Final Order No. DOH-08-0988-FOF-MQA
FILED DATE - 5.15.08
Department of Health
By: Raquel Rhodes
Deputy Agency Clerk

STATE OF FLORIDA
BOARD OF NURSING

DEPARTMENT OF HEALTH,

2008 MAY 16 P 12:15

Petitioner,

DIVISION OF ADMINISTRATIVE HEARINGS

vs.

DOH CASE NO.: 2006-31490
DOAH CASE NO.:07-1914PL
LICENSE NO.: RN 1302962

BJ WALPER PENANSKY,

Respondent.
_____/

FINAL ORDER

THIS CAUSE came before the BOARD OF NURSING (Board) pursuant to Sections 120.569 and 120.57(1), Florida Statutes, on February 14, 2008, in Tallahassee, 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 Megan Blancho and William Miller, Assistant General Counsels. Respondent was represented by Suzanne Suarez Hurley, Esquire.

Upon review of the Recommended Order, the argument of the parties, and after a review of the complete record in this case, the Board makes the following findings and conclusions.

RULINGS ON EXCEPTIONS

1. The first exception is addressed to the facts contained in the Emergency Suspension Order entered by the Surgeon General, Head of the Department of Health (formerly titled Secretary of the Department of Health). The Board has no jurisdiction over

emergency suspension order entered pursuant to Chapter 456, Florida Statutes. Therefore, this exception is denied.

2. This exception was filed because the Court did not comply with the essential requirements of law. There is a dispute over the interpretation of the actual testimony that was given. An exception must be based on a finding that there is no competent substantial evidence to support a finding of fact made by the ALJ. Respondent filed a motion in limine with regard to certain incidents that were introduced into evidence, which was denied by the ALJ. The Board may not overturn evidentiary rulings, such as rulings on motions in limine by an ALJ. The Board rejects the exceptions in paragraph two of the exception

3. This exception was filed because Respondent asserts that the ALJ did not comply with the essential requirements of law because the probable cause panel of the Board authorized an administrative complaint for a violation of 2006 statutes arising from actions that occurred in 2004. Respondent's exception is approved.

4. Respondent objects to the findings of fact in paragraph number 4 because the findings of fact do not comply with the essential requirements of law. There was a dispute in the testimony concerning the findings of fact. Exceptions can only be granted if there is no competent substantial evidence in the record to support the findings of fact. The exception to the

findings of fact in paragraph 4 of the findings of fact do not raise sufficient grounds on which to grant an exception.

5. Respondent's exception to the findings of fact stated in paragraph 5 is based on the argument that the ALJ omitted facts. There is no requirement that an ALJ make findings of fact on every evidentiary issue raised at hearing. An exemption must be based on an assertion that there are findings of fact not supported by competent substantial evidence-not an assertion that other facts based on competent substantial evidence would result in an alternative outcome. Exception number 5 is denied.

6. Exception numbered 6 is based on an allegation that the ALJ's finding did not comply with the essential requirements of law. The exception does not cite any finding that is not supported by competent substantial evidence, so the exception is denied.

7. The Board does not have jurisdiction over Chapter 440, Florida Statutes, and therefore cannot grant the exemption set forth in Respondent's exemption paragraph 7.

8. The evidentiary ruling by the ALJ regarding the admissibility of evidence related to the Drug Free Workplace Act is outside the substantive jurisdiction of the Board, so the exception is denied.

[Exception numbered 9 was not addressed by the Board and does not change the outcome of the case.]

10. Respondent's exception number 10 asserts that there was substantial competent evident to support findings contrary to the ALJ's finding. The exception is rejected because the standard is whether there is competent substantial evidence to support the finding, not whether there is competent substantial evidence to support an alternative finding.

11. Respondent's exception addresses relevancy of information admitted by the ALJ. The Board does not have the authority to overrule the evidentiary rulings of the ALJ. The exception is therefore rejected.

12. Respondent's exception to the findings of fact stated in paragraph 12 is based on the argument that the ALJ omitted facts. There is no requirement that an ALJ make findings of fact on every evidentiary issue raised at hearing. An exemption must be based on an assertion that there are findings of fact not supported by competent substantial evidence-not an assertion that other facts based on competent substantial evidence would result in an alternative outcome. Exception number 12 is denied.

13. Respondent's exception to the findings of fact stated in paragraph 13 is based on the argument that the ALJ omitted facts. There is no requirement that an ALJ make findings of fact on every evidentiary issue raised at hearing. An exemption must be based on an assertion that there are findings of fact not supported by competent substantial evidence-not an assertion that

other facts based on competent substantial evidence would result in an alternative outcome. Exception number 13 is denied.

14. Respondent's exception to the findings of fact stated in paragraph 17 is based on the argument that the ALJ omitted facts. There is no requirement that an ALJ make findings of fact on every evidentiary issue raised at hearing. An exemption must be based on an assertion that there are findings of fact not supported by competent substantial evidence-not an assertion that other facts based on competent substantial evidence would result in an alternative outcome. Exception number 14 is denied.

15. Respondent's exception to the findings of fact stated in paragraph 15 is based on the argument that the ALJ omitted facts. There is no requirement that an ALJ make findings of fact on every evidentiary issue raised at hearing. An exemption must be based on an assertion that there are findings of fact not supported by competent substantial evidence-not an assertion that other facts based on competent substantial evidence would result in an alternative outcome. Exception number 15 is denied.

16. Respondent's exception to the findings of fact stated in paragraph 16 is based on the argument that the ALJ omitted facts. There is no requirement that an ALJ make findings of fact on every evidentiary issue raised at hearing. An exemption must be based on an assertion that there are findings of fact not supported by competent substantial evidence-not an assertion that

other facts based on competent substantial evidence would result in an alternative outcome. Exception number 16 is denied.

17. The Board does not have substantive jurisdiction over Chapter 440, Florida Statutes, to determine if Respondent's employer was obligated to comply with that law and whether non-compliance would result in an evidentiary exclusion; therefore the Board cannot grant the exemption set forth in Respondent's exemption paragraph 17. The exception is denied.

