Final Order No. DOH-06-1790-FOF-MQA
FILED DATE - 9-20-06
Department of Health
By: [signature]
Deputy Agency Clerk

2006 SEP 21 P 1:07
DIVISION OF ADMINISTRATIVE HEARINGS
FILED

STATE OF FLORIDA
BOARD OF NURSING

DEPARTMENT OF HEALTH,

Petitioner,

vs.

DOH CASE NO.: 2003-20751
2004-10250
2003-30279
DOAH CASE NO.: 05-3217PL
LICENSE NO.: RN 2837932

GAIL KING DELLINGER,

Respondent.

______________________________/

FINAL ORDER

THIS CAUSE came before the BOARD OF NURSING (Board) pursuant to Sections 120.569 and 120.57(1), Florida Statutes, on August 10, 2006, in Jacksonville, Florida, for the purpose of considering the Administrative Law Judge's Recommended Order and Exceptions to the Recommended Order, and (copies of which are attached hereto as Exhibits A and B, respectively) in the above-styled cause. Petitioner was represented by Diane Kiesling, Assistant General Counsel. Respondent was represented by William Sutton, Esquire.

Upon review of the Recommended Order, the argument of the parties, the Exceptions and responses thereto, and the pleadings regarding the investigative fees, and after a review of the complete record in this case, the Board makes the following findings and conclusions.

RULINGS ON EXCEPTIONS

1. Respondent takes exception to a portion of the finding of fact in paragraph 9 of the Recommended Order. The exception is rejected on the grounds that the record contains competent substantial evidence to support this finding of fact.

2. Respondent takes exception to a portion of the finding of fact in paragraph 11 of the Recommended Order. The exception is rejected on the grounds that the record contains competent substantial evidence to support this finding of fact.

3. Respondent takes exception to a portion of the finding of fact in paragraph 14 of the Recommended Order. The exception is rejected on the grounds that the record contains competent substantial evidence to support this finding of fact.

4. Respondent takes exception to a portion of the finding of fact in paragraph 15 of the Recommended Order. The exception is rejected on the grounds that the record contains competent substantial evidence to support this finding of fact.

5. Respondent takes exception to a portion of the finding of fact in paragraph 16 of the Recommended Order. The exception is rejected on the grounds that the record contains competent substantial evidence to support this finding of fact.

6. Respondent takes exception to a portion of the finding of fact in paragraph 17 of the Recommended Order. The exception

is rejected on the grounds that the record contains competent substantial evidence to support this finding of fact.

7. Respondent takes exception to a portion of the finding of fact in paragraph 18 of the Recommended Order. The exception is rejected on the grounds that the record contains competent substantial evidence to support this finding of fact.

8. Respondent takes exception to a portion of the finding of fact in paragraph 21 of the Recommended Order. The exception is rejected on the grounds that the record contains competent substantial evidence to support this finding of fact.

9. Respondent takes exception to a portion of the finding of fact in paragraph 24 of the Recommended Order. The exception is rejected on the grounds that the record contains competent substantial evidence to support this finding of fact.

10. Respondent takes exception to the conclusion of law in paragraph 37 of the Recommended Order on the grounds that it contains findings if fact. The exception is rejected. Paragraph 37 reflects findings supported by competent substantial evidence in the record and reflects a correct interpretation of Section 464.018(1)(h), Florida Statutes, and Rule 64B9-8.005(1), Florida Administrative Code.

11. Respondent takes exception to the conclusion of law in paragraph 38 of the Recommended Order on the grounds that it contains findings if fact. The exception is rejected. Paragraph

38 reflects findings supported by competent substantial evidence in the record and reflects a correct interpretation of Section 464.018(1)(h), Florida Statutes.

12. Respondent takes exception to the conclusion of law in paragraph 42 of the Recommended Order on the grounds that it contains findings if fact. The exception is rejected. Paragraph 42 reflects findings supported by competent substantial evidence in the record and reflects a correct interpretation of the provisions of Section 464.018(1)(n), Florida Statutes.

13. Respondent's Motion to Reduce the penalty recommended by the Administrative Law Judge is **DENIED.**

FINDINGS OF FACT

1. The findings of fact set forth in the Recommended Order are approved and adopted and incorporated herein by reference.

2. There is competent substantial evidence to support the findings of fact.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter pursuant to Section 120.57(1), Florida Statutes, and Chapter 458, Florida Statutes.

2. The conclusions of law set forth in the Recommended Order are approved and adopted and incorporated herein by reference.

3. Respondent has violated Sections 464.018(1)(h) and (n), Florida Statutes.

DISPOSITION

Upon a complete review of the record in this case, the Board determines that the disposition recommended by the Administrative Law Judge be ACCEPTED. WHEREFORE,

IT IS HEREBY ORDERED AND ADJUDGED that:

The licensee must pay an administrative fine of $500.00 within sixty (60) days from the date of entry of this Order. Partial payments shall not be accepted. Payment shall be made to the Board of Nursing and mailed to, DOH-Client Services, P.O. Box 6320, Tallahassee, Florida 32314-6320, Attention: Nursing Compliance Officer.

The license of GAIL KING DELLINGER is suspended for two years.

Upon reinstatement of the license, the license of GAIL KING DELLINGER shall be placed on probation for three years under the following terms:

The licensee shall not violate chapters 456 or 464, Florida Statutes, the rules promulgated pursuant thereto, any other state or federal law, rule, or regulation relating to the practice or the ability to practice nursing.

The licensee shall enroll in and successfully complete courses in lEGAL ASPECTS OF NURSING and NURSING ETHICS. This

shall be in addition to other normally required continuing education courses. Verification of course content and course completion must be submitted to the Nursing Compliance Officer within six (6) months from the date of this Order. The Board will retain jurisdiction for the purpose of enforcing continuing education requirements.

The licensee must report any change in address or telephone number, employment, employer's address or telephone number, or any arrests in writing within 10 working days to the Nursing Compliance Officer at the Department of Health, Client Services Unit, HMQAMS, BIN # C01, 4052 Bald Cypress Way, Tallahassee, Florida 32399-3251.

