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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,
BOARD OF ACUPUNCTURE,

Petitioner,

v.

DOAH CASE NO. 06-4117 PL
DOH CASE NO. 2004-27932

ELHAM KHARABI, A.P.,

Respondent.

DEPARTMENT OF HEALTH,
BOARD OF MASSAGE THERAPY,

Petitioner,

v.

DOAH CASE NO. 06-4491 PL
DOH CASE NO. 2004-27897

ELHAM KHARABI-MOGHADDAM, L.M.T.,

Respondent.

**PETITIONER'S RESPONSE TO RESPONDENT'S EXCEPTIONS TO THE
RECOMMENDED ORDER**

COMES NOW Petitioner, Department of Health, and submits its Response to Respondent's Exceptions to the Recommended Order issued by the Administrative Law Judge (ALJ), and in support thereof, states as follows:

Preliminary Statement

Section 120.57(1), Florida Statutes, and recent case law have clarified the reviewing authority of a Board under the Administrative Procedure Act. Under the law, the Board 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. The Board of Acupuncture is vested by the laws of Florida with the authority to interpret and apply such laws, regulations and policies as are applicable to programs within the Board's regulatory sphere.

If the Board wishes to reject or modify a finding of fact, Section 120.57(1)(I), Florida Statutes, requires that the agency make a determination from a review of the entire record and state with particularity in the order that the findings of fact were not based upon competent substantial evidence or that the proceeding on which the findings were based did not comply with essential requirements of law. Findings of fact may only be overturned by the Board if they are not supported by competent, substantial evidence in the record.

It is not the Board's responsibility to reweigh the trial testimony against the other evidence in the record. See § 120.57(1)(I), Fla. Stat. (2006). It is the Board's responsibility to "review whether the record contains competent, substantial evidence to support the [ALJ's] order," not to "review whether there was competent, substantial evidence to support [Respondent's position]." Swanigan v. Dobbs House, 442 So. 2d 1026, 1027 (Fla. 1st DCA 1983).

In regard to the conclusions of law, the Board may reject or modify the conclusions of law to reflect a more reasonable interpretation of the applicable laws and rules. However, the Board must state with particularity its reasons for rejecting or modifying such conclusions of law or interpretation of administrative rule *and* make a finding that the substituted conclusion of law or interpretation of administrative rule is as or more

reasonable than that which was rejected or modified. See § 120.57(1)(l), Fla. Stat. (2006).

Respondent's Exceptions

1. Respondent presents for the Boards' consideration exceptions to the findings of fact and the conclusions of law of the Recommended Order and to the recommended penalty. Petitioner opposes Respondent's exceptions.

2. Respondent takes exception to the Administrative Law Judge's (ALJ) finding of fact in Paragraph 7 of the Recommended Order. Respondent alleges that the findings of fact listed in Paragraph 7 are inconsistent with the testimony of Patient U.C. and with the document Patient U.C. completed on her first visit at Respondent's office, labeled Respondent's Exhibit 3. Respondent argues that Patient U.C. was actively suffering from all of the ailments checked on the "Comprehensive Acupuncture Examination Form" when she entered Respondent's office on June 29, 2004.

The ALJ's finding of fact in Paragraph 7 is entirely consistent with Patient U.C.'s testimony. Patient U.C. admitted to filling out the form in her own handwriting and multiple times during her testimony explained that she checked every ailment that she had ever suffered in the past. (Tr. P. 89, L. 20-25, P. 90, L. 1-9; P. 98, L. 12-18; P. 100, L. 1-11) There is competent, substantial evidence to support the ALJ's finding in Paragraph 7; therefore, this exception should be denied.

3. Respondent takes exception to the weight the ALJ gave to Patient U.C.'s testimony. The testimony of a credible witness is competent and substantial evidence.

As stated in Paragraph 58 of the Recommended Order, "these cases turn almost exclusively on the credibility of Patient U.C. and Respondent. Largely for the reasons explained in paragraphs 51 through 67 of Petitioner's Proposed Recommended Order, which are found to be accurate, the credibility issue has been resolved in favor of Patient U.C."

Furthermore, the credibility of a witness should be decided by the ALJ. Heifitz v. Dept. of Bus. & Prof'l Reg., 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). As stated in Heifitz, "it is the hearing officer's function to consider all the evidence presented, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence." The Recommended Order clearly demonstrates that the ALJ considered the totality of the evidence and drew reasonable inferences based on that evidence. This is within the discretion of the ALJ. See id. at 1281.

Respondent proposes that the board re-examine the evidence in this matter. It is not the Board's responsibility to reweigh trial testimony. See § 120.57(1)(l), Fla. Stat. (2006). In fact, it would be error for the Board to do so. Respondent's exception to the weight given Patient U.C.'s testimony should be denied.

4. Respondent takes exception to ALJ's finding of fact in Paragraph 23 of the Recommended Order. Respondent argues that the ALJ's finding that an anal specimen was forwarded to the police is not consistent with the report from Jackson Memorial Hospital (Jackson) admitted into evidence as Joint Exhibit 1. The ALJ's finding is consistent with the evidence presented, including the report from Jackson, which clearly

shows that rectal specimens were obtained and "given to police." Contrary to Respondent's argument, the findings of fact are not inconsistent with the medical records. The ALJ based his finding of fact in Paragraph 23 on competent, substantial evidence. This exception should be denied.

