

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, )  
BOARD OF VETERINARY MEDICINE, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 06-2717PL  
 )  
PHILIP J. ALEONG, D.V.M., )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

This case came before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, on the filing of a Joint Stipulation of Facts and Documentary Evidence.

APPEARANCES

For Petitioner: Drew Winters, Esquire  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Tallahassee, Florida 32399-2202

For Respondent: Bradford J. Beilly, Esquire  
Law Offices of Bradford J. Beilly, P.A.  
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Phillip J. Aleong, D.V.M., violated Section 474.214(1)(f), Florida Statutes (2005), by failing to pay an administrative fine and

investigative costs within 30 days from the date of the filing of Final Order BPR-2005-04911 with Petitioner's Clerk as alleged in an Administrative Complaint filed by Petitioner, the Department of Business and Professional Regulation, on June 26, 2006, in BPR Case Number 2005-066424; and, if so, what disciplinary action should be taken against his license to practice veterinary medicine in the State of Florida.

PRELIMINARY STATEMENT

On or about June 26, 2006, the Department of Business and Professional Regulation filed an Administrative Complaint against Phillip Jerome Aleong, D.V.M., an individual licensed to practice veterinary medicine in Florida, before the Board of Veterinary Medicine, in which it alleged that Dr. Aleong had violated Section 474.214(1)(f), Florida Statutes (2005).

Dr. Aleong executed and filed an Election of Rights form indicating that he disputed the allegations of fact contained in the Administrative Complaint and requesting a formal administrative hearing pursuant to Section 120.569(2)(a), Florida Statutes (2006). An Answer was attached to the Election of Rights form. In the Answer, Dr. Aleong "denied" paragraphs 8 through 11 and asserted three affirmative defenses. Two of the affirmative defenses were subsequently withdrawn. Dr. Aleong has continued to assert the following affirmative defense:

. . . Respondent alleges that Petitioner is selectively prosecuting Respondent in violation of the equal protection clause and that Respondent has been singled out for prosecution while the Petitioner has not generally proceeded against other similarly situated persons and Petitioner's discriminatory selection of Respondent for prosecution is not in good faith.

Respondent's proposed Recommended Order, Page 2.

On July 27, 2006, the matter was filed with the Division of Administrative Hearings with a request that an administrative law judge be assigned the case to conduct proceedings pursuant to Section 120.57(1), Florida Statutes (2006). The matter was designated DOAH Case Number 06-2717PL and was assigned to the undersigned.

The final hearing was scheduled by Notice of Hearing entered August 11, 2006, for October 10, 2006. By Order Granting Continuance and Re-scheduling Hearing by Video Teleconference, a Joint Motion for Continuance was granted, and the final hearing was re-scheduled for November 9, 2006.

On October 31, 2006, Petitioner filed Petitioner's Motion to Relinquish Jurisdiction. Dr. Aleong filed a response to the Motion on November 6, 2006. A motion hearing was conducted by telephone to consider the Motion. As a result of that hearing, the parties and the undersigned agreed that the final hearing would be cancelled and the parties would submit stipulated facts

and documentary evidence upon which this Recommended Order would be based.

On November 13, 2007, the parties filed a Joint Stipulation of Facts and Documentary Evidence. The parties stipulated to the admission into evidence of the following documents, which were admitted into evidence by an Order entered November 17, 20056, acknowledging receipt of the Joint Stipulation:

1. Final Order Approving Settlement Stipulation BPR-2005-04911 (Exhibit "A");
2. Final Order BPR-95-05774 (Exhibit "B"); and
3. Final Order BPR-2003-02869 (Exhibit "C").

The Order acknowledging receipt of the Joint Stipulation gave the parties until December 13, 2006, to file proposed recommended orders. Petitioner filed Petitioner's Proposed Recommended Order and Dr. Aleong filed a Proposed Recommended Order on December 13, 2006. Both pleadings have been fully considered in entering this Recommended Order.

All further references to Florida Statutes and the Florida Administrative Code are to the 2005 versions unless otherwise noted.

#### FINDINGS OF FACT

1. The following facts were stipulated to by the parties:
  1. Respondent is licensed in the State of Florida as a veterinarian, having been issued license number VM-6466.