Whether employed as a nurse or not, the licensee shall submit written reports to the Nursing Compliance Officer which shall contain the licensee's name, license number, and current address; the name, address, and phone number of each current employer; and a statement by the licensee describing her employment. This report shall be submitted to the Nursing Compliance Officer every three (3) months in a manner as directed by the Nursing Compliance Officer.

The licensee must work in a setting under direct supervision and only on a regularly assigned unit. Direct supervision requires another nurse to be working on the same unit as the licensee and readily available to provide assistance and

intervention. The licensee cannot be employed by a nurse registry, temporary nurse employment agency or home health agency. Multiple employers are prohibited. The licensee cannot be self-employed as a nurse.

All current and future settings in which the licensee practices nursing shall be promptly informed of the licensee's probationary status. Within five days of the receipt of this Order, the licensee shall furnish a copy to her nursing supervisor. The supervisor must acknowledge this probation to the Nursing Compliance Officer in writing on employer letterhead within ten days. Should the licensee change employers, she must supply a copy of this Order to her new nursing supervisor within five days. The new employer shall acknowledge probation in writing on employer letterhead to the Nursing Compliance Officer within ten days. The licensee shall be responsible for assuring that reports from nursing supervisors will be furnished to the Nursing Compliance Officer every three (3) months. That report shall describe the licensee's work assignment, work load, level of performance, and any problems. Any report indicating an unprofessional level of performance shall be a violation of probation.

If the licensee leaves Florida for thirty (30) days or more or ceases to practice nursing in the state, this probation shall be tolled until the licensee returns to the active practice of

nursing in Florida. Then the probationary period will resume. Unless this Order states otherwise, any fines imposed or continuing education required must be paid or completed within the time specified and are not tolled by this provision. Employer reports are not required during the time probation is tolled. Working in nursing without notification to the Board is a violation of this Order.

The licensee's failure to comply with the terms of this Probation Order without the prior written consent of the Board shall be a violation of this Probation. The probation shall not be terminated until the licensee has complied with all terms of probation. The failure to comply with the terms of probation set forth above shall result in a subsequent Uniform Complaint Form being filed by the Board with the Department of Health against the Respondent's license, which may result in additional administrative fines, probationary periods, and/or suspensions being imposed against the Respondent's license. The licensee shall pay all costs necessary to comply with the terms of this Order. Such costs include, but are not limited to, the cost of preparation of investigative and probationary reports detailing the compliance with this probation; the cost of obtaining, and analysis of, any blood or urine specimens submitted pursuant to this Order; and administrative costs directly associated with the licensee's probation.

The terms of this Order are effective as of the date this Order is filed with the clerk for the Department of Health. The Board office will send the licensee information regarding probationary terms, however, failure of the licensee to receive such information DOES NOT EXCUSE COMPLIANCE with the terms of this Order.

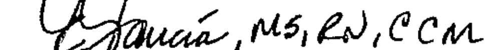
RULING ON MOTION TO ASSESS COSTS

The Board reviewed the Petitioner's Motion to Assess Costs and Respondent's Reply to Petitioner's Motion to Assess Costs in Accordance wtih Section 456.072(4). The Board imposes the costs associated with this case in the amount of $29,152.28. Said costs are to be paid within 10 years from the date this Final Order is filed. Payment shall be made to the Board of Nursing and mailed to, DOH-Client Services, P.O. Box 6320, Tallahassee, Florida 32314-6320, Attention: Nursing Compliance Officer.

This Final Order shall take effect upon being filed with the Clerk of the Department of Health.

DONE AND ORDERED this 19 day of September, 2006.

BOARD OF NURSING



Rick García, MS, RN, CCM
Executive Director
for Patricia Dittman, RN, Chair

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 DEPARTMENT OF HEALTH 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 THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by U.S. Mail to GAIL KING DELLINGER, c/o William Sutton, Esquire, 111 N. Orange Avenue, Suite 1750, Orlando FL 32801; to Susan B. Harrell, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; and by interoffice delivery to Kathryn Price and Pamela Page, Department of Health, 4052 Bald Cypress Way, Bin #C-65, Tallahassee, Florida 32399-3265 this 20 day of September, 2006.

Deputy Agency Clerk

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State of Florida
Division of Administrative Hearings

Jeb Bush
Governor

Robert S. Cohen
Director and Chief Judge

Ann Cole
Clerk of the Division

June 29, 2006

Harry L. Hooper
Deputy Chief
Administrative Law Judge

David W. Langham
Deputy Chief Judge
Judges of Compensation Claims

Dan Coble, RN, Ph.D., CNAA, C, BC
Executive Director
Board of Nursing
Department of Health
4052 Bald Cypress Way, Bin C02
Tallahassee, Florida 32399-1701

Re: DEPARTMENT OF HEALTH, BOARD OF NURSING vs. GAIL KING DELLINGER, R.N., DOAH Case No. 05-3217PL

Dear Mr. Coble:

Enclosed is my Recommended Order in the referenced case. Also enclosed is the three-volume Transcript, together with the Petitioner's Exhibits numbered 1 through 3, 4B through 4D, 4F, 4G, 5 through 13; and the Respondent's Exhibits numbered 3, 4, and 7. Copies of this letter will serve to notify the parties that my Recommended Order and the hearing record have been transmitted this date.

As required by Subsection 120.57(1)(m), Florida Statutes, you are requested to furnish the Division of Administrative Hearings with a copy of the Final Order within 15 days of its rendition.

Sincerely,

Susan B. Harrell

SUSAN B. HARRELL
Administrative Law Judge

SBH/lds
Enclosures
cc: Timothy M. Cerio, General Counsel
William F. Sutton, Jr., Esquire
Kathryn E. Price, Esquire

FILED
DEPARTMENT OF HEALTH
DEPUTY CLERK
CLERK [signature]
DATE 7/17/06

STATE OF FLORIDA
DEPARTMENT OF HEALTH

DEPARTMENT OF HEALTH,

Petitioner,

vs.

GAIL KING DELLINGER

Respondent.