18. The exception set forth in paragraph 18 is based on the assertion that essential facts were omitted by the ALJ, and questions the credibility of the witnesses. There is no requirement that an ALJ make findings of fact on every evidentiary issue raised at hearing. An exemption must be based on an assertion that there are findings of fact not supported by competent substantial evidence-not an assertion that other facts based on competent substantial evidence would result in an alternative outcome. Additionally, it is the responsibility of the ALJ to determine the credibility of witnesses and the Board does not have the authority to make different credibility determinations. The exception is denied.

19. The exception set forth in paragraph 19 of the exceptions is based on the absence of testimony from other potential witnesses and questions the credibility of the testifying witnesses. It is not in the purview of the Board to

speculate on possible testimony of absent witnesses or to alter the credibility determinations made by the ALJ. Additionally, competent substantial evidence to support a different finding of fact does not support granting an exception, because the Board does not have the authority to determine on which testimony to rely when contrary evidence is presented. The exception is denied.

20. The exception set forth in paragraph 20 is based on Respondent's assertion that the testimony on which the ALJ relied does not have sufficient facts to support the finding and omits additional facts on which evidence was admitted. This exception also addresses the requirements of Chapter 440. The Board does not have the authority to choose among contrary facts in opposition to the findings of the ALJ, and does not have substantive jurisdiction over Chapter 440. The exception is denied.

21. The exception in paragraph 21 of the exceptions requested the Board to take into account that facts supported by the evidence were not included in the Recommended Order. The exception does not assert that there was no competent substantial evidence to support the findings made by the ALJ. The exception is denied.

22. The exception set forth in paragraph 22 of the exceptions requests the Board to interpret Chapter 440 and its

application to the facts at issue. The Board does not have substantive jurisdiction over the provisions of Chapter 440. The exception is denied.

23. The exceptions do not include a paragraph numbered 23.

24. The exception set forth in paragraph 24 of the exceptions asserts that facts in evidence were not included in the ALJ's finding of fact and that the expert testimony was contradictory. The credibility of witnesses and the weight to be assigned testimony is the province of the ALJ. Respondent does not assert that there was no competent evidence to support the ALJ's findings. The exception is denied.

25. The exception set forth in paragraph 25 of the exceptions is based on the argument that the ALJ omitted facts. There is no requirement that an ALJ make findings of fact on every evidentiary issue raised at hearing. An exemption must be based on an assertion that there are findings of fact not supported by competent substantial evidence-not an assertion that other facts based on competent substantial evidence would result in an alternative outcome. Exception number 25 is denied.

26. The exception set forth in paragraph 26 of the exceptions is based on the argument that the ALJ omitted facts. There is no requirement that an ALJ make findings of fact on every evidentiary issue raised at hearing. An exemption must be based on an assertion that there are findings of fact not

supported by competent substantial evidence-not an assertion that other facts based on competent substantial evidence would result in an alternative outcome. Exception number 26 is denied.

27. Exception number 27 appears to call the credibility of one of the witnesses into question. The Board may not make findings of credibility of witnesses contrary to the findings of the ALJ. Exception number 27 is denied.

28. The exception set forth in paragraph 28 of the exceptions is based on the argument that the ALJ omitted facts. There is no requirement that an ALJ make findings of fact on every evidentiary issue raised at hearing. An exemption must be based on an assertion that there are findings of fact not supported by competent substantial evidence-not an assertion that other facts based on competent substantial evidence would result in an alternative outcome. Exception number 28 is denied.

29. The exception in paragraph 29 asserts that the record contained testimony contradictory to the testimony on which the ALJ relied, which may have resulted in a different recommendation. The exception is not based on an assertion that findings of fact made by the ALJ are not supported by competent substantial evidence. Exception number 29 is denied.

30 & 31. The exception set forth in paragraph "30 & 31" concerns the credibility of a witness and the submission of documentary evidence. The Board does not have substantive

jurisdiction over the rules of evidence, and does not have authority to rule on the credibility of witnesses. The exception is denied.

32. Exception number 32 is based on the argument that the ALJ omitted facts or made findings of fact contrary to a portion of the evidence. There is no requirement that an ALJ make findings of fact on every evidentiary issue raised at hearing. An exemption must be based on an assertion that there are findings of fact not supported by competent substantial evidence- not an assertion that other facts based on competent substantial evidence would result in an alternative outcome. Exception number 32 is denied.

33. Exception number 33 is based on the argument that the ALJ omitted facts or made findings of fact contrary to a portion of the evidence. There is no requirement that an ALJ make findings of fact on every evidentiary issue raised at hearing. An exemption must be based on an assertion that there are findings of fact not supported by competent substantial evidence- not an assertion that other facts based on competent substantial evidence would result in an alternative outcome. Exception number 33 is denied.

34. Exception number 34 is based on the argument that the ALJ omitted facts or made findings of fact contrary to a portion of the evidence. There is no requirement that an ALJ make

findings of fact on every evidentiary issue raised at hearing. An exemption must be based on an assertion that there are findings of fact not supported by competent substantial evidence- not an assertion that other facts based on competent substantial evidence would result in an alternative outcome. Exception number 34 is denied.

35. Exception number 35 asserts that the findings of fact by the ALJ were based on a "subjective smell" by one or two witnesses. It does not appear that the ALJ's sole basis for the findings of fact was that limited testimony. Exception number 35 is denied.

36. There is no exception numbered 36.

37. Exception number 37 addresses the ALJ's conclusions of law with regard to the standard of proof and the admission of evidence over objection, issues in the purview of the ALJ. Exception number 37 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 464, Florida Statutes.

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

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 $250.00 within sixty (60) days from the date of entry of this Order. 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 BJ WALTER PENANSKY is suspended until she undergoes an evaluation coordinated by the Intervention Project for Nurses (IPN), and complies with any and all terms and conditions imposed by IPN as a result of said evaluation. It is the duty of the licensee to contact the IPN at P.O. Box 49130, Jacksonville Beach, Florida 32240-9130, (904) 270-1620 within 30 days. If the licensee is in need of monitoring or treatment, the

licensee shall comply with all conditions of the IPN Advocacy Contract or she will be in violation of the Board Order.

