-y-t-o-s-a-n.
>
> MR. MONE: Cytosan.
>
> MR. COLLETTE: Cytosan. Okay. In October of '95, the patient was also started on tamoxifen therapy to be given in conjunction with aggressive chemotherapy. The patient subsequently presented to Respondent for nutritional counseling. Respondent advised the patient to discontinue taking the tamoxifen. Respondent advised the patient that the tamoxifen and other drugs prescribed by patient's physician were poisons. Respondent presented the petitioner with a written statement in January '96 which states that the patient presented to him to obtain information regarding her immune system, nutritional status and to supply her with information regarding the use of drugs and alternative methods for treatment of cancer. Respondent further indicated he advised the patient of the side effects of the medication prescribed by her physician. It's therefore alleged Respondent attempted to implement a dietary plan for a condition for which the patient was under active care of a physician, without the oral or written dietary order of the patient's physician, in violation of the provisions of Section 468.516(1)(a). It's further alleged Respondent inappropriately attempted to treat the patient's condition by means other than by dietetics and nutrition practice. Based on these facts, the Agency is alleging violations of 468.518(1)(a) and (j), recommends probable cause be found and an administrative complaint be filed. Because of the facts of the case the Agency recommends permanent revocation or suspension be sought as the maximum penalty available in the case.

DR. SLADE: Motion?
DR. EL-BAHRI: Moved.
DR. SLADE: Second. This is certainly an egregious violation, it seems to me.
MR. MONE': You don't have an (h) violation then, too, do you?[1]
MR. COLLETTE: No.
DR. SLADE: (h) violation?
MR. MONE': Is there an (h) violation that you are suggesting in there as well?
MR. COLLETTE: I don't think so.
MR. MONE': Committing an act of fraud or deceit or negligence or competency or misconduct.
MR. COLLETTE: I don't have an opinion that backs me up to go that far.
MR. MONE': Okay.
MR. COLLETTE: I think that's something that we maybe were looking at at one time, but I didn't have enough to go forward on it.
DR. SLADE: It doesn't speak for itself, though? It seems to me.
MR. MONE': The problem is that while you and I and most of the medical world may agree that it speaks for itself, in the course of a prosecution, the hearing officer is going on those types of violations to rely on an expert opinion and some expert to come in and say that it is.
MR. COLLETTE: I think it's much more evident on its face for the violation of inappropriately attempting to treat patient's means, by means other than dietetic or nutrition practices. I think that's something that anybody can see, you know. Nutrition counselors and dieticians are not in the realm of deciding when or when not to prescribe tamoxifen or other chemotherapy or treatment drugs of that nature; that's strictly the purview of specialized physicians and not nutrition counselors.
DR. EL-BAHRI: Dr. Slade.
DR. SLADE: Yes.
DR. EL-BAHRI: Isn't it clear that he attempted to discontinue or he discontinued the tamoxifen, right?
DR. SLADE: Yes.
MR. COLLETTE: That's what the patient is alleging and will swear to, is that the

nutrition counselor told her to stop taking the tamoxifen.
DR. EL-BAHRI: Which is, by itself, is a pretty serious violation.
MR. COLLETTE: Yes, it is; but it's the violation of attempting to treat a patient by means other than nutrition counseling. He is basically -
DR. EL-BAHRI: Practicing without a license. [2]
MR. COLLETTE: He is very, very close to that offense, yes, sir. Very close.
DR. SLADE: And we -permanent record-okay, I just wanted to make sure.
MR. COLLETTE: Yes.
DR. SLADE: Okay. All in favor?
(Chorus of ayes.)

11. Based on the stipulation of the parties, it is found that the amount of attorney's fees and costs reflected by the affidavit filed prior to hearing were reasonable and necessary up to the point of October 29, 1997.

12. Based on the stipulation of the parties, it is found that the there are no circumstances which would make an award of fees and costs unjust.

13. Based on the stipulation of the parties, it is found that the DOH and AHCA were not nominal parties in DOAH Case No. 96-3354.

14. Based on the stipulation of the parties, it is found that Mr. Brancaleone was a prevailing party in DOAH Case No. 96-3354.