DOAH Case No. 05-3217PL

DOH Case Nos. 2003-20751
2004-10250
2003-30279

RESPONDENT'S EXCEPTIONS TO THE RECOMMENDED ORDER AND MOTION TO REDUCE RECOMMENDED PENALTY

COMES NOW the Respondent, GAIL KING DELLINGER, R.N., by and through her undersigned counsel, and files these Exceptions to the Recommended Order pursuant to Section 120.57(1)(k), Florida Statutes, and Motion to Reduce Recommended Penalty pursuant to Section 120.57(1)(l), Florida Statutes, and as grounds therefore states:

1. On June 29, 2006, the Honorable Susan B. Harrell entered a Recommended Order in this matter finding that the Respondent had violated the Nurse Practice Act, and recommending the imposition of an administrative fine of $500, and a two-year suspension followed by three-years probation.

2. Florida Statutes, Chapter 120, permits parties to filed Exceptions to the Recommended Order, and permits the Board of Nursing to reduce a penalty recommended in a Recommended Order after review of the complete record. Respondent requests that the complete record be prepared and submitted to the Board of Nursing in conjunction with its consideration of the Recommended Order.

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I. EXCEPTIONS TO THE RECOMMENDED ORDER

3. Respondent takes exception to a portion of the Finding of Fact contained in Paragraph 9 of the Recommended Order, to wit:

> Dr. Anderson is on call for his patients, and, if Ms. Dellinger wanted to speak to Dr. Anderson, all she had to do was hold the line until the answering service picked up the call. The answering service would have contacted Dr. Anderson.

The Petitioner failed to present sufficient evidence at hearing demonstrating that the answering service utilized by Dr. Anderson's practice group ***at the time the alleged violation occurred*** would have, or could have contacted Dr. Anderson. Moreover, the Petitioner failed to present any evidence rebutting Ms. Dellinger's claim that the service advised that prescriptions could not be filled for 72 hours. Absent any transcript, recording or other means of reliable communication, all doubt with regard to this fact should have been resolved in Respondent's favor.

4. Respondent takes exception to a portion of the Finding of Fact contained in Paragraph 11 of the Recommended Order, to wit:

> Dr. Olsson verbally ordered Ativan for J.E., a prescription medication designed to relieve anxiety, on a per need basis for three days, April 13, 14, and 15, 2003, and signed the written request after the verbal order was given.

To the extent that the Administrative Law Judge is suggesting that the Ativan prescribed by Dr. Olsson was limited to April 13, 14 and 15, 2003 (and not April 11, 2003), such a conclusion overlooks evidence in the record (i.e., Dr. Olsson's statement and medical records) clearly indicating that Dr. Olsson approved J.E. receiving Ativan on April 11, 2003.

5. Respondent takes exception to a portion of the Finding of Fact contained in Paragraph 14 of the Recommended Order, to wit:

> The request for Ativan was made on April 11, 2003, but this written confirmation of the verbal order showed that the Ativan was to be administered only on April 13, 14 and 15. Thus, if the written order was correct, Ms. Dellinger should not have given J.E. an Ativan until Sunday.

This finding of fact ignores evidence in the record (i.e., Dr. Olsson's statement and medical records) clearly indicating that Dr. Olsson approved J.E. receiving Ativan on April 11, 2003. Also, this finding of fact remarkably dismisses a common sense conclusion stemming from a previous finding of fact that on April 11, 2003, J.E. became very agitate and anxious (see Paragraph 9 of Recommended Order). Specifically, it makes no sense to conclude that J.E. should have to wait two days (i.e., until April 13, 2003) to receive Ativan when she evidently needed it on April 11, 2003, which prompted Respondent's call to Dr. Olsson.

6. Respondent takes exception to a portion of the Finding of Fact contained in Paragraph 15 of the Recommended Order, to wit:

> J.E. saw Dr. Anderson on April 17, 2003. Ms. Dellinger accompanied J.E. to Dr. Anderson's office, and Ms. Dalton was also present during the visit. Dr. Anderson advised Ms. Dellinger that he was J.E.'s primary care physician and that he wanted to be contacted when there was a change of J.E.'s status. He additionally advised Ms. Dellinger that he was to be the physician prescribing medications for J.E.

Respondent takes exception to several findings contained in this paragraph. First, to the extent that the Administrative Law Judge is suggesting that Ms. Dalton was present in the room when J.E. was being examined by Dr. Anderson, there is evidence in the record (i.e., the testimony of Dr. Anderson) indicating that J.E. was accompanied by Respondent and "a black female".[1] What is particularly illuminating about this testimony is that both Respondent and Penny Dalton, J.E.'s daughter, both agree that a "black female" was not present at the April 17, 2003 office visit with Dr. Anderson (Ms. Dalton was at the office visit). If Dr. Anderson cannot even recall the people who were attending J.E.'s April 17 office visit, he can anyone plausibly

[1] Hearing transcript page 72, lines 17 - 21.

conclude, with any degree of confidence, that Dr. Anderson can so clearly remember the instructions he gave to Respondent?

Further, the finding regarding Dr. Anderson's instructions to Respondent is not supported by competent substantial evidence in the record. Specifically, J.E. medical records and, in particular, the record created for J.E.'s April 17, 2003 office visit with Dr. Anderson, lack any entry indicating that Respondent was give such critical instructions. During the hearing, Dr. Anderson himself conceded that no such entries were made in J.E.'s medical record. Coupled with the fact that Dr. Anderson cannot accurately recall who attended the April 17 office visit with J.E., the absence of such entries create considerable doubt as to whether these instructions were actually given.

7. Respondent takes exception to a portion of the Finding of Fact contained in Paragraph 16 of the Recommended Order, to wit:

> Ms. Dellinger did not tell Dr. Anderson during the visit on April 17 that Dr. Olsson had prescribed Ativan for J.E. or that J.E. had taken an Ativan.

This finding is not based on competent substantial evidence in the record and, in particular, wholly disregards any possibility that Dr. Anderson, an admittedly busy physician, may have simply not remembered being told that J.E. was given a small dose of a mild sedative during an office visit that occurred almost three years earlier. This possibility is buttressed by the fact that Dr. Anderson failed to record what are (evidently considered by Petitioner to be) critical instructions to Respondent regarding J.E.'s medications and status. Under such circumstances, Respondent should be given the benefit of the doubt.