The license of BJ WALTER PENANSKY is placed on probation for three, subject to the following conditions:

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 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 retained jurisdiction to consider the Motion to Assess Costs and Respondent's filed objections thereto. The issues regarding costs were presented to the Board at its duly-noticed public meeting on April 11, 2008 in Dania, Florida. Respondent's objections to the assessed costs did not assert that the costs were not actually expended in the investigation and litigation of this case. Therefore, the Board The Board reviewed imposes the costs associated with this case in the amount of $66,445.41. Said costs are to be paid within 60 days 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 5TH day of MAY, 2008.

BOARD OF NURSING

D. García, MS, RN, CCM

Rick García, RN, MS, CCM
Executive Director *for*
Vicky Stone Gale, ARNP, MSN, 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 Suzanne Suarez Hurley, Esquire P.O. Box 13215, Tampa FL 33681-3215 and 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 William Miller, Department of Health, 4052 Bald Cypress Way, Bin #C-65, Tallahassee, Florida 32399-3265 this 13th day of May, 2008.

Deputy Agency Clerk

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STATE OF FLORIDA
DEPARTMENT OF HEALTH

DEPARTMENT OF HEALTH,

Petitioner,

v. **Case No. 2006-31490**

B.J. WALPER PENANSKY, A.R.N.P.,

Respondent.
_____/

ADMINISTRATIVE COMPLAINT

COMES NOW, Petitioner, Department of Health, by and through its undersigned counsel and files this Administrative Complaint before the Board of Nursing against the Respondent, B.J. Walper Penansky, A.R.N.P., and in support thereof alleges:

1. Petitioner is the state department charged with regulating the practice of nursing pursuant to Section 20.43, Florida Statutes; Chapter 456, Florida Statutes; and Chapter 464, Florida Statutes.

2. At all times material to this Complaint, Respondent was an Advanced Registered Nurse Practitioner (A.R.N.P.) in the State of Florida, having been issued license number RN 1302962.

3. Respondent's last address of record is 1012 Hallwood Loop, Brandon, Florida 33511-7718.

4. From on or about April 1, 1993 through August 3, 2006, Respondent was employed as an A.R.N.P. at Suncoast Community Health Center ("Suncoast") located in Ruskin, Florida.

5. On or about October 20, 2004, the Medical Records Coordinator at Suncoast noticed Respondent, while working on patient records, was talking out loud to herself about personal issues for approximately thirty (30) minutes.

6. On or about October 20, 2004, the RN Supervisor wrote a memorandum to the Human Resources supervisor and reported that several employees had commented that Respondent appeared to be under the influence of alcohol. Respondent was observed having difficulty walking, was talking to herself, and was observed to be badly bruised. When asked about the bruising, Respondent either reported that she walked into a wall or that she was involved with rough play with her husband.

7. On or about October 21, 2004, a physician observed that Respondent had a large bruise on her forehead and two black eyes. The

physician also noticed that Respondent's hands were shaking.

8. The RN supervisor placed Respondent on administrative leave and directed her to contact the Intervention Project for Nurses ("IPN").

9. IPN is the impaired practitioner program for the Board of Nursing, pursuant to Section 456.076, Florida Statutes. IPN is an independent program that monitors the evaluation, care and treatment of impaired nurses. IPN oversees random drug screens and provides for the exchange of information between treatment providers, evaluators and the Department for the protection of the public.

10. On or about November 8, 2004, Respondent submitted to an IPN-facilitated evaluation by a licensed medical doctor.

11. On or about November 22, 2004, the evaluator issued her evaluation report, noting she had several significant concerns about Respondent.

12. The evaluator noted that Respondent has a family history of chemical dependency.

13. The evaluator noted that Respondent has been a fairly daily drinker in the past.

14. The evaluator further stated that Respondent now notes she

feels better and sleeps less since stopping drinking, indicating that her drinking was strongly affecting how she was doing.

15. The evaluator noted that there are multiple reports from individuals at work that Respondent smelled of alcohol, had a black eye and was tremulous.

16. The evaluator opined that Respondent's history is suspicious for her having a substance abuse problem.

17. The evaluator recommended that, in order to assure that Respondent could practice with reasonable skill and safety, she enter into a two-year contract with IPN with a one year review for early termination.

18. In or about December of 2004, Respondent entered into a two year monitoring contract with IPN which required her to attend alcoholics anonymous or narcotics anonymous meetings weekly and submit to random drug tests. The contract had a provision that allowed for early completion of the contract if Respondent was compliant with all aspects of IPN monitoring.

19. On or about December 29, 2005, Respondent successfully completed her IPN monitoring contract.

20. On or about August 2, 2006, a co-worker smelled alcohol on

the breath of Respondent and noticed a bruise under Respondent's right eye.

21. On or about August 3, 2006, the RN supervisor wrote a memorandum to the Human Resources director indicating that several employees had reported that Respondent was observed to be shaking, dropping instruments and smelled of alcohol. Respondent was also noticed to have bruises on her face.

22. The supervisor directed Respondent to contact IPN again. Respondent refused to contact IPN.

23. On or about December 12, 2006, the Department of Health filed an Order Compelling a Mental and Physical Examination of Respondent by the same evaluator who conducted the November 8, 2004 evaluation.

24. The evaluator conducted the evaluation of Respondent on or about January 5, 2007.

25. According to the evaluator's report, Respondent attributed the bruise on her fact to a hit and run accident on July 31, 2006. Respondent stated that no alcohol or drugs were involved.

26. Respondent stated she is currently employed as a nurse at an

obstetrics-gynecology practice in Brandon, Florida.

27. Respondent further stated, when describing her family history, that her brother made a "personal choice" not to drink alcohol twenty-two years ago, but she does not see him as having any alcohol problems as noted in the previous evaluation.

