STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JANNEL CHERRINGTON, Petitioner, vs. BARRY UNIVERSITY SNHS-ANESTHESIOLOGY, Respondent.	)	Case No. 06-4648
JANNEL CHERRINGTON, Petitioner, vs. WOLVERINE ANESTHESIA CONSULTANTS, Respondent.	)	Case No. 06-4650

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Orlando, Florida, on February 28, 2007.

APPEARANCES

For Petitioner: Andrea Bateman, Esquire
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For Respondent Barry University SNHS-Anesthesiology:

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Barry University
Division of Legal Affairs
and Human Resources
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For Respondent Wolverine Anesthesia Consultants:

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Deborah L. La Fleur, Esquire
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STATEMENT OF THE ISSUE

The issue is whether either respondent bore a relationship to Petitioner, as described in Section 760.10, Florida Statutes, that confers jurisdiction upon the Florida Commission on Human Relations to investigate Petitioner's claims of racial discrimination under the Florida Civil Rights Act of 1992, Sections 760.01-760.11 and 509.092, Florida Statutes.

PRELIMINARY STATEMENT

By Employment Complaint of Discrimination filed June 22, 2006, Petitioner alleged that Respondent Barry University SNHS-Anesthesia discriminated against her, based on her race, by terminating her from a graduate nursing program. By Employment Complaint of Discrimination filed June 22, 2006, Petitioner alleged that Respondent Wolverine Anesthesia Consultants discriminated against her, based on her race, by assigning her

to a certified registered nurse anesthetist longer than it assigned non-black students even though her skill average was well above average.

On October 3, 2006, with respect to Respondent Barry University SNHS-Anesthesia, the Florida Commission on Human Relations entered a Notice of Determination: No Jurisdiction. The notice states that no employer-employee relationship existed between the parties. The notice states that Petitioner was a student intern in the graduate nursing program at Barry University, which placed her at Wolverine Anesthesiology Consultants to complete the clinical portion of her graduate program. The notice states that Petitioner received no wages and was not the subject of a personnel file, tax documents, or other employee-related documentation. Based on "the lack of direct or indirect economic remuneration, or any promise of such to [Petitioner] by Respondent [Barry University SNHS-Anesthesia], the notice concludes that no employer-employee relationship existed. The notice cites as authority Llampallas v. Mini-Circuits, 163 F.3d 1236 (11th Cir. 1998) and O'Connor v. Davis, 126 F.3d 112 (2nd Cir. 1997).

On October 31, 2006, with respect to Respondent Wolverine Anesthesia Consultants, the Florida Commission on Human Relations entered a Notice of Determination: No Jurisdiction.

The bases of the notice are the same as those set forth in the preceding paragraph.

By Petition for Relief dated November 7, 2006, Petitioner alleged that Respondent Barry University SNHS-Anesthesiology discriminated against her, based on her race, by dismissing her from its graduate nursing program by evaluating her pursuant to more rigorous standards than it used to evaluate non-minority students. This petition commenced DOAH Case No. 06-4648.

By Petition for Relief dated November 14, 2006, Petitioner alleged that Respondent Wolverine Anesthesia Consultants discriminated against her, based on her race, by imposing more rigorous standards during her internship than it imposed upon non-minority students. This petition commenced DOAH Case No. 06-4650.

On December 5, 2006, the Administrative Law Judge entered an order consolidating the two cases. The Administrative Law Judge limited the evidence at hearing to the jurisdiction issue because the investigation of the Florida Commission on Human Relations was limited to the jurisdictional issue identified above.

At the hearing, Petitioner called three witnesses and offered into evidence eight exhibits: Petitioner Exhibits 1-8. Respondents called one witness and offered into evidence 12

exhibits: Respondents Exhibits 1-12. All exhibits were admitted.

The court reporter filed the transcript on May 17, 2007. The parties filed Proposed Recommended Orders on May 29, 2007.