8. Respondent takes exception to a portion of the Finding of Fact contained in Paragraph 17 of the Recommended Order, to wit:

> The office records of Dr. Olsson revealed that on April 15, 203, Ms. Dellinger called Dr. Olsson's office and asked Dr. Olsson to "Please go evaluate pt [J.E.] & take over care." Ms. Dellinger also neglected to tell Dr. Anderson on April 17, 2003 that she had asked Dr. Olsson to take over the care of J.E.

To the extent that the Administrative Law Judge is suggesting that Respondent was somehow scheming to remove J.E. from Dr. Anderson's care, such a finding is not based on competent substantial evidence in the record. As a preliminary matter, such glib, short-hand comments made in J.E.'s records by someone other than Respondent should not be attributed to Respondent in such a literal manner. The passage "[p]lease go evaluate pt & take over care" can easily and plausibly be interpreted as Respondent's request to Dr. Olsson to merely see J.E., not to assume the role of primary care physician. Accordingly, there would be no reason for Respondent to tell Dr. Anderson that she had asked Dr. Olsson to take over the care of J.E. because that was never Respondent's intent in the first place. It would stand to reason that if Respondent had intended to supplant Dr. Anderson as J.E.'s primary care physician, she would not have taken J.E. to her April 17, 2003 appointment with Dr. Anderson (particularly if, as the Administrative Law Judge concluded, Respondent called Dr. Olsson's office on April 15). In light of this evidence, all of which if found in the record, one cannot objectively conclude that Respondent had intended to substitute Dr. Olsson as the primary care physician for Dr. Anderson.

9. Respondent takes exception to a portion of the Finding of Fact contained in Paragraph 18 of the Recommended Order, to wit:

> It is clear that Ms. Dellinger wanted Dr. Olsson to take over the care of J.E., even after Dr. Anderson had informed her that he was J.E.'s primary care physician.

Based on the arguments advanced in Paragraph 8 above, this finding is not based on substantial competent evidence in the record.

10. Respondent takes exception to a portion of the Finding of Fact contained in Paragraph 21 of the Recommended Order, to wit:

> It is clear that Ms. Dellinger was not willing to follow the orders of J.E.'s primary care physician and took upon herself to get Dr. Olsson involved in the care of J.E.

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This finding is not supported by substantial competent evidence in the record. In fact, there is evidence in the record indicating that Respondent was not countermanding Dr. Anderson's instructions with regard to the care of J.E.'s stump wound, but challenging what appeared to be medical advice given by Roy McMurray, a prosthetic technician who was not qualified to give wound treatment advice. It was the recommendations made by Mr. McMurray, and not the instructions provided by Dr. Anderson, which prompted the Respondent to call Dr. Olsson. Moreover, Dr. Anderson's hearing testimony supports that fact that Respondent was not made aware of the treatment he recommended for the care of J.E.'s stump wound, as he testified that the Respondent was not at the particular office visit where such instructions were provided,[2] thereby making it impossible for him to communicate any instructions to Respondent. Given these facts, one cannot plausibly conclude that Respondent ignored Dr. Anderson's instructions with regard to the care of J.E.'s stump wound.

11. Respondent takes exception to a portion of the Finding of Fact contained in Paragraph 24 of the Recommended Order, to wit:

> Dr. Anderson was unaware that Dr. Olsson had been treating J.E., while she was a resident at King Manor, until after her death.

This finding is not supported by substantial competent evidence in the record. In fact, there is evidence in the record indicating that Dr. Anderson was told by Dr. Olsson that he (Dr. Olsson) had seen J.E., explained what he had done, and that Dr. Anderson "was okay with this."[3]

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[2] Hearing Transcript Page 49, Lines 14 -20.
[3] Petitioner's Exhibit 6, no. 3-80

While Dr. Anderson testified that he did not recall being informed that Dr. Olsson was treating J.E., the fact remains that both of the physicians who were treating J.E. do not agree on this issue. As the Petitioner has the burden of proving its allegations with clear and convincing evidence, this obvious and critical discrepancy should have been resolved in Respondent's favor, and this particular finding of fact should not have been made.

II. ARGUMENT RELATING TO CONCLUSIONS OF LAW

12. Respondent takes exception to Paragraph 37 of the Recommended Order, which is characterized as a Conclusion of Law, but which Respondent maintains contains Findings of Fact, and which states:

> The Department has proven by clear and convincing evidence that Ms. Dellinger violated Subsection 464.018(1)(h), Florida Statutes (2002), and Florida Administrative Code Rule 64B9-8.005(1), by failing to advise Dr. Anderson that J.E. had been prescribed and taken Ativan. The Department did not establish that Dr. Anderson had told Ms. Dellinger not to administer sleeping medications to J.E. because it would mask the symptoms of the pressure sore, but the Department did establish that Ms. Dellinger obtained the Ambien negligently by requesting the prescription from Dr. Olsson when she knew that Dr. Anderson was J.E.'s primary care physician and wanted to be the physician prescribing medications for J.E.

The evidence failed to substantially and competently establish that Respondent violated Subsection 464.018(1)(h), Florida Statutes (2002), and Florida Administrative Code Rule 64B9-8.005(1), as there is considerable doubt as to whether Respondent failed to advise Dr. Anderson that J.E. had been prescribed and taken Ativan. The record of hearing indicates that Dr. Anderson cannot accurately remember who was with J.E. during an April 17, 2003 office visit (in fact, Dr. Anderson may have gotten this wrong altogether). Also, Dr. Anderson failed to write anything in J.E.'s medical record indicating that he gave any instructions to Respondent (or anyone else for that matter) regarding J.E.'s medications and status. Finally, and most importantly, this conclusion appears contrary to Florida law on the prescribing of medications:

> A practitioner, in good faith and in the course of his or her professional practice only, may prescribe, administer, dispense, mix or otherwise prepare a controlled substance, or the practitioner may cause the same to be administered by a licensed nurse or an intern practitioner under his or her direction and supervision only. Section 893.05(1), Florida Statutes.