28. Respondent denied abusing alcohol.

29. Respondent stated that the "alcohol smell" noticed by her coworkers must have come from the Listerine and generic mouthwash that she uses.

30. Respondent admitted that she has returned to drinking alcohol occasionally since getting out of IPN, but denied drinking in large amounts or while at work.

31. The evaluator opined that given the same type of complaints from co-workers are occurring again, the reports are very suspicious of Respondent having an alcohol problem. Individuals who are social drinkers, the evaluator opined, would not have had multiple reports as she has to both IPN and the Department of Health.

32. The evaluator further opined that Respondent appears to be either in denial or minimizing the impact alcohol has had on her life and

problems she has had at work.

33. The evaluator recommended that Respondent should minimally complete an alcohol treatment program and be monitored by IPN for at least two years without an option for early termination after one year.

34. The evaluator further opined that IPN monitoring is the only option that can assure that Respondent is able to practice with reasonable skill and safety.

35. Section 464.018(1)(j), Florida Statutes (2006), provides that being unable to practice nursing with reasonable skill and safety to patients by reason of illness or use of alcohol, drugs, narcotics, or chemicals or any other type of material or as a result of any mental or physical condition constitutes grounds for discipline of a licensee by the Board of Nursing.

36. As set forth above, Respondent is unable to practice nursing with reasonable skill and safety to patients by reason of use of alcohol.

37. Based on the foregoing, Respondent violated Section 464.018(1)(j), Florida Statutes (2006), by being unable to practice nursing with reasonable skill and safety to patients by reason of illness or use of alcohol, drugs, narcotics, or chemicals or any other type of material or as a result of any mental or physical condition.

WHEREFORE, the Petitioner respectfully requests that the Board of Nursing enter an order imposing one or more of the following penalties: permanent revocation or suspension of Respondent's license, restriction of practice, imposition of an administrative fine, issuance of a reprimand, placement of the Respondent on probation, corrective action, refund of fees billed or collected, remedial education and/or any other relief that the Board deems appropriate.

Signed this 19th **day of** March, **2007.**

Ana M. Viamonte Ros, M.D., M.P.H.
Secretary, Department of Health

Heidi M. Mayhard

FILED
DEPARTMENT OF HEALTH
DEPUTY CLERK
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3/15/07
Nancy Breen
Mary Jane Herrera

PCP:
PCP Members:
/HM

NOTICE OF RIGHTS

Respondent has the right to request a hearing to be conducted in accordance with Section 120.569 and 120.57, Florida Statutes, to be represented by counsel or other qualified representative, to present evidence and argument, to call and cross-examine witnesses and to have subpoena and subpoena duces tecum issued on his or her behalf if a hearing is requested.

NOTICE REGARDING ASSESSMENT OF COSTS

Respondent is placed on notice that Petitioner has incurred costs related to the investigation and prosecution of this matter. Pursuant to Section 456.072(4), Florida Statutes, the Board shall assess costs related to the investigation and prosecution of a disciplinary matter, which may include attorney hours and costs, on the Respondent in addition to any other discipline imposed.

STATE OF FLORIDA
DEPARTMENT OF HEALTH
BOARD OF NURSING

DEPARTMENT OF HEALTH
BOARD OF NURSING,

Petitioner,

vs.

DOH Case No. 2006-31490
DOAH Case No. 2007-1914PL

B.J. PENANSKY, A.R.N.P., C.N.M.,

Respondent.
_____/

PETITIONER'S RESPONSE TO RESPONDENT'S OBJECTIONS TO PETITIONER'S MOTION TO ASSESS COSTS AND IN THE ALTERNATIVE, REQUEST FOR FORMAL HEARING

COMES NOW the Petitioner, Department of Health ("Department"), by and through undersigned counsel, files this Response to Respondent's Objections to Petitioner's Motion to Assess Costs and in the Alternative, Request for Formal Hearing, and in support states:

1. On October 22, 2007, the Department served its Motion to Assess Costs in this case. The Department attached to its Motion a day-by-day tracking of the time spent by the Department in investigating and prosecuting Respondent. The Department attached in support of the Motion an affidavit regarding investigative costs, a

Department "Complaint Cost Summary", a list of attorneys who worked on the prosecution of Respondent, and the Department's "Confidential Time Tracking System and Itemized Cost " (Itemized Cost Report).

2. On or about March 19, 2008, Respondent's counsel provided a copy of Respondent's Request for a Hearing on Petitioner's Motion to Assess Costs and Respondent's Objections to Petitioner's Motion to Assess Costs and in the Alternative, Request for Formal Hearing.

3. Respondent's counsel erroneously filed same before the Division of Administrative Hearings. Respondent is not entitled to a formal evidentiary hearing before an Administrative Law Judge, as there is no statutory authority for such a hearing, and the Division of Administrative Hearings has closed the underlying case and relinquished jurisdiction in this matter. Therefore, the Board of Nursing should deny Respondent's request as set forth in the Request for a Hearing on Petitioner's Motion to Assess Costs to have the case referred to the Division of Administrative Hearings.

4. Respondent's Objections to Petitioner's Motion to Assess Costs and in the Alternative, Request for Formal Hearing sets forth various and sundry grounds, which seek the denial of Petitioner's Motion to Assess Costs. While the objections and responses made by

Respondent's counsel were unclear and repetitive to the undersigned, they can be categorized into essentially four (4) main arguments. Each of Respondent's arguments will be addressed below.

Objection I:

Assessment of costs is not a penalty and therefore requires no evidence be adduced during the administrative hearing.