FINDINGS OF FACT

1. Petitioner has been a registered nurse licensed in Florida for 14 years. Her specialty is intensive care. Seeking advancement within the profession of nursing, Petitioner decided to pursue certification as a Certified Registered Nurse Anesthetist (CRNA).

2. A CRNA has advanced training and education in anesthesia and passes a national certification examination, which is administered by neither Respondent. Upon passing the examination and meeting other requirements, an applicant is entitled to certification from the Council on Certification of Nurse Anesthetists. After obtaining this certificate and completing other requirements, such as financial responsibility, the applicant is eligible for certification by the Florida Board of Nursing as an advanced registered nurse practitioner in anesthesiology, pursuant to Florida Administrative Code Rule 64B9-4.002. In Florida, a CRNA is authorized to administer anesthesia in in- and out-patient settings and bears significant responsibilities for the safety of anesthetized patients.

3. Petitioner enrolled at Barry University to fulfill the educational requirements for certification. Barry University is a private institution headquartered in Miami Shores and is one of several institutions in Florida that offer a program to satisfy the educational requirements for CRNA certification.

4. The 28-month program at Barry University leads to a master of science degree in anesthesiology. A major component of the educational program is clinical practice. The clinical practice requires a student to perform clinical responsibilities, under supervision, with an anesthesiology group. At the time in question, Barry University maintained relationships with different anesthesiology groups in most major urban areas in Florida.

5. Petitioner began the Barry University program in January 2005 and withdrew from the program in May 2006. She chose to take her clinical training in Orlando, where Wolverine Anesthesia Consultants accepted Barry University students for clinical practice. Wolverine Anesthesia Consultants served various hospitals forming part of the Orlando Regional Healthcare System. Petitioner began the clinical portion of the program in May 2005.

6. No cash is exchanged between Barry University and Wolverine Anesthesia Consultants as part of the arrangement described above. The obvious benefit for Barry University,

whose program is not inexpensive, is that Wolverine's supervision of its students in the clinical practice allows Barry to offer a comprehensive anesthesiology program that qualifies its students to sit for the CRNA examination.

7. The obvious benefits to Wolverine Anesthesia Consultants are access to newly certified CRNAs, who are in high demand, and the ability to recruit the students likeliest to excel within the profession. It is less clear, from the present record, if Wolverine is able to bill for the services of more advanced students. From time to time, Wolverine provides Barry with financial support, such as a stipend so that a financially needy student may attend an out-of-town conference, as the tuition charged by Barry does not cover the cost of the program or incidental student costs.

8. The economic relationship between the respondents is only of relevance, however, in providing the background from which to assess the economic relationship between the respondents, on the one hand, and Petitioner--and, more specifically, the value that flows to Petitioner from one or both respondents. Clearly, the educational and clinical programs provide educational value, and potential economic value, if and when certification is obtained, but, as explained in the Conclusions of Law, the key question is what, if any,

economic value flows to Petitioner from either respondent during her relationship with each respondent.

9. Neither respondent paid Petitioner any income, compensation, or other benefit, directly or indirectly. Neither respondent ever provided Petitioner with an IRS W-2 statement or Form 1099, as evidence of payments to an employee or independent contractor. She never received compensation of any type from either respondent, nor did she receive an IRS Form 1099, reflective of the payment of compensation to an independent contract. Petitioner never received any other employment-related benefits from either respondent, such as health insurance or retirement benefits. Neither respondent provided Petitioner with housing or a housing allowance. Wolverine did not insure Petitioner on its medical malpractice insurance policy. Neither respondent covered Petitioner under workers' compensation.

10. Wolverine Anesthesia Consultants required Petitioner to sign her name on any anesthesia record pertaining to a case in which she was involved. When Petitioner was required, due to the needs of a particular patient, to work in excess of her scheduled time, she was entitled, from Barry University, to "comp time," which means only that she could receive credit for the additional time worked when setting a subsequent schedule. However, apart from a grant from Barry University as part of her

financial-aid package, Petitioner never received any financial benefit from either respondent.