If Dr. Olsson approved the drugs prescribed for J.E. (the evidence clearly indicates that Dr. Olsson, by his own admission, approved, the Respondent cannot, as a matter of law, be held in violation of Subsection 464.018(1)(h), Florida Statutes (2002), and Florida Administrative Code Rule 64B9-8.005(1), as Dr. Olsson, obviously aware that he was not J.E.'s primary care physician, nonetheless approved, in writing, the medications ultimately given to J.E. These facts, coupled with Florida's law on prescribing medications, dictate that Respondent did not violate the law.

13. Respondent takes exception to Paragraph 38 of the Recommended Order, which is characterized as a Conclusion of Law, but which Respondent maintains contains Findings of Fact, and which states:

> The Department did establish by clear and convincing evidence that Ms. Dellinger violated Subsection 464.018(1)(h), Florida Statutes (2002), by leaving Mr. Brown in charge of the residents at King Manor while Ms. Dellinger went to work in South Caroline for several weeks. The care needed by the residents, in particular W.R., warranted the care of at least a license practical nurse. Ms. Dellinger knew that Mr. Brown, as a certified nursing assistant and was not trained to take care of the residents at the level of care which their conditions warranted.

The evidence failed to substantially and competently establish that Respondent violated Subsection 464.018(1)(h), Florida Statutes (2002) by leaving Mr. Brown, a certified nursing assistant, in charge of the King Manor residents. As a preliminary matter, the Administrative Law Judge apparently failed to recognize that each resident place in an Adult Family Care Home ("AFCH"), such as King Manor, must receive a Health Assessment, performed by a health care provider using the Resident Health Assessment Form, to ensure appropriateness of placement at

an AFCH.[4] The Resident Health Assessment form for J.E., which was completed by Dr. Anderson approving J.E.'s admission to King Manor, was offered by Petitioner and made part of the record. With this in mind, it appears that the Administrative Law Judge overlooked the fact that any and all residents admitted to King Manor were placed there after a health care provider concluded, after performing a Resident Health Assessment, ***that it was appropriate for them to be there.*** Therefore, it is improper for the Administrative Law Judge to conclude that absent any proof to the contrary, a higher level of care was required for these residents.

Further, there is absolutely no requirement for residents living in an AFCH to be cared for by a licensed practical nurse, as the Administrative Law Judge concludes in the Recommended Order. Remarkably, the administrative rules applicable to AFCH's do not even require people with Mr. Brown's qualifications (i.e., certified nursing assistants) to staff an AFCH.[5] Therefore, it appears that the Administrative Law Judge, by concluding that the King Manor residents should have been left in the care of a licensed practical nurse, not only ignored that fact that all residents were assessed prior to admission (and deemed healthy enough to reside at King Manor), but imposed of standard of professional care ***not even required by Florida law.*** Given these requirements, this particular conclusion of law is improper.

14. Respondent takes exception to Paragraph 42 of the Recommended Order, which is characterized as a Conclusion of Law, but which Respondent maintains contains Findings of Fact, and which states:

> The Department has established by clear and convincing evidence that Ms. Dellinger failed to meet the minimal standards of acceptable nursing practice when she misappropriated three Ativan pills from J.B.'s medication supply and gave them to J.E. The Department did not establish that Dr. Anderson had told Ms. Dellinger not to give

[4] Rule 58A-14.0061, Florida Administrative Code.
[5] Rule 58A-14.008(1), Florida Administrative Code. The professional requirements for persons staffing an AFCH are remarkably thin. Most important, is that no person working on an AFCH is required to be a certified nursing assistant, much less a licensed practical nurse.

J.E. a sleeping medication because it would mask the symptoms of a pressure sore on J.E.'s stump. The Department did establish that Ms. Dellinger was trying to circumvent the care of J.E.'s primary care physician by contacting Dr. Olsson for prescriptions and medical evaluations when Dr. Anderson had told Ms. Dellinger that he was J.E.'s primary care physician and wanted to be contacted when there was a change in J.E.'s condition and that he wanted to be the physician prescribing the medication for J.E.

Based on the arguments advanced in Paragraph 12 above, this conclusion of law is unwarranted, as it is not sufficiently established by the evidence in the record.

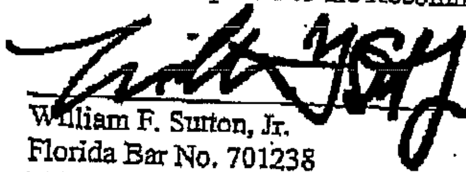
III. ARGUMENT AS TO PENALTY

15. The Administrative Law Judge attempts to interpret and apply the disciplinary guidelines of the Board of Nursing. Section 456.079 requires each Board to adopt by rule and periodically review the disciplinary guidelines applicable to each ground for disciplinary action which may be imposed by the Board. This section provides, in pertinent part:

16. The Administrative Law Judge, in her Recommended Order, did not recite the range of penalties for the violations that the Judge felt had been established by the Department of Health. Rather, the Administrative Law Judge stated recommended penalties consisting of a $500 fine, two-year suspension, and three-years of probation.

17. By Emergency Order dated January 11, 2005, Respondent had her license suspended. Therefore, at the time of the consideration of the Recommended Order, Respondent will have had her license suspended for in excess of 18 months and has, in fact, been unable to work as a nurse in the State of Florida since that time. If the Board of Nursing determines that the two-year suspension recommended by the Administrative Law Judge can be legally supported, and is appropriate, Respondent should be given credit for this period of time of suspension, as well as any subsequent period of time up to and including the date of a Final Order.

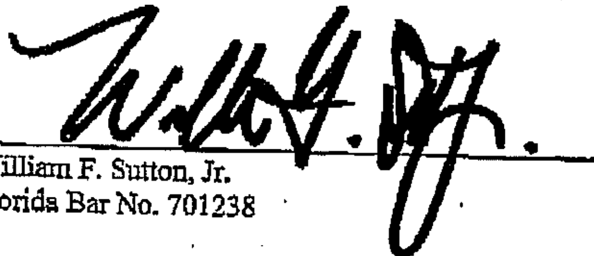
WHEREFORE, Respondent files these Exceptions to the Recommended Order.