15. The affidavit filed at the formal hearing in this proceeding, is, in the absence of any evidence to the contrary, found to be for services that were reasonable and necessary.

16. At all times pertinent to this proceeding, Part X of Chapter 468, Florida Statutes, consisting of Sections 468.501 through 458.518, constituted the Florida Dietetics and Nutrition Practice Act.

17. At all times pertinent to this proceeding, Section 468.516(1)(a), Florida Statutes, has provided as follows:

> (1)(a) A licensee under this part shall not implement a dietary plan for a condition for which the patient is under the active care of a physician licensed under chapter 458 or chapter 459, without the oral or written dietary order of the referring physician. In the event the licensee is unable to obtain authorization or consultation after a good faith effort to obtain it from the physician, the licensee may use professional discretion in providing nutrition services until authorization or consultation is obtained from the physician.

18. At all times pertinent to this proceeding, Section 468.518(1)(a) and (j), Florida Statutes, have provided as follows:

> (1) The following acts constitute grounds for which the disciplinary actions in subsection (2) may be taken:
> (a) Violating any provision of this part, any board or agency rule adopted pursuant thereto, or any lawful order of the board or agency previously entered in a disciplinary hearing held pursuant to this part, or failing to comply with a lawfully issued subpoena of the agency. The provisions of this paragraph also apply to any order or subpoena previously issued by the Department of Business and Professional Regulation during its period of regulatory control over this part.
>
> * * *
>
> (j) Treating or undertaking to treat human ailments by means other than by dietetics and nutrition practice or nutritional counseling.

19. Count One of the Administrative Complaint in DOAH Case No. 96-3354 charged that Mr. Brancaleone attempted to implement a dietary plan for Christine B., thereby violating the

provisions of Section 468.516(1)(a), Florida Statutes. The violation of Section 468.516(1)(a), Florida Statutes, was alleged to be a violation of Section 468.518(1)(a), Florida Statutes.[3]

20. Count Two of the Administrative Complaint in DOAH Case No. 96-3354 charged that Mr. Brancaleone attempted to treat Christine B.'s condition by means other than by dietetics and nutrition practice.[4]

21. Mr. Brancaleone is the owner of a Subchapter S corporation named Palm Lakes Natural Food Market and Café, Incorporated, which operates as a natural food market and café in Margate, Florida. At the times pertinent to this proceeding, Mr. Brancaleone engaged in the practice of nutritional counseling in the back of the natural food market and café. The fees earned by Mr. Brancaleone as a nutritional counselor are paid directly to him, not to his corporation. Although he testified that he was an employee of that corporation and that he practiced from facilities owned by that corporation, Mr. Brancaleone did not establish that he practiced nutritional counseling through his corporate entity.

22. Mr. Brancaleone did not have a net worth of two million dollars or more at any time pertinent to this proceeding. Mr. Brancaleone's corporation did not have a net worth of two million dollars or more at any time pertinent to this proceeding.

23. Mr. Brancaleone did not employ more than twenty-five full time employees at any time pertinent to this proceeding.

Mr. Brancaleone's corporation did not employ more than twenty-five full time employees at any time pertinent to this proceeding.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction of the parties to and the subject of this proceeding. Section 120.57(1), Florida Statutes.

25. Section 57.111, Florida Statutes, the Florida Equal Access to Justice Act, provides, in pertinent part as follows:

> (1) This section may be cited as the "Florida Equal Access to Justice Act."
> (2) The Legislature finds that certain persons may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expense of civil actions and administrative proceedings. Because of the greater resources of the state, the standard for an award of attorney's fees and costs against the state should be different from the standard for an award against a private litigant. The purpose of this section is to diminish the deterrent effect of seeking review of, or defending against, governmental action by providing in certain situations an award of attorney's fees and costs against the state.
> (3) As used in this section:
> (a) The term "attorney's fees and costs" means the reasonable and necessary attorney's fees and costs incurred for all preparations, motions, hearings, trials, and appeals in a proceeding.
> (b) The term "initiated by a state agency" means that the state agency:
>
> * * *
>
> 2. Filed a request for an administrative hearing pursuant to chapter 120;
>
> * * *
>
> (c) A small business party is a "prevailing small business party" when:
> 1. A final judgment or order has been entered in favor of the small business party and such judgment or order has not been

reversed on appeal or the time for seeking judicial review of the judgment or order has expired;