11. In addition to the occasional stipend, which Petitioner does not appear to have received, Wolverine Anesthesia Consultants provided minor items, such as lunches for meetings of the interns, which Petitioner may not have attended, and $50 Christmas gift certificates to all interns, including Petitioner. In no way does the record support an interpretation of these minor acknowledgements or courtesies as compensation because Wolverine is under no obligation to provide them, no relationship exists between the recipient of the item and the amount of time worked, and no relationship exists between the value of the item or stipend and the amount of time worked by the student receiving the item or stipend.

12. Although Barry University administers a comprehensive test to all candidates for a master's degree in anesthesiology, passage of which is required for a degree, Petitioner withdrew from the program prior to the administration of this test. She withdrew essentially due to reports from Wolverine to Barry University that she had failed to make adequate progress in the clinical program.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569, 120.57(1), and 760.11(7), Fla. Stat. (2006).

14. Section 760.10, Florida Statutes, provides, in relevant part:

> (1) It is an unlawful employment practice for an employer:
>
> (a) To discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.
>
> (b) To limit, segregate, or classify employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities, or adversely affect any individual's status as an employee, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.
>
> (2) It is an unlawful employment practice for an employment agency . . ..
>
> (3) It is an unlawful employment practice for a labor organization . . ..
>
> (4) It is an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual because of race, color, religion, sex, national origin, age, handicap, or marital status in admission to, or

employment in, any program established to provide apprenticeship or other training.

(5) Whenever, in order to engage in a profession, occupation, or trade, it is required that a person receive a license, certification, or other credential, become a member or an associate of any club, association, or other organization, or pass any examination, it is an unlawful employment practice for any person to discriminate against any other person seeking such license, certification, or other credential, seeking to become a member or associate of such club, association, or other organization, or seeking to take or pass such examination, because of such other person's race, color, religion, sex, national origin, age, handicap, or marital status.

(6) It is an unlawful employment practice for an employer, labor organization, employment agency, or joint labor-management committee to print, or cause to be printed or published, any notice or advertisement relating to employment, membership, classification, referral for employment, or apprenticeship or other training, indicating any preference, limitation, specification, or discrimination, based on race, color, religion, sex, national origin, age, absence of handicap, or marital status.

(7) It is an unlawful employment practice for an employer, an employment agency, a joint labor-management committee, or a labor organization to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

* * *

15. The seven subsections address four different classes of potential respondents: employers, employment agencies, labor-related organizations, and persons involved in the licensing/certification process. Section 760.10(2),(3), (6), and (7) is inapplicable to these cases. Section 760.10(2) and (3) pertains to employment agencies and labor organizations, and neither respondent qualifies as these types of entity. Section 760.10(6) and (7) applies to employers, but describes activity not of the type involved in these cases.

16. The three subsections potentially at issue in this case are Section 760.10(1), (4), and (5), but no jurisdiction exists in these cases because neither respondent is an employer, as is required for Section 760.10(1) and (5), and neither respondent is a person described in Section 760.10(4).

17. Section 760.02(7), Florida Statutes, defines "employer" as any person employing at least 15 persons during a specified period. Doubtlessly, each respondent satisfies this definition, but this does not mean that either respondent is the employer of Petitioner. The problem for Petitioner is that neither respondent is her employer. In general, the employer-employee relationship requires that that the employer compensate the employee for the latter's services.

18. In O'Connor v. Davis, 126 F.3d 112 (2d Cir. 1997), cert. denied, 522 U.S. 1114 (1998), the plaintiff was a college

student performing a required internship at a hospital approved by her school. Because the internship qualified as work-study for financial aid purposes, the student's college paid her for the work that she performed for the hospital. After being subjected to behavior by a hospital employee that may have constituted sexual harassment, the student sued, among others, her college, the individual whom she accused of sexually harassing her, and the hospital. Eventually, the sole defendant among these three parties was the hospital.