William F. Sutton, Jr.
Florida Bar No. 701238
RUDEN, MCCLOSKY, SMITH, SCHUSTER, & RUSSELL, P.A.
111 N. Orange Avenue, Ste. 1750
Orlando, Florida 32801
Phone: 407-244-8003
Fax: 407-244-8080

CERTIFICATE OF SERVICE

I HEARBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail this 14th day of July, 2006, to: U.S. mail to Kathryn Price, Assistant General Counsel, Department of Health, 4052 Bald Cypress Way, Bin #C-65, Tallahassee, FL 32399-3265; to Enrique Garcia, Executive Director, Board of Nursing, 4052 Bald Cypress Way, Bin #CO2, Tallahassee, Florida 32399-3265. The original of the foregoing has been furnished via overnight delivery to Sam Powers, Agency Clerk to the Department of Health, 4052 Bald Cypress Way, BIN A-02, Tallahassee, Florida 32399-3265, and via facsimile (850) 410-1448.



William F. Sutton, Jr.
Florida Bar No. 701238

STATE OF FLORIDA
DEPARTMENT OF HEALTH

FILED
DEPARTMENT OF HEALTH
DEPUTY CLERK
CLERK Alicia Stoffer
DATE 4-24-2006

DEPARTMENT OF HEALTH,

PETITIONER,

v.

DOAH CASE NO. 05-3217
DOH CASE NOS.: 2003-20751
2004-10250
2003-30279

GAIL KING DELLINGER, R.N.,

RESPONDENT.

______________________________/

PETITIONER'S RESPONSE TO RESPONDENT'S EXCEPTIONS TO RECOMMENDED ORDER AND MOTION TO REDUCE RECOMMENDED PENALTY

Comes now the Department of Health and files its Response to Respondent's Exceptions to Recommended Order and Motion to Reduce Recommended Penalty and states in opposition:

1. The Board of Nursing may reject or modify a Recommended Order only as allowed in Section 120.57(1)(l), Florida Statutes (2005), which provides as follows:

> (l) 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. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action.

2. Respondent has asked the Board to reject or modify not only conclusions of law, but also findings of fact and the recommended penalty, however, Respondent has not satisfied any of the requirements of Section 120.57(1)(l).

3. The Board and the Administrative Law Judge (ALJ) have very distinct, but equally important, roles in formal administrative hearings. It is the ALJ's function to consider all the evidence presented, resolve conflicts, assess credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based upon competent substantial evidence. Heifetz v. Dept. of Business Regulation, 475 So. 2d 1277 (Fla. 1st DCA 1985); Goss v. District School Board of St. John's County, 601 So. 2d 1232 (Fla. 5th DCA 1992); Cenac v. Florida State Board of Accountancy, 399 So. 2d 1013 (Fla. 1981) and Bejarano v. Department of Education, Division of Vocational Rehabilitation, 901 So. 2d 891, 892 (Fla. 4th DCA 2005). This is not the province of the Board and is clearly the exclusive purview of the ALJ. The ALJ in this case fulfilled her role and the Respondent's request that this Board make ultimate findings of fact by adding additional facts is improper.

4. The Board's role is to review the entire record and the Recommended Order, determine whether there is competent, substantial evidence to support the

findings of fact; whether the conclusions of law that are within the Board's substantive jurisdiction are correct; and whether the penalty should be reduced or increased, based on a review of the entire record and findings that justify such a reduction or increase.

Respondent's Exceptions to Findings of Fact

5. Respondent's first exception is to a portion of Finding of Fact 9, however, Respondent fails to quote the sentence immediately preceding the one allegedly not supported by competent, substantial evidence. That sentence states: "Ms. Dellinger's testimony is not credible." The ALJ weighed the credibility of the witnesses and drew the permissible inferences from that testimony and found the facts as set forth in Finding of Fact 9. This finding should not be disturbed. Additionally, the challenged portion of Finding of Fact 9 is supported by competent substantial evidence at Transcript I, pages 66 and 67.

6. Respondent's next exception is to a portion of Finding of Fact 11. In fact, this Finding of Fact is supported by Petitioner's Exhibit 6, page 3-105, the actual prescription given by Dr. Olsson, which clearly shows the Ativan was prescribed to be given only on April 13, 14, and 15, 2003. Respondent fails to cite to any evidence in the record to support Respondent's version of the events related to the giving of Ativan contrary to the written prescription except the testimony of the Respondent. Regarding this specific matter, after detailing all the evidence about the Ativan, the ALJ again states in Finding of Fact 14: "Ms. Dellinger's testimony is not credible." The ALJ weighed the credibility of the witnesses and drew the permissible inferences from that testimony and found the facts as set forth in Finding of Fact 11. This finding should not be disturbed.

7. Respondent's next exception is to a portion of Finding of Fact 14. This is the Finding of Fact in which the ALJ found the Respondent not to be credible, yet the Respondent's entire exception relies on testimony from Respondent. Because her testimony is not credible on this exact point, the exception should be denied.

8. Respondent's next exception is to a portion of Finding of Fact 15. Respondent is arguing that there is a conflict in the evidence and therefore this exception should be granted. That is not how it works. So long as there is competent, substantial evidence to support the finding of fact, it cannot be changed. As to the portions of Finding of Fact 15 to which Respondent excepts, there is competent, substantial evidence in support is found at Transcript I, page 46; Transcript III, pages 300-301; and Transcript II, page 222. Respondent is arguing the manner in which the ALJ has resolved conflicts, assessed the credibility of witnesses, and drawn permissible inferences from the evidence. Respondent asserts that the ALJ should have resolved conflicts in testimony differently, should have assessed the credibility of witnesses in favor of Respondent, and should have drawn inferences from the evidence that support Respondent's version of the events. However, the ALJ exercised her exclusive authority in reaching these facts and there is no basis to reject or modify this Finding of Fact.