5. Section 456.072(4), Florida Statutes (2006), provides that:

> In addition to any other discipline imposed through final order, or citation, entered on or after July 1, 2001, under this section or discipline imposed through final order, or citation, entered on or after July 1, 2001, for a violation of any practice act, **the board**, or the department when there is no board, **shall assess costs related to the investigation and prosecution of the case**. The costs related to the investigation and prosecution include, but are not limited to, salaries and benefits of personnel, costs related to the time spent by the attorney and other personnel working on the case, and any other expenses incurred by the department for the case. The board, or the department when there is no board, shall determine the amount of costs to be assessed after its consideration of an affidavit of itemized costs and any written objections thereto. In any case where the board or the department imposes a fine or assessment and the fine or assessment is not paid within a reasonable time, the reasonable time to be prescribed in the rules of the board, or the department when there is no board, or in the order assessing the fines or costs, the department or the Department of Legal Affairs may contract for the collection of, or bring a civil action to recover, the fine or assess costs. (Emphasis Added)

6. The Florida Legislature has clearly defined the penalties for violation of any applicable practice act. Section 456.072(2), Florida Statutes, provides:

> When the board, or the department when there is no board, finds any person guilty of the grounds set forth in subsection (1) or of any grounds set forth in the applicable practice act, including conduct constituting a substantial violation of subsection (1) or a violation of the applicable practice act which occurred prior to obtaining a license, it may enter an order imposing one or more of the following penalties:
>
> (a) Refusal to certify, or to certify with restrictions, an application for a license.
>
> (b) Suspension or permanent revocation of a license.
>
> (c) Restriction of practice or license, including, but not limited to, restricting the licensee from practicing in certain settings, restricting the licensee to work only under designated conditions or in certain settings, restricting the licensee from performing or providing designated clinical and administrative services, restricting the licensee from practicing more than a designated number of hours, or any other restriction found to be necessary for the protection of the public health, safety, and welfare.
>
> (d) Imposition of an administrative fine not to exceed $10,000 for each count or separate offense. If the violation is for fraud or making a false or fraudulent representation, the board, or the department if there is no board, must impose a fine of $10,000 per count or offense.
>
> (e) Issuance of a reprimand or letter of concern.
>
> (f) Placement of the licensee on probation for a period of time and subject to such conditions as the board, or the department when there is no board, may specify. Those

conditions may include, but are not limited to, requiring the licensee to undergo treatment, attend continuing education courses, submit to be reexamined, work under the supervision of another licensee, or satisfy any terms which are reasonably tailored to the violations found.

(g) Corrective action.

(h) Imposition of an administrative fine in accordance with s. 381.0261 for violations regarding patient rights.

(i) Refund of fees billed and collected from the patient or a third party on behalf of the patient.

(j) Requirement that the practitioner undergoes remedial education.

7. As is clear from a comparison of this language to that found in Section 456.072(4), Florida Statutes, as quoted in paragraph 5 above, the legislature drew a clear distinction between what constitutes penalties to be imposed following a finding of guilt and what constitutes costs to be assessed subsequently.

8. Because costs are not a potential penalty to be considered by the administrative law judge, and because costs are solely within the discretion of the Board, evidence regarding costs is improper in the administrative hearing before the administrative law judge. Therefore, contrary to Respondent's claim, the Department had no obligation to offer evidence regarding costs at that stage of the proceedings and Respondent's Objection I should be rejected.

Objection II:

The Department is not offering "new evidence" in regard to the Recommended Order.

9. Respondent mistakenly asserts that the Department's affidavit and attached spreadsheet filed in support of its Motion to Assess Costs constitutes impermissible "new evidence" under Chapter 120. Once again, Respondent is confusing the Board's consideration of the Recommended Order, which is controlled exclusively by the record as defined in Section 120.57(1)(f), Florida Statutes, with the Board's subsequent consideration of the Department's Motion to Assess Costs, which is controlled exclusively by Section 456.072(4), Florida Statutes.

10. The Department is mindful of the existence of Board of Pharmacy v. Bousquet, 2007 WL 2300784 (Fla.Div.Admin.Hrgs.). However, the Department's position is that the decision is contrary to the plain language of Section 456.072, Florida Statutes. Therefore, the Department asserts that this case has no precedential value.

11. The Department is not offering "new evidence" that should have been offered before the administrative law judge and should be part of the record of that proceeding. Therefore, Respondent's Objection IV should be rejected.

Objection III:

The Department is not requesting an increase in the recommended penalty.

12. For the same reasons discussed in the Department's Response to Objection 2 above, the Department asserts that assessment of costs does not constitute a penalty. Therefore, the issue of the assessment of costs is not an issue before the administrative law judge, is not part of the recommended order, and, as stated above, is solely when the discretion of the Board of Nursing.

13. The Florida Legislature has established a procedure by which the costs of investigation and prosecution of a disciplinary case are to be assessed. That procedure requires the Board to "determine the amount of costs to be assessed after its consideration of an affidavit of itemized costs and any written objections thereto." The Department has followed that procedure in this case.

Objection IV:

The Department's Motion to Assess Costs, Affidavit and Summary of Costs are sufficient for the Board to determine costs.

14. Section 456.025(8), Florida Statutes, requires that the Department maintain an accounting, by profession, of the expenses incurred by the Department to regulate those professions. Direct

expenses, include, but are not limited to, costs for investigations, examination and legal services. For indirect expenses, the Department is to proportionally allocate to the boards the expenses the Department expends to perform its duties with respect to the regulation of each profession. The Department is required to maintain sufficient records to support its allocation of agency expenses and to provide each board an annual report of revenues and direct and allocated expenses related to the operation of that profession.

15. The Department has the duty to keep data of the costs related to the investigation and prosecution of professional license disciplinary cases. The collection of data includes determining an hourly rate for those persons whose activities are directly attributable to individual and specific cases and an hourly overhead rate for administrative costs. The overhead rate includes salaries, OPS expense, telephone services, utilities, copier maintenance fees, and other similar expenses.

16. All employees of the Department's Medical Quality Assurance (MQA) Enforcement Program, which consists of the Consumer Services Unit, the Investigative Services Unit and the Prosecution Services Unit, are designated either as timekeepers or non-timekeepers. Timekeepers are those employees who perform activities

directly related to specific cases. All other employees are considered to be non-timekeepers and their salary and benefits are part of the costs that are apportioned within the overhead rate calculation. A Department of Health methodology is used to determine an hourly rate for each timekeeper and that methodology of applying the hourly rate to the time records of the timekeepers' results in the overall costs of the Consumer Services Unit, the Investigative Services Unit and the Prosecution Services Unit. This methodology has been approved as valid in Mohamed Ibrahim Abdel-Aziz v. Department of Health, Board of Medicine, DOAH Case 03-0295RU.