2. On September 1, 2005, Respondent appeared before the Florida Board of Veterinary Medicine to approve a Settlement Stipulation as to DOAH Case No. 05-1971PL. At the hearing, the terms of the Settlement Stipulation (herein after the "Stipulation") were placed on the record and the members of the Board voted to approve the settlement.

3. On September 9, 2005, the Florida Board of Veterinary Medicine rendered the Final order Approving Settlement Stipulation Number BPR-2005-04911 (herein after the "Final Order") against Respondent's veterinary license, by filing the original Final Order with the Department's Agency Clerk. A copy of the Final Order was mailed to Respondent's Counsel. However, a copy was not sent or mailed directly to the Respondent.

4. The Settlement Stipulation, as adopted by the Final Order, amongst other terms, required Respondent to pay an administrative fine in the amount of \$5000.00 and investigative costs in the amount of \$479.76 within thirty (30) days from the date of filing the Final Order with the Department's Agency Clerk.

5. As the Final Order was filed with the Agency Clerk on Setpember [sic] 9, 2005, Respondent's compliance with the payment terms of the Final Order was required on or before October 9, 2005.

6. Pursuant to the Final Order and the Stipulation Agreement incorporated therein by reference, Petitioner and Respondent agreed that Respondent's veterinarian license would be suspended for 90 days in the event that Respondent failed to comply with the terms of the Settlement Stipulation or the Final Order. Respondent was aware of this penalty provision at the time of signing the agreement, was present as the

time of its adoption by the Florida Board of Veterinary Medicine, and was aware that the sums would be due 30 days after the Board signed the Final Order itself which was to occur sometime after the September 1, 2005 meeting.

7. Respondent failed to remit payment of the administrative fine and cost required under the Final Order by October 9, 2005.

8. On December 27, 2005, the DBPR mailed Respondent an investigatory complaint placing Respondent on notice that the fine had not been paid. The computer printout attached to the investigatory complaint, as well as the handwritten complaint generated by the Petitioner, both of which were included therein allege that Respondent had not paid the fine. Neither document asserts that the Respondent failed to remit the costs, however, a copy of the Stipulation and Order were included with the investigatory complaint.

9. On January 12, 2006, after receipt of the investigatory [sic] complaint, Respondent paid the fine. Respondent paid the costs on May 8, 2006.

10. On June 26 2006, after both the fine and costs were paid in full, Petitioner filed this proceeding alleging that the fine and costs had not been paid.

11. Petitioner has stated that it has not located any cases in its records where a fine was imposed, then paid late, in which an administrative complaint was not filed. However, Petitioner is unable to offer testimony, with absolute certainty, that prior to the administrative complaint filed in this matter, that all other veterinarians have paid fines assessed in a final order by their due date.

12. Petitioner has not found any evidence indicating that it has ever filed an administrative complaint against a party for failure to timely pay an imposed fine, after said fine was paid by the party.

13. Petitioner has found no evidence contrary to or may otherwise reasonably dispute that the administrative complaint against a party for failure to timely pay an imposed fine, after said fine was paid by the party.

2. The facts in Final Order BPR-95-05774 (Exhibit "B") and Final Order BPR-2003-02869 (Exhibit "C") are distinguishable from the facts of this case.

#### CONCLUSIONS OF LAW

##### A. Jurisdiction.

3. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2006).

##### B. The Charges of the Administrative Complaint.

4. Section 474.214(2), Florida Statutes, authorizes the Board of Veterinary Medicine (hereinafter referred to as the "Board"), to impose penalties ranging from the issuance of a letter of concern to revocation of a veterinarian's license to practice veterinary medicine in Florida if a veterinarian commits one or more acts specified therein.

5. In its Administrative Complaint, the Department of Business and Professional Regulation (hereinafter referred to as the "Department"), has alleged that Dr. Aleong has violated Section 474.214(1)(f), Florida Statutes.

C. The Burden and Standard of Proof.

6. The Department seeks to impose penalties against Dr. Aleong that include suspension or revocation of his license and/or the imposition of an administrative fine. Therefore, the Department has the burden of proving the specific allegations of fact that support its charge that Dr. Aleong violated Section 474.214(1)(f), Florida Statutes, by clear and convincing evidence. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998). See also Section 120.57(1)(j), Florida Statutes (2006) ("Findings of fact shall be based on a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute.").