9. Respondent's next exception is to one sentence in Finding of Fact 16 regarding the office visit of April 17, 2003. The entire basis for this exception is that the Respondent should be given the benefit of the doubt and that Dr. Anderson is a very busy physician who may have just forgotten that Respondent told him that she had given J.E. Ativan. This exception must be rejected for three reasons. First, on the issues related to the Ativan, the ALJ has already found that the Respondent is not

credible. Second, Ms. Dalton testified that she heard Dr. Anderson ask Respondent about new medications on April 17, 2003, and that Respondent did not tell Dr. Anderson about having administered Ativan to J.E. See Transcript III, page 301. Third, Dr. Anderson testified that he told Respondent that he should be advised of any change in J.E.'s condition and that he should remain her primary care physician and be the physician prescribing her medications. However, Respondent did not tell him that she had secured Ativan for J.E. or that J.E. had taken the Ativan. See Transcript I, pages 46-47. Under these circumstances the Respondent is not entitled to the "benefit of the doubt" and the exception should be denied.

10. Respondent's next exception is to Finding of Fact 17. This exception is firstly based on an accusation that the Department is suggesting that Respondent was somehow scheming to remove J.E. from Dr. Anderson's care. Respondent then argues that it was never her intent to have Dr. Olsson take over care from Dr. Anderson and that if that had been her intent, different inferences should have been drawn from the evidence. It does not really matter. The point of this Finding of Fact is not to establish some type of scheme on the part of Respondent. It is, as the ALJ states, to make clear what else Respondent "neglected to tell Dr. Anderson on April 17, 2003," which goes to the overall credibility of Respondent. Because this Finding of Fact is supported by competent, substantial evidence, namely the records of Dr. Olsson (Petitioner's Exhibit 6, page 3-107) and the testimony of Dr. Anderson and Ms. Dalton cited above, it must be sustained.

11. Respondent's next exception is to one sentence in Finding of Fact 18. Given all the evidence, and primarily the records of Dr. Olsson (Petitioner's Exhibit 6,

page 3-103) which were dated after Respondent was advised by both Ms. Dalton and Dr. Anderson that Dr. Anderson was to remain J.E.'s primary care physician (see citations above), the ALJ drew a permissible inference that Respondent wanted Dr. Olsson to take over the care of J.E., even after Dr. Anderson had advised her that he was J.E.'s primary care physician. The ALJ does not have to assert a motive for this or to find some scheme in all this. It is enough that the ALJ examined the evidence and drew permissible inferences. Since this is a permissible inference to draw, the exception must be denied.

12. Respondent's next exception is to a portion of Finding of Fact 21. This Finding of Fact is supported by Respondent's own testimony at Transcript II, page 225, page 228, lines 12-13, and page 229, lines 8-11, where she states that she called Dr. Olsson after Dr. Anderson had given orders for treatment of the pressure wound because she did not believe Dr. Anderson's orders were correct. Respondent specifically testified that she did not believe that Dr. Anderson was correct because he was an "internist" (Transcript II, page 225) and Respondent had taken a course in wound care (Transcript II, page 275). Because there is competent, substantial evidence to support this Finding of Fact, the exception must be denied.

13. Respondent takes exception to Finding of Fact 24, arguing that there is no competent, substantial evidence that Dr. Anderson was unaware that Dr. Olsson had been treating J.E. while she was at King Manor, until after her death. Contrary to that argument, Dr. Anderson directly testified at Transcript I, page 47, lines 15-25; page 48, lines 1-5; page 55, line 25; page 56, lines 1-25; and page 57, lines 1-22 that he had no knowledge that Dr. Olsson was involved in the care of J.E. until after J.E.'s death. The

ALJ weighed that live testimony and the demeanor of the witness against one self-serving entry in the response of Dr. Olsson made in his defense to a complaint filed against him. Dr. Olsson was a duly supoenaed witness who refused to testify at the hearing. The ALJ was totally within her authority to find as she did in Finding of Fact 24. The exception should be denied because Finding of Fact 24 is supported by competent, substantial evidence.

Respondent's Exceptions to Conclusions of Law

14. Respondent takes exception to Conclusion of Law 37 because Respondent asserts there is no competent, substantial evidence to support the conclusion that the statute and rule were violated. Respondent fails to recognize that Section 120.57(1)(l), Florida Statutes, specifically prohibits the Board from rejecting or modifying a conclusion of law if it would form the basis for rejection or modification of a finding of fact. That is exactly what Respondent is trying to get this Board to do by going through the backdoor. The Board cannot reject or modify Findings of Fact unless they are not supported by any competent, substantial evidence. The Department has already addressed above each exception and shown how each Finding of Fact from which Respondent has taken an exception is supported by a great weight of competent, substantial evidence. Now, Respondent is trying to disguise an attempt to get the Board to reject or modify those same Findings of Fact by attacking them as the underpinnings of the Conclusions of Law. Section 120.57(1)(l), Florida Statutes, exists explicitly to prevent such a backdoor attack on Findings of Fact. Conclusion of Law 37 should not be rejected or modified.

15. Respondent takes exception to Conclusion of Law 38 and that exception must be denied for the same reasons as the exception to Conclusion of Law 37 discussed in paragraph 14 immediately above. However, there is one additional matter that must be mentioned. Section 120.57(1)(f), Florida Statutes, specifically defines the entire record that can be considered by this Board in considering this Recommended Order. Respondent improperly attempts to insert evidence that was never before the ALJ and that is not part of the record before this board by discussing what assessments must have been performed for the other residents of King Manor and the level of care that was due to those residents. This is directly contrary to evidence of record. See Petitioner's Exhibit 4b, page 13; Transcript III, page 373. By inserting these matters that are not in evidence, Respondent is apparently looking for sympathy for Respondent even if the evidence is not in the record. Do not fall for this ploy. This Board is confined to the record and only the record. The matters outside the record should be stricken.

16. Respondent takes exception to Conclusion of Law 42 and relies on her arguments regarding her exception to Conclusion of Law 37 in support. The Department therefore relies on its arguments in opposition as contained in paragraph 14 above.

Response to Motion to Reduce Penalty

17. The Department vehemently objects to any reduction in penalty. The Department was being benevolent when it did not request that the penalty be increased to the revocation it had sought in its proposed recommended order. There is not one single fair reason to reduce the penalty beyond that recommended by the ALJ. Further,

the Board should not lose sight of Section 120.57(1)(l), Florida Statutes, which requires it to accept the recommended penalty in a recommended order unless it reviews the complete record and states with particularity its reasons for reducing or increasing the penalty, by citing to the record in justifying the action.