* * *

3. The state agency has sought a voluntary dismissal of its complaint.

(d) The term "small business party" means:

1.a. A sole proprietor of an unincorporated business, including a professional practice, whose principal office is in this state, who is domiciled in this state, and whose business or professional practice has, at the time the action is initiated by a state agency, not more than 25 full-time employees or a net worth of not more than $2 million, including both personal and business investments; or

b. A partnership or corporation, including a professional practice, which has its principal office in this state and has at the time the action is initiated by a state agency not more than 25 full-time employees or a net worth of not more than $2 million;

* * *

(e) A proceeding is "substantially justified" if it had a reasonable basis in law and fact at the time it was initiated by a state agency.

(4)(a) Unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated by a state agency, unless the actions of the agency were substantially justified or special circumstances exist which would make the award unjust.

(b)1. To apply for an award under this section, the attorney for the prevailing small business party must submit an itemized affidavit to the court which first conducted the adversarial proceeding in the underlying action, or to the Division of Administrative Hearings which shall assign an administrative law judge, in the case of a proceeding pursuant to chapter 120, which affidavit

> shall reveal the nature and extent of the services rendered by the attorney as well as the costs incurred in preparations, motions, hearings, and appeals in the proceeding.
>
> 2. The application for an award of attorney's fees must be made within 60 days after the date that the small business party becomes a prevailing small business party.
>
> (c) The state agency may oppose the application for the award of attorney's fees and costs by affidavit.
>
> (d) The court, or the administrative law judge in the case of a proceeding under chapter 120, shall promptly conduct an evidentiary hearing on the application for an award of attorney's fees and shall issue a judgment, or a final order in the case of an administrative law judge. The final order of an administrative law judge is reviewable in accordance with the provisions of s. 120.68. If the court affirms the award of attorney's fees and costs in whole or in part, it may, in its discretion, award additional attorney's fees and costs for the appeal.
>
> 1. No award of attorney's fees and costs shall be made in any case in which the state agency was a nominal party.
>
> 2. No award of attorney's fees and costs for an action initiated by a state agency shall exceed $15,000.

26. Mr. Brancaleone is a small business party within the meaning of Section 57.111(3)(d), Florida Statutes, because he is the sole proprietor of an unincorporated professional practice.

27. The parties stipulated that Mr. Brancaleone was a prevailing party in the underlying action. Consequently, it is concluded that he is a prevailing small business party.

28. Once Mr. Brancaleone established that he was a prevailing small business party, the burden shifted to DOH to show that its actions in initiating the disciplinary action was "substantially justified." Gentele v. Department of Prof. Reg.,

Bd. of Optometry, 9 F.A.L.R., 310, 327 (Div. Of Admin. Hearings 1986), aff'd, 513 So. 2d 672 (Fla. 1st DCA 1987).

29. As set forth by Section 57.111(3)(e), Florida Statutes, "[a] proceeding is 'substantially justified' if it had a reasonable basis in law and fact at the time it was initiated by a state agency." An analogous Federal standard has been interpreted to require that the proceeding be justified to the degree that it could satisfy a reasonable person. Pierce v. Underwood, 487 U.S. 552, 565, 108 S.Ct. 2541, 101 L.Ed.2d 490 (1988). The Court in Helmy v. Department of Business and Professional Regulation, 23 F.L.W. 554a (Fla. 1st DCA Feb. 17, 1998) cited Pierce, supra, in support of its conclusion that the "substantially justified" standard falls somewhere between the no justiciable issue standard of Section 57.105, Florida Statutes and an automatic award of fees to a prevailing party. Probable cause exists if reasonable prudent persons in the conduct of their affairs would think that a violation had taken place. Kasha v. Department of Legal Affairs, 375 So. 2d 43 (Fla. 3RD DCA 1979).