17. The Itemized Expense by Complaint itemizes the expenses directly attributable to the specific case. Typical direct expenses would include expert witness fee, travel, and court reporting services. These expenses are ones for which an invoice has been received and paid for a specific expense on a specific case.

18. The Complaint Cost Summary is a summary of the accounting information contained in the Time Tracking Report. It summarizes the total hours spent on a case, by unit, the costs per unit, and the expenses. The total reflected in the Complaint Cost Summary corresponds to the individual subtotals by unit, plus the expenses, which are detailed in the Time Tracking Report.

19. The affidavit of Mr. James R. Cooksey and the Complaint Cost Summary are statements on total costs compiled within the Time Track System. The costs found within the Time Track System are a data compilation of the activities reported by the timekeepers in their respective profession, whether investigator or attorney, as related the prosecution of Respondent's specific case.

20. Costs for attorney time as calculated in Section 456.072(4), Florida Statutes, are different than attorney fees or penalties because:

a) Cost reimbursement is only for the costs incurred in prosecuting the case,

b) Reasonableness and necessity are not issues under Section 456.072(4), Florida Statutes as it functions solely for recoupment purposes.

Because it is a recoupment statute, the Department of Health has met the requirements of Section 456.072(4), Florida Statutes, by filing the affidavit required therein and no independent assessment of reasonableness or necessity is a required part of the process.

21. The affidavit and Itemized Cost Report is self-authenticating pursuant to Section 90.02(4), Florida Statutes. Because the document is authentic it is also admissible as an exception to the hearsay rule pursuant to Section 90.803(6) and (8), Florida Statutes.

22. Respondent also asserts that the Department's documents and their content do not give sufficient detail to know what work was performed, who performed the work, and/or whether that work was reasonable and necessary to the investigation and prosecution of this case. However, the issue is not whether the work was reasonable or necessary to the investigation and prosecution of the case. Section 456.072(4), Florida Statutes, requires that the Board assess the costs related to the investigation and prosecution of the case and provides:

> . . . the costs related to the investigation and prosecution include, but are not limited to, salaries and benefits of personnel, costs related to the time spent by the attorney, and other personnel working on the case, and any other expenses incurred by the department for the case . . . .

23. Respondent's counsel also argues that the costs are "unreasonable" because the lead counsel was inexperienced and filed multiple responses to pleading. The number of responses filled by Ms. Maynard is in direct correlation to the number of documents filled by Respondent's counsel. Respondent's counsel filed an extraordinary amount of documents in this matter, to which Petitioner's counsel is required to respond. It is disingenuous, at best, to object to the Department's costs in this matter, when such costs were generated by the necessity to respond to the voluminous filings made be Respondent's counsel.

24. Additionally, it should be noted by the Board that the total amount of costs that the Department is entitled to is $84,189.50. However, the Department has generously decreased the request for costs to $66,445.51 by removing the undersigned counsel's hourly rate as a timekeeper in an effort to be courteous to the Respondent.

WHEREFORE, for the foregoing reasons, Respondent's Objections to Petitioner's Motion to Assess Costs and in the Alternative, Request for Formal Hearing should be rejected and Petitioner's Motion to Assess Costs in Accordance with Section 456.072(4), Florida Statutes, should be granted.

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CERTIFICATE OF SERVICE

I CERTIFY that a copy hereof has been furnished to Suzanne Suarez Hurley, Esquire, P.O. Box 13215, Tampa, Florida 33681-3215; by ☒ postage-paid U.S. Mail, ☐ Hand-Delivery, ☐ E-mail, ☒ Facsimile Transmission, ☐ E-mail address, and/or ☒ Over-Night Mail, this 2 day of April, 2008.

William F. Miller
Assistant General Counsel

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH

Petitioner,

vs. **DOAH CASE NO.: 07-1914PL**
DOH CASE NO.: 2006-31490

B.J. PENANSKY, ARNP, CNM,

Respondent.
_____/

NOTICE OF FILING EXCEPTIONS TO RECOMMENDED ORDER

COMES RESPONDENT, B.J. PENANSKY, A.R.N.P., C.N.M., pursuant to Rule 28-106.217, F.A.C., and by and through her undersigned counsel, and files her exceptions to findings of fact and conclusions of law in the Recommended Order issued by this Court on September 25, 2007, as follows:

RE: THE EMERGENCY SUSPENSION ORDER

Respondent files this exception because, among other things, the finding of the Court did not comply with essential requirements of law.

The Respondent takes Exception to the omission of facts received as evidence during Final Hearing regarding the Emergency Suspension Order (ESO). Prior to the Final Hearing, over objection by the Department of Health, this Court agreed to hear the facts that would support the filing and continuation of the ESO. However, in its Recommended Order, the Court failed to list the facts supporting or failing to support the Emergency Suspension Order. The Recommended Order omits clear proof at Final Hearing and in the Record that there was never a serious and immediate danger to the public to support such an Order. The Respondent hereby incorporates by reference the analysis of law regarding the ESO in her Proposed Recommended Order. The

Department failed to comply with Florida law and, as such, has no basis by which to continue to enforce the ESO. Ms. Penansky has not been afforded her basic Constitutional Rights to Due Process under the U.S. and the Florida Constitutions.

EXCEPTIONS TO FINDINGS OF FACT

Evidence referred to in this section, and corresponding by numbers with the Court's Recommended Order, was testified to in the Final Hearing in this matter. Respondent asserts that by the omission of these facts, the Court's conclusion was not based on competent substantial evidence.

2. Respondent files this exception because, among other things, the ruling of the Court did not comply with essential requirements of law.