5. Respondent takes exception to ALJ's finding of fact in Paragraph 25 of the Recommended Order. Luis Yllanes testified that he could not remember the exact date Patient U.C. told him of the incident, but he remembered it to be "only about two days after the incident." (Tr. P. 148, L. 22-25) There is competent, substantial evidence to support the ALJ's finding in Paragraph 25; therefore, this exception should be denied.

6. Respondent takes exception to ALJ's finding of fact in Paragraph 31 of the Recommended Order. Respondent is once again asking that the Board re-examine the evidence concerning Dr. Garcia's assessment of Patient U.C.'s mental status. As stated above, it is not the Board's responsibility to reweigh the trial testimony. Regardless, the ALJ's finding is consistent with the credible testimony of Patient U.C. and Dr. Garcia. (Tr. P. 175, L. 21-25; P. 176; P. 177, L. 1-4) There is competent, substantial evidence to support the ALJ's finding in Paragraph 31; therefore, this exception should be denied.

7. Respondent takes exception to the weight the ALJ gave to the testimony of Dr. Haber. It is the responsibility of the ALJ to determine the credibility of witnesses and weigh the evidence. The ALJ considered Dr. Haber's opinion, but rejected it for the reasons outlined in Paragraph 36 through 44 of the Recommended Order. The Recommended Order clearly demonstrates that the ALJ considered the totality of the evidence and drew reasonable inferences based on that evidence. This is within the

discretion of the ALJ. Heifitz v. Dept. of Bus. & Prof'l Reg., 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985). There is competent, substantial evidence to support the ALJ's finding of fact as it relates to the testimony of Dr. Haber. Therefore, this exception should be denied.

8. Respondent takes exception to the ALJ's findings of fact in Paragraphs 27 through 44. Again, these findings of fact are supported by the credible testimony of Patient U.C. and her treating psychiatrist, Dr. Garcia. It is the ALJ's function to consider all the testimony presented, judge credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of fact based on competent, substantial evidence. See id. at 1281. Respondent's exception to Paragraphs 27 through 44 should be denied.

9. Respondent takes exception to the findings of fact and conclusions made by the ALJ as they relate to the medical testimony presented at the hearing. Respondent argues that the findings of the ALJ do not support the conclusions of law in the Recommended Order. He further argues that Petitioner failed to prove a violation by clear and clear and convincing evidence. In support of these arguments, Respondent asserts that the ALJ's findings of fact and conclusions of law are against the weight of the evidence. The standard of review as to the ALJ's findings of fact is whether competent, substantial evidence exists to support the ALJ's findings. As detailed above the ALJ's findings of fact are supported by an abundance of competent, substantial evidence.

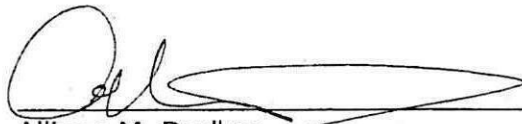
The standard of review as to the ALJ's conclusions of law is whether the ALJ's conclusion is a reasonable interpretation of the applicable laws and rules. The ALJ's conclusions of law in Paragraphs 46 through 71 are a reasonable interpretation of the applicable laws and rules. The Recommended Order demonstrates that the ALJ considered the totality of the evidence in reaching his conclusions and that there is not a more reasonable interpretation of the applicable laws and rules. Therefore, this exception should be denied.

10. Respondent takes exception to the recommended penalty because a six month suspension would negatively affect Respondent's livelihood. The penalty recommended by the ALJ is appropriate and should be imposed. The ALJ appropriately weighed all the aggravating and mitigating factors and arrived at an appropriate recommended penalty. Additionally, in Paragraph 71 of the Recommended Order, the ALJ concluded that "a longer suspension of Respondent's licenses could be justified due to the harm caused to Patient U.C." This exception should be denied.

11. Respondent takes exception to the ALJ's finding in Paragraph 70. In this Paragraph, the ALJ considered the mitigating and aggravating factors in determining his recommended penalty. One of the mitigating factors outlined in the Florida Administrative Code for both the Board of Acupuncture and the Board of Massage Therapy is the attempt "by the licensee to correct or stop a violation or refusal by the licensee to correct or stop a violation." After concluding that Respondent committed sexual misconduct against Patient U.C., the ALJ reasonably inferred that those advances were discontinued. This exception should be denied.

WHEREFORE, Petitioner respectfully requests that the Board deny Respondent's exceptions and that the Recommended Order be adopted in its entirety.

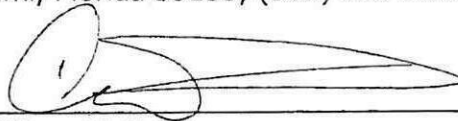
Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the forgoing Petitioner's Response to Respondent's Motion to Continue has been furnished by facsimile and U.S. Mail this 10th day of August, 2007, to Respondent's counsel, David M. Shenkman, Esq., at 2701 South Bayshore Drive, Suite 602, Miami, Florida 33133, (305) 858-6097 (facsimile).



Allison M. Dudley
Assistant General Counsel