30. The agency failed to establish that it was substantially justified in filing Count I of the Administrative Complaint against Mr. Brancaleone. There was no evidence presented to the Probable Cause Panel that substantiates the assertion that Mr. Brancaleone implemented a nutritional plan for Christine B. without her doctor's authorization in violation of

Section 468.516(1)(a), Florida Statutes. Further, there was no discussion and no showing by DOH at the formal hearing in this proceeding how any of the statements Mr. Brancaleone allegedly made to Christine B. would constitute an attempt to implement a nutritional plan without her doctor's authorization in violation of Section 468.516(1)(a), Florida Statutes. Finally, there was no showing by DOH that an attempt to implement a nutritional plan for a person without the authorization from that person's physician would constitute a violation of Section 468.516(1)(a), Florida Statutes.[5]

31. In determining whether the agency was substantially justified in alleging that Mr. Brancaleone was guilty of "[t]reating or undertaking to treat human ailments by means other than by dietetics and nutrition or nutritional counseling" within the meaning of Section 468.518(1)(j), Florida Statutes, the undersigned has considered certain definitions contained in Section 468.503, Florida Statutes.

32. Section 468.503, Florida Statutes, provides, in pertinent part, as follows:

> As used in this part:
> (1) "Agency" means the Agency for Health Care Administration.
> (2) "Board" means the Board of Medicine.
> (3) "Dietetics" means the integration and application of the principles derived from the sciences of nutrition, biochemistry, food, physiology, and management and from the behavioral and social sciences to achieve and maintain a person's health throughout the person's life. It is an integral part of preventive, diagnostic, curative, and

restorative health care of individuals, groups, or both.

(4) "Dietetics and nutrition practice" shall include assessing nutrition needs and status using appropriate data; recommending appropriate dietary regimens, nutrition support, and nutrient intake; improving health status through nutrition research, counseling, and education; and developing, implementing, and managing nutrition care systems, which includes, but is not limited to, evaluating, modifying, and maintaining appropriate standards of high quality in food and nutrition care services.

* * *

> (8) "Nutrition assessment" means the evaluation of the nutrition needs of individuals or groups, using appropriate data to determine nutrient needs or status and make appropriate nutrition recommendations.
> (9) "Nutrition counseling" means advising and assisting individuals or groups on appropriate nutrition intake by integrating information from the nutrition assessment.

33. Rule 64B8-43.002(6), Florida Administrative Code, provides as follows:

> (6) Nutrition counseling does not include diagnosis, treatment, operation, or prescription for any human disease, pain, injury, deformity, or other physical or mental condition.

34. The information available to the Probable Cause Panel was that Mr. Brancaleone told a cancer patient to stop taking the medicine that had been prescribed for her by her treating oncologist. The members of the Probable Cause Panel were entitled to rely on the evidence they had before them pertaining to the meeting Christine B. had with Mr. Brancaleone, the purpose of the meeting, and the advice Christine B. said Mr. Brancaleone gave her.

35. The question becomes whether the agency was substantially justified in alleging that Mr. Brancaleone violated the provisions of Section 568.518(1)(j), Florida Statutes, by giving such advice.

36. As a nutritional counselor, Mr. Brancaleone is not competent to advise a cancer patient that she should stop taking her medicine. Such advise is clearly beyond the scope of

dietetics and nutrition or nutrition counseling as those terms are defined in Section 458.503, Florida Statutes, and used in Section 458.518(1)(a)(j), Florida Statutes, based on the facts presented to the probable cause panel.

37. Mr. Brancaleone conceded at the formal hearing in this proceeding that he was familiar with Rule 64B8-43.002(6), Florida Administrative Code, and that he was aware that he could not interfere with prescription writing of doctors.

38. It is concluded that the probable cause panel was substantially justified in alleging that Mr. Brancaleone advised Christine B. to stop taking the medicine that had been prescribed by her doctor and that it was substantially justified in alleging in Count Two of the underlying Administrative Complaint that by giving such alleged advice, he violated Section 468.518(1)(j), Florida Statutes. It is also concluded that because of the definition provided by statute and rule, the probable cause panel could find probable cause to file Count Two without the presentation of an expert opinion.