7. What constitutes "clear and convincing" evidence was described by the court in Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116 n.5 (Fla. 1st DCA 1989), as follows:



. . . [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

See also In re Graziano, 696 So. 2d 744 (Fla. 1997); In re Davey, 645 So. 2d 398 (Fla. 1994); Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652 (Fla. 5th DCA 1998)(Sharp, J., dissenting).

8. Dr. Aleong has asserted an affirmative defense. He has the burden of proving the facts that support that defense. See Ellingham v. Florida Department of Children and Family Services, 896 So. 2d 926 (Fla. 1st DCA 2005); and Public Health Trust of Dade County v. Holmes, 646 So. 2d 266 (Fla. 3d DCA 1994).

D. Section 474.214(1)(f), Florida Statutes.

9. Section 474.214(1)(f), Florida Statutes, defines the following offense: "Violating any provision of this chapter or chapter 455, a rule of the board or department, or a lawful order of the board or department previously entered in a disciplinary hearing, or failing to comply with a lawfully issued subpoena of the department." [Emphasis added].

10. The Department has alleged that Dr. Aleong violated Section 474.214(1)(f), Florida Statutes, by violating "a lawful order of the board of department previously entered in a disciplinary hearing . . . ."

11. In support of its charge, the Department has essentially alleged that Dr. Aleong failed to timely pay an administrative fine and costs in compliance with the Final Order Approving Settlement Stipulation it entered in BPR-2005-04911 (hereinafter referred to as the "Final Order"). Based upon the evidence stipulated to by the parties, the factual basis for the Department's charge has been proved clearly and convincingly:

a. On September 9, 2005, the Final Order was entered. That order approved the terms of a Settlement Stipulation entered into between the Department and Dr. Aleong;

b. The Settlement Stipulation required that Dr. Aleong pay an administrative fine and investigative costs "no later than thirty days (30) of rendering of a Final Order adopting this Settlement Stipulation";

c. The Final Order approving the Settlement Stipulation was rendered on September 9, 2005;

d. Dr. Aleong was aware of the terms and approval of the Settlement Stipulation by the Final Order, and was provided, through counsel, with a copy of it;

e. Payment of the administrative fine and investigative costs was due on or before October 9, 2005; and

f. Dr. Aleong failed to pay the administrative fine and investigative costs consistent with the Board's Settlement Stipulation as required in the Final Order.

E. Affirmative Defense.

12. Dr. Aleong has argued that the Department has arbitrarily sought enforcement of the Settlement Stipulation in this case. He has suggested that the evidence proved that he is the first person that the Department has filed an administrative complaint against for failure to timely pay a fine, "after said fine was ultimately paid . . . ." Dr. Aleong goes on to suggest that the foregoing facts prove that the Department is singling him out for prosecution.

13. Dr. Aleong's view of the evidence is rejected. While the parties have stipulated that this case appears to be the only one where a veterinarian was prosecuted for failure to pay a fine timely, where the fine was ultimately paid, the evidence did not prove that there were other similarly situated veterinarians who were not prosecuted. Indeed, the parties stipulated that the Department was unable to find any other case where "a fine was imposed, then paid late, in which an administrative complaint was not filed" even though it could not say "with absolute certainty, that prior to the administrative

complaint filed in this matter, that all other veterinarians have paid fines assessed in a final order by their due date."

14. It must be remembered that Dr. Aleong has the burden of proving his affirmative defense. The Department, therefore, was not required to prove with absolute certainty that, prior to this case, there were no similarly situated veterinarians; Dr. Aleong was required to prove that there were similarly situated veterinarians and that he is being arbitrarily treated differently. This he failed to do.

F. The Appropriate Penalty.

15. In addition to specifying the disciplinary action to be imposed upon Dr. Aleong in the prior disciplinary case, the Settlement Stipulation adopted by the Final Order established punishment for his failure to comply with the Settlement Stipulation. The established punishment is a 90-day suspension of his license. In Petitioner's Proposed Recommended Order Petitioner has argued that, having failed to comply with the terms of the Settlement Stipulation as required by the Final Order, Dr. Aleong is "thereby subject to the provisions of the Settlement Stipulation requiring the suspension of the license for a period of ninety (90) days."