Witness Carmen Laguerra may have smelled alcohol in 2004; she may not have. Smelling is subjective to the person doing the smelling. "Smelling of alcohol," said the Department of Health's expert, "is a sign that there is at least potential impairment...going on... They may be impaired or they may not. ...[T]he persons who said they smelled alcohol could have been mistaken."

Laguerra did not work closely with Penansky and is not a clinical provider (e.g. nurse, etc.). Any of three factors, Ms. Penansky's mouthwash, periodontal disease or weight loss, according to IPN-Approved Addictionologist Raymond Johnson, M.D., could have caused someone else to believe that her breath smelled like alcohol.

Ms. Laguerra's testimony is based on her erroneous assumption that bruises had something to do with Penansky's alleged alcohol use. But, bruises, testified the Department of Health's expert, Martha Brown, M.D., have nothing to do with alcoholism or alcohol use.

Respondent filed a Motion in Limine regarding the 2004 incidents, as the allegations giving rise to the emergency suspension dealt with alleged incidents in 2006.

Respondent renewed her objections to testimony regarding the alleged 2004 incidents but the Court overruled the objections.

"Facts" from 2004 cannot be used to prosecute a breach of the 2006 Statutes. Any "facts" from 2004 are irrelevant anyway when Section 456.076(3)(a), Florida Statutes is applied, because the Respondent voluntarily entered the IPN program in 2004 and completed it.

3. Respondent files this exception because, among other things, the finding of the Court did not comply with essential requirements of law. The Probable Cause Panel of the Board of Nursing authorized a Complaint for a breach of the 2006 statute only. One cannot violate a 2006 statute in 2004.

4. Respondent files this exception because, among other things, the finding of the Court did not comply with essential requirements of law. On occasion Ms. Penansky had a habit of talking out loud to herself prior to and after 2004. Her demeanor did not change; nor is this "fact" related to alcohol use. The Department of Health's own expert, Martha Brown, M.D., explained this fallacy when she testified that she talks out loud to herself sometimes. The Administrative Complaint did not allege that Penansky was talking out loud to herself and, therefore, this alleged "fact" cannot be utilized to support the prosecution. *And see Paragraph 2 of #2, above.*

5. Respondent files this exception because, among other things, the finding of the Court omitted certain competent, substantial facts. When someone's *body* smells of alcohol, that person had to have had so much alcohol that it is coming out of their pores. Such a person, testified Addictionologist Raymond Johnson, M.D., can barely stand up, much less work. The testimony is inconsistent with all witness descriptions of Penansky who was, at all times, a well-functioning nurse practitioner. Ms. Guzman, who

worked in an inferior nursing position to Penansky, significantly changed her testimony from deposition to Final Hearing, rendering it unreliable. *And see Paragraph 2 of #2, above.*

6. Respondent files this exception because, among other things, the finding of the Court did not comply with essential requirements of law. A smell by Dr. Medidi in 2004 is irrelevant to the issue before the Court in this case for reasons given above. Penansky's occasionally shaky hands in 2004 were never diagnosed as an alcoholic tremor. There was no diagnosis of alcohol abuse or dependency in 2004. Without such diagnosis, a hand tremor is not probative. The Department of Health's own expert testified that shaky hands could have been caused by multiple other factors. Dr. Medidi, unlike Guzman or Leguerra, worked closely with Penansky. Though he testified that he smelled alcohol on Penansky's breath once in 2004, he never smelled alcohol on her ever again. The Department of Health's own expert, Dr. Brown, testified that bruises are irrelevant to alcohol use.

7. Respondent files this exception because, among other things, the finding of the Court did not comply with essential requirements of law. In 2004 George Hammond followed the requirements of the Drug Free Workplace Act explicitly until the test came back negative. At that juncture, he and the Suncoast administration decided not to follow it. The 2004 IPN referral was disallowed by the plain language of Chapter440 as was the failure to require a drug test in 2006. Clearly, when Penansky voluntarily entered the IPN program in 2004 and completed it in 2005, she earned protection from prosecution under law. Any alleged "facts" from 2004 must be expunged.

8. See #7, above.

9. This "fact" from 2004 is irrelevant by application of law. Nevertheless, a dilute test is not an indication that a test result would otherwise be positive. The test was negative - dilute or not.

10. Respondent files this Exception because the Court misinterpreted the testimony given and its meaning and left out substantial competent facts that were part of the expert testimony. This "fact" from 2004 is also irrelevant by application of law. An admission that she had a drink once a day does not prove that Penansky is an alcoholic. One drink a day, according to the Department of Health's own expert, is not excessive. Addictionologist, Raymond Johnson, M.D., testified that Penansky has no family history of alcoholism.

11. Respondent files this exception because, among other things, the finding of the Court did not comply with essential requirements of law. This "fact" from 2004 is irrelevant by application of law. "Suspicion" is insufficient and fails to prove a breach of Section 464.018(1)(j), Florida Statutes. Penansky should never have been in Dr. Brown's office in 2004 to start with because both tests that she took were negative.

12. Respondent files this exception because, among other things, the finding of the Court omitted certain competent, substantial facts. The Court fails to note that Penansky's entry to IPN was voluntary; it was not forced by an Order of the Board. Penansky did not want to lose her job or she would never have voluntarily entered the IPN program. She did not realize the long-term ramifications and merely wanted to comply so that she could continue working at Suncoast as she approached her retirement.

13. Respondent files this exception because, among other things, the finding of the Court omitted certain competent, substantial facts. Only some employees at

Suncoast testified to improvements noticed. Others noticed nothing of the kind. But participation in group therapy may cause anyone to exhibit a better mood, whether or not they "had a problem." Her occasionally shaky hands were never diagnosed as being caused by an alcohol problem.

14. Respondent files this exception because, among other things, the ruling of the Court omitted certain competent, substantial facts. It was these bruises that led to Guzman's statement that she had seen bruises like these before. On being asked when, she stated "in 2004." Yet Guzman never asked Penansky in 2004 why she had bruises. Likewise, in 2006, Guzman never inquired and did not know that Penansky had been involved in a car accident. Assumptions that bruises are somehow related to alcohol use were put to rest as incorrect by the Department of Health's own expert's sworn statements to the contrary.