39. Because Count One and Count Two of the underlying Administrative Complaint were based on the same facts, it is concluded that the inclusion of Count One did not cause Mr. Brancaleone to incur fees and costs in addition to and separate from those incurred because of Count Two. Because the agency was substantially justified in filing Count Two, it is concluded that Mr. Brancaleone is not entitled to an award of

attorney's fees and costs pursuant to Section 57.111, Florida Statutes.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Petition for attorney's fees and costs is DENIED.

DONE AND ORDERED this 27th day of April, 1998, in Tallahassee, Leon County, Florida.

CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of April, 1998.

ENDNOTES

1/ Section 469.518(h), Florida Statutes, provides that the following acts constitute grounds for the imposition of discipline against a licensee:

> (h) Committing an act of fraud or deceit, or of negligence, incompetency, or misconduct in the practice of dietetics and nutrition or nutrition counseling.

2/ The undersigned is mindful of Section 458.305(3), Florida Statutes, which defines the "practice of medicine" to mean the ". . . diagnosis, treatment, operation, or prescription for any human disease, pain injury, deformity, or other physical or mental condition."

3/ Count One of the Administrative Complaint was voluntarily dismissed by the attorney for AHCA at the beginning of the formal hearing in DOAH Case No. 96-3354.

4/ The Recommended Order found that Mr. Brancaleone discussed with Christine B. the severe side effects of Tamoxifen in a manner designed to discourage her from taking the medicine. The evidence was insufficient to support a finding that Mr. Brancaleone told her to stop taking Tamoxifen. For that reason, it was concluded that Mr. Brancaleone did not undertake to treat Christine B. If the evidence had clearly and convincingly established that he advised her to stop taking Tamoxifen, the undersigned would have concluded that he was guilty of Count Two.

5/ The language of Section 468.516(1)(a), Florida Statutes, that the licensee "shall not implement" a dietary plan without the approval of the patient's physician, can be contrasted with the language of Section 468.518(1)(j), Florida Statutes, that includes as grounds for imposing discipline the licensee "[t]reating or undertaking to treat human ailments by means other than by dietetics and nutritional practices or nutritional counseling." Had the Legislature intended for an "attempt to implement" a dietary plan without the attending physician's authorization to be included as a violation of Section 468.516(1)(a), Florida Statutes, it would have clearly expressed that intent.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a second copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the appellate district where the party resides. The Notice of Appeal must be filed within 30 days of rendition of the order to be reviewed.

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[1] Section 469.518(h), Florida Statutes, provides that the following acts constitute grounds for the imposition of discipline against a licensee:

> (h) Committing an act of fraud or deceit, or of negligence, incompetency, or misconduct in the practice of dietetics and nutrition or nutrition counseling.

[2] The undersigned is mindful of Section 458.305(3), Florida Statutes, which defines the "practice of medicine" to mean the "… diagnosis, treatment, operation, or prescription for any human disease, pain injury, deformity, or other physical or mental condition."

[3] Count One of the Administrative Complaint was voluntarily dismissed by the attorney for AHCA at the beginning of the formal hearing in DOAH Case 96-3354.

[4] The Recommended Order found that Mr. Brancaleone discussed with Christine B. the severe side effects of Tamoxifen in a manner designed to discourage her from taking the medicine. The evidence was insufficient to support a finding that Mr. Brancaleone told her to stop taking Tamoxifen. For that

reason, it was concluded that Mr. Brancaleone did not undertake to treat Christine B.

[5] The language of Section 468.516(1)(a), Florida Statutes, that the licensee "shall not implement" a dietary plan without the approval of the patient's physician can be contrasted with the language of Section 468.518(1)(j), Florida Statutes, that includes as grounds for imposing discipline the licensee "[t]reating or undertaking to treat human ailments by means other than by dietetics and nutritional practices or nutritional counseling." Had the Legislature intended for an "attempt to implement" a dietary plan without the attending physician's authorization to be included as a violation of Section 468.516(1)(a), Florida Statutes, it would have clearly expressed that intent.