16. Despite the terms of the Settlement Stipulation, this case is not an action to enforce the Settlement Stipulation, which is a contract between the Department and Dr. Aleong. Even

if this case could be considered as an action to enforce the contract between the Department and Dr. Aleong, this forum has jurisdiction over such a dispute. What this case is about and what this forum does have jurisdiction over is an alleged violation of Section 474.214(1)(f), Florida Statutes, a violation for which the Board has the authority to impose punishment. Therefore, in deciding the appropriate punishment, it is Section 474.214(2), Florida Statutes, and the rules adopted by the Board thereunder, which governs as opposed to the terms of the Settlement Stipulation.

17. In determining the appropriate punitive action to recommend to the Board in this case, it is necessary to consult the Board's "disciplinary guidelines," which impose restrictions and limitations on the exercise of the Board's disciplinary authority under Section 474.214, Florida Statutes. See Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231 (Fla. 5th DCA 1999).

18. The Board's guidelines are set out in Florida Administrative Code Rule 61G18-30.001, which provides, in pertinent part, the following penalty guideline for "[v]iolating . . . a lawful disciplinary order . . . ":

The usual action of the Board shall be to impose a penalty of one (1) year probation and a two thousand dollar (\$2,000.00) administrative fine. In the case of a . . . disciplinary order, the usual action shall

be to impose a period of suspension and a four thousand dollar (\$4,000.00) administrative fine.

Fla. Admin. Code R. 61G18-30.001(2)(f).

19. The foregoing penalty guideline is not inconsistent with the 90-day suspension agreed to by the parties in the Settlement Stipulation and proposed in Petitioner's Proposed Recommended Order.

20. Florida Administrative Code Rule 61B18-30.001(4) provides that, in applying the penalty guidelines, the following aggravating and mitigating circumstances are to be taken into account:

- (a) The danger to the public;
- (b) The length of time since the violation;
- (c) The number of times the licensee has been previously disciplined by the Board;
- (d) The length of time licensee has practiced;
- (e) The actual damage, physical or otherwise, caused by the violation;
- (f) The deterrent affect of the penalty imposed;
- (g) The affect [sic] of the penalty upon the licensee's livelihood;
- (h) Any effort of rehabilitation by the licensee;
- (i) The actual knowledge of the licensee pertaining to the violation;
- (j) Attempts by licensee to correct or stop violation or refusal by licensee to correct or stop violation;
- (k) Related violations against licensee in another state including findings of guilt or innocence, penalties imposed and penalties served;

- (l) Actual negligence of the licensee pertaining to any violation;
- (m) Penalties imposed for related offenses under subsections (1), (2) and (3) above;
- (n) Pecuniary benefit or self-gain enuring to licensee;
- (o) Any other relevant mitigating or aggravating factors under the circumstances.

21. In his proposed Recommended Order, Dr. Aleong has suggested that several mitigating factors apply in this case:

a. Dr. Aleong paid the imposed fine in its entirety prior to the filing of the Administrative Complaint. The administrative fine was paid on January 12, 2006, after Dr. Aleong received the investigatory complaint dated December 27, 2005;

b. No danger was caused to the public by the late payment of the administrative fine and investigative costs;

c. There no was prejudice to the Board, which ultimately received the administrative fine;

d. The penalty sought, a 90-day suspension, will have a severe adverse impact on Dr. Aleong's ability to earn a living;

e. The Final Order was not sent to Dr. Aleong directly;  
and

f. Dr. Aleong gained no pecuniary benefit by failing to timely pay the imposed fine.

22. Having carefully considered the facts of this matter in light of the provisions of Florida Administrative Code Rule

61G18-30.001, it is concluded that the Department's proposed penalty is excessive. While Dr. Aleong failed to comply with the Board's order, the evidence failed to prove why. In particular, the evidence failed to prove that he failed to pay timely for any reason other than his failure to pay attention as opposed to an intentional defiance of the Board's order. Therefore, it is suggested that the Board exercise its discretion to impose a fine on Dr. Aleong, rather than a suspension of his license.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered by the Board of Veterinary Medicine finding that Phillip J. Aleong, D.V.M., has violated Section 474.214(1)(f), Florida Statutes, as described in this Recommended Order, and requiring that he pay an administrative fine of \$2,000.00.



DONE AND ENTERED this 5th day of January, 2007, in  
Tallahassee, Leon County, Florida.



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LARRY J. SARTIN  
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Filed with the Clerk of the  
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COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in these cases.