19. The O'Connor opinion notes that, prior to any determination as to whether an individual is an employee or independent contractor, it is necessary first to determine if the hospital "hired" the plaintiff for any purpose. The opinion states:

> Where no financial benefit is obtained by the purported employee from the employer, no "plausible" employment relationship of any sort can be said to exist because although "compensation by the putative employer to the putative employee in exchange for his services is not a sufficient condition, . . . it is an essential condition to the existence of an employer-employee relationship." Graves [v. Women's Professional Rodeo Association], 907 F.2d at 73. See also Neff v. Civil Air Patrol, 916 F. Supp. 710, 712-13 (S.D. Ohio, 1996); Smith v. Berks Community Television, 657 F. Supp. 794, 796 (E.D. Pa. 1987); cf. Haavistola v. Community Fire Co., 6 F.3d 211, 219 (4th Cir. 1993).

126 F.3d at 115-116.

20. The O'Connor decision concludes that the plaintiff was never hired by the hospital due to the absence of remuneration:

> It is uncontested that O'Connor received from [the hospital] no salary or other wages, and no employee benefits such as health insurance, vacation, or sick pay, nor was she promised any such compensation. [1] [1 We reject O'Connor's claim that she was compensated to the extent that she received, through (the college), federal work study funding for the hours of volunteer work performed at (the hospital). Plainly, it was (the college) -- not (the hospital) -- that made these payments to O'Connor.] This case thus differs from Haavistola v. Community Fire Co., in which the Fourth Circuit considered whether a volunteer member of a fire company was an employee for Title VII purposes where "on the one hand, [plaintiff] did not receive direct compensation as a member of the Fire Company, but, on the other hand, she did not affiliate with the company without reward entirely." 6 F.3d 211, 221 (4th Cir. 1993). The court then noted that the plaintiff received, through her volunteer position, a state-funded disability pension, survivors' benefits for dependents, scholarships for dependents upon death or disability, group life insurance, and several other benefits. See id. The court concluded that the district court granted summary judgment improvidently, given that a factfinder should determine whether "the benefits represent indirect but significant remuneration . . . or inconsequential incidents of an otherwise gratuitous relationship." Id. at 222.

21. In Llampallas v. Mini-Circuits, Inc., 163 F.3d 1236 (11th Cir. 1998), the court cited O'Connor with approval, noting that statutory prohibitions against discrimination by an employer against "any individual" necessarily require

discrimination against an employee or potential employee. 163 F.3d at 1242-43. The Llampallas court then declined to find jurisdiction in a case in which the employer paid only $1000 to an officer/director under ambiguous circumstances.

22. In Pietras v. Board of Fire Commissioners, 180 F.3d 468 (2d Cir. 1999), the court found jurisdiction to hear discrimination claims of a volunteer firefighter when, by state law, as a volunteer firefighter, she received retirement benefits, life insurance, death benefits, disability insurance, and some medical benefits.

23. Under this authority, Petitioner was never hired by either respondent. Thus, as to Petitioner, neither respondent is an employer, so no jurisdiction exists under Section 760.10(1) and (4), Florida Statutes.

24. The certification regime, which is described in the Findings of Fact, is set forth in Florida Administrative Code Rule 64B9-4.002, which states, in part:

> (1) In accordance with the provisions of Section 464.012, F.S., any person who wishes to be certified as an Advanced Registered Nurse Practitioner shall submit an application to the Department, on forms prescribed by it, as incorporated in subsection 64B9-4.004(1), F.A.C., demonstrating that the applicant holds a current unencumbered license to practice professional nursing in Florida.
>
> (2) Applicant shall submit proof of national advanced practice certification

from an approved nursing specialty board. After July 1, 2006, applications for certification as an Advanced Registered Nurse Practitioner pursuant to Section 464.012(3), F.S., shall submit proof of national advanced practice certification from an approved nursing specialty board.