18. As stated by Respondent, Section 456.079, Florida Statutes, requires each Board to adopt by rule the disciplinary guidelines applicable to each ground for disciplinary action. This Board has done so in Rule 64B9-8.006, Florida Administrative Code (FAC), and official recognition was granted for the versions of that rule which were in place during the events at issue in this case. Because there were different versions for different offenses at different times, the Department summarized the guidelines for each offense in its proposed recommended order based on the date of the offense. The ALJ was fully cognizant of the disciplinary guidelines for each offense.

19. The Department also quoted the provisions of the disciplinary guidelines that had not changed regarding offering aggravating and mitigating circumstances and a list of aggravating and mitigating circumstances that was not exclusive. Of major import is the provision that allows the Board to deviate from the penalty recommended by the ALJ only based on aggravating or mitigating factors that were presented in evidence in the record at the formal hearing. That provision states: "At the final hearing following a formal hearing, the Board will not hear additional aggravating or mitigating evidence."

20. The Respondent argues that the ALJ does not recite the range of penalties for the violations; however, there is no requirement that the ALJ do so. The range is clearly identified in the Department's proposed recommended order and in the various

versions of Rule 64B9-8.006, FAC, which were officially recognized and therefore a part of the record.

21. Respondent first argues, without any support as to reason or citation to the record that the Board may not find the two-year suspension recommended by the ALJ to be legally supported and appropriate. Pursuant to Section 120.57(1)(l), Florida Statutes, without any citation to the record or reasons justifying this action, the Board cannot and should not change the two-year suspension.

22. Next, instead of citing to any authority, Respondent simply argues that because her license has been under an Order of Emergency Suspension (ESO) since January 11, 2005, she should be given credit for time served against the suspension recommended by the ALJ. This argument should be rejected for several reasons. First, Respondent went to great pains to make sure the ALJ knew her license was suspended under an ESO as early as March 1, 2005, in her letter requesting a hearing, and continued in the Motion for Continuance of December 5, 2005, Motion for Continuance of January 25, 2006, and Motion to Stay Proceedings of March 10, 2006. However, Respondent nowhere mentioned the ESO in the record of the formal hearing. She cannot have it both ways.

23. Clearly the ALJ was aware of the ESO and could have recommended a shorter suspension or could have recommended that Respondent be given credit for the time already served under her ESO. The ALJ did not do so.

24. If the Respondent thought that the time served on the ESO should be considered by the ALJ and this Board as mitigation of the penalty, Respondent should have put it in the record at the hearing as required by Rule 64B9-8.006, FAC. Respondent

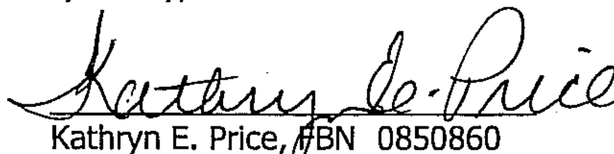
failed to do so. There is not one mention of the ESO or the suspension in the entire transcript or the exhibits or Respondent's proposed recommended order. Having failed to do so, Respondent cannot bring the ESO up at the final hearing as mitigation of the recommended two-year suspension.

25. The Department put on ample evidence of aggravating circumstances in the formal hearing as it was required to do by the penalty guidelines. The Department proved that Respondent exposed J.E. to potential injury by requesting medications without going through her primary care physician, especially when there was no clear emergency. (TR. I, pages 50-52, 57, 73, 76; TR. III, pages 356, 357, 359). Respondent exposed J.E to potential aggravation of her medical conditions because only Respondent knew the medications J.E. was on without Dr. Anderson's knowledge or approval. (TR.I, pages 46, 47). The witnesses testified that there was a great potential for overmedication when more than one doctor is prescribing medications without the knowledge of the other. (TR. I, pages 50-52; TR. III, pages 354-355). The Department also proved that Respondent left three individuals in the care of a certified nursing assistant, (TR.II, pages 172-176, 179-183; TR. III, page 431), who advised Respondent he was flipping out, thereby placing those residents in harms way. (TR. III, pages 371-373). None of those residents could care for themselves and had to be taken out of the facility by authorities. (TR. II, pages 182-183; TR. III, pages 371-373, 384, 423). The Department showed the Respondent took advantage of elderly people who were least able to protect themselves. Because of the egregiousness of the offenses and the aggravating factors, as well as the number of clear, serious lapses in judgment over such a short period of time, the suspension recommended by the ALJ should not be reduced.

26. Additionally what kind of suspension is it that Respondent has been under in Florida pursuant to the ESO when she can just traipse off to another state and use another license and keep working as if nothing has happened. In fact, the evidence was that she was already working in South Carolina before King Manor was closed and she has not returned to nursing in Florida at any time to serve one minute of a suspension pursuant to the ESO issued by the Secretary of the Department of Health. The Board should not countenance such blatant disregard for the Secretary's Order.

27. The penalty recommended by the ALJ is fully within the penalty guidelines. When the variety of offenses are considered, together with the penalty guidelines and the aggravating factors proven by the Department, the Board cannot cite to a single reason or justification to reduce the penalty as requested by the Respondent. Respondent's Motion to Reduce Recommended Penalty must be DENIED.

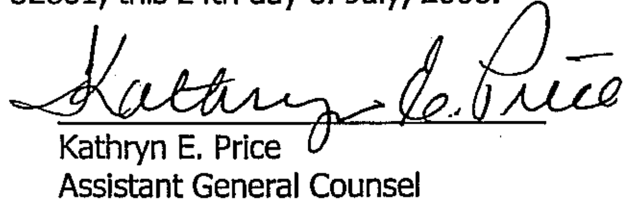
Respectfully submitted, this 24th day of July, 2006.



Kathryn E. Price, FBN 0850860
Assistant General Counsel
DOH, Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265
(850) 245-4640 Telephone
(850) 245-4683 Telefax

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Proposed Recommended Order was sent by hand delivery to Agency Clerk, Department of Health, and by regular mail to William Sutton, Esquire, Ruden McCloskey, Smith Schuster, and Russell, P.A., 111 North Orange Avenue, Suite 1750, Orlando, Florida 32801, this 24th day of July, 2006.



Kathryn E. Price
Assistant General Counsel