(3) Professional or national nursing specialty boards recognized by the Board include, but are not limited to:

(a) Council on Certification of Nurse Anesthetists, or Council on Recertification of Nurse Anesthetists, or their predecessors.

* * *

(4) Those nursing specialty boards seeking recognition by the Board shall meet the following standard:

(a) Attests to the competency of nurses in a clinical specialty area;

(b) Requires a written examination prior to certification;

(c) Requires (and required at the time of original certification) completion of a formal program prior to eligibility of examination;

(d) Maintains a program accreditation or review mechanism that adheres to criteria which are substantially equivalent to requirements in Florida;

(e) Identifies standards or scope of practice statements as appropriate for the specialty.

(5) Pursuant to Section 456.048, F.S., all ARNP’s shall carry malpractice insurance or demonstrate proof of financial responsibility. Any applicant for certification shall submit proof of compliance with Section 456.048, F.S. or exemption to the Board office within sixty days of certification or be in violation of this rule. All certificateholders shall submit such proof as a condition of biennial

> renewal or reactivation. Acceptable coverage shall include: . . ..

25. Florida Administrative Code Rule 64B9-4.004(1) describes the application to be submitted to the Florida Board of Nursing:

> (1) A Registered Nurse applying for initial certification as an Advanced Registered Nurse Practitioner shall file with the Department an "Initial Application for Certification As An Advanced Registered Nurse Practitioner," Form DOH-NUR 105 (9/97), effective 4-5-00, incorporated herein by reference, and available from the Board office, and provide the Board with the following:
>
> (a) Documentation acceptable to the Board that the educational program attended meets the program guidelines stipulated in subsections 64B9-4.003(1) and (2), F.A.C.
>
> (b) Proof acceptable to the Board of satisfactory completion of the educational program which shall consist of:
>
> 1. An official Registrar's copy of the applicant's transcript shall be sent directly to the Board from the school and shall denote successful completion of the formal post-basic program or awarding of the masters' degree in a nursing clinical specialty.
>
> 2. A verification form prescribed by the Board submitted by the director of the advanced nursing program indicating successful completion with the official school seal.
>
> 3. Such other documentary proof which evidences completion.
>
> (c) If the applicant is required to be nationally certified, one of the following shall also be submitted:
>
> 1. A notarized true and correct copy of the original or recertification specialty board certificate.

2. Such other documentary proof which evidences certification by an appropriate specialty board.

3. Verification from the specialty association of certification.

26. Under the facts and law concerning the process by which a registered nurse becomes a CRNA, it is impossible to assign to either respondent the status of a covered individual under Section 760.10(5), Florida Statutes. Although it is, of course, unnecessary to find an employer-employee status to find liability under a statute addressing discrimination in licensing, neither respondent administered an examination directly required for licensure. It is unclear that Wolverine Anesthesia Consultants administered any tests. Obviously, Barry University administers tests, including a comprehensive test at the end of the master's program, but Petitioner could not claim any discrimination in this test, as she never took it. More generally, though, Section 760.10(5) is not applicable to educational institutions whose degrees are necessary, but not sufficient, conditions for licensure, any more than this statute is applicable to universities, whose bachelor's degree may be a necessary, but not sufficient, condition to becoming a nurse or a physician. The same kind of reasonable interpretation of "individual" recognized in Llampallas as to the employer-based statutes must apply to the licensing-based statute. Section 760.10(5) applies instead to entities more directly involved in

the licensing process--in this case, the Council on Certification of Nurse Anesthetists.

RECOMMENDATION

It is

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the petitions of Petitioner in these two cases.

DONE AND ENTERED this 1st day of June, 2007, in Tallahassee, Leon County, Florida.

S

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 1st day of June, 2007.

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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 must be filed with the agency that will issue the final order in this case.