15. Respondent files this exception because, among other things, the ruling of the Court omitted certain competent, substantial facts. Guzman embellished and changed the information she originally wrote in her 8-3-06 memo. At Final Hearing she newly claimed to have smelled alcohol "at least three times," though she gave no dates and no other descriptions. She claimed that there was also a "shaky mouth and speech" but these allegations were also new. The Administrative Complaint did not allege that Penansky had a shaky mouth or shaky speech in 2006. The Administrative Complaint does not allege that Penansky had unclear speech or that her "speech was not normal."

In 2006 Dr. Medidi, who worked closely with Penansky on a daily basis, did not smell alcohol and never noticed a problem with Penansky's speech. Neither he nor witnesses Marie Massaro, LPN, Susan Bingham, ARNP, nor others who worked with Penansky noticed any such thing.

The statement does not reveal that in 2006, witness Guzman asked witness Laguerra to join her in accusing Penansky of "smelling"; nor does it reveal that Laguerra's testimony was inconsistent as to when or if she smelled alcohol. Ms. Penansky testified that she continued to use mouthwash in 2006 as directed by her dentist. But, most importantly, no impairment of any kind on the part of Ms. Penansky was noticed or documented by anyone.

16. Respondent files this exception because, among other things, the ruling of the Court was not in accord with the testimony given at Final Hearing and omitted certain competent, substantial facts. Penansky was diagnosed with severe periodontal disease before 2004. She testified that she continued to comply with the directives of her peridontist by using mouthwash in 2004 and in 2006. Guzman and Leguerra provided testimony that was inconsistent with their depositions, making their testimony unreliable.

17. Respondent files this exception because, among other things, the ruling of the Court did not comply with essential requirements of law. Smelling is subjective and has never, by itself, been found determinative of a breach of Section 464.018(1)(j). A violation of the Statute requires at least one act indicating clear evidence of impairment at work. Here there was none. Ironically, evidence in the form of a blood or urine test would have been simple to get and was required by law but not performed. The employer failed, at Penansky's expense, to comply with its legal testing obligation pursuant to the Drug Free Workplace Act, Chapter 440.101 and 440.102, Florida Statutes.

18. Respondent files this exception because, among other things, the finding of the Court did not comply with essential requirements of law and omitted substantial

and important facts. False allegations could have been and were made by Guzman and Leguerra as evidenced by the fact that both of them changed their story from the time of the incident and/or deposition to Final Hearing. Neither Guzman or Leguerra ever saw Penansky use alcohol. They misinterpreted her occasional hand tremors. They never saw her behave in other than a professional manner. There were no patient complaints about her care. Dr. Medidi testified that Penansky's slight hand tremor caused no problem in the services she provided. The CEO of Suncoast testified that he never received any information that Penansky had put a patient in danger, acted incorrectly performing her duties, mischarted or failed to report to work on time.

19. Respondent files this exception because, among other things, the finding of the Court did not comply with essential requirements of law. Because those working closest with Penansky noticed no smell and no impairment of any kind in 2006, the testimony of one nurse who overlooked a building full of clinicians (physicians, nurses, etc.) and sought a "second-opinion" from an office worker to make a report of alcohol on Penansky's breath is not clear and convincing. However, alcohol on a licensee's breath without an accompanying exhibition of behavior demonstrating impairment is not probative of a breach of the Statute cited in the Administrative Complaint.

20. Respondent files this exception because, among other things, the finding of the Court was not in accord with the testimony given at Final Hearing. Penansky was not terminated from Suncoast "for her use of alcohol." She was terminated for being "under the influence" but this was proven untrue. The statement leaves out the rest of the story. Suncoast sent the Department of Health a copy of its "termination letter" where it blatantly lied saying she was "under the influence" of alcohol at work. Suncoast's definition of "under the influence" in its own written policies required a

specific blood or urine level of alcohol. Suncoast did not offer Penansky a test as required by a Drug Free Workplace. Also, under the circumstances, Chapter 440.101 and 440.102, Florida Statutes, absolutely proscribed the release of any information about Penansky to the Department of Health.

21. Respondent files this exception because, among other things, the finding of the Court left out important and substantial facts that were provided in testimony at Final Hearing. There was one big event during Penansky's employment by Dr. Zwiebach, the "private physician." After Penansky had worked with him closely full-time for four months, and with no serious or immediate danger to the public of any kind, the Department of Health suddenly suspended her license. Dr. Zwiebach testified that he had been around and worked around impaired persons and that Penansky was not one.

22. Respondent files this exception because, among other things, the finding of the Court did not comply with essential requirements of law. Pursuant to the Drug Free Workplace Act, Penansky should never have met Dr. Brown in 2004 because her test (based on "reasonable suspicion") was negative. A positive test is what triggers a referral to IPN and an Evaluation. Penansky made an error to her detriment when voluntarily entered the IPN Program in order to save her job. But her IPN Contract came with legal assurances that no one could use her voluntary participation against her.

Suncoast failed to comply with the Act again when it referred her erroneously (with no test) to the IPN. Thus, Penansky had no obligation to attend IPN. Dr. Brown had taken an overly cautious approach the first time that Penansky had been accused of being under the influence by sending Penansky off to the IPN Program in spite of no evidence of impairment and negative drug tests. Penansky reasonably (and formally) objected to Dr. Brown being the evaluator the second time and wanted an unbiased and

fair evaluator. The Department of Health denied her request and forced her to go again to Dr. Brown or lose her license immediately.

24. Respondent files this exception because, among other things, the finding of the Court omits important and substantial testimony given at Final Hearing. Dr. Brown admitted that Penansky "minimally met the criteria for alcohol abuse." She further admitted that it "takes very little to make that diagnosis." Dr. Brown's opinion does not amount to a breach by Penansky of Section 464.018(1)(j), F.S. Hers is a mere opinion. Dr. Johnson, an equally-trained Addictionologist, provided an opinion which differed 180 degrees from hers and his was a far more in-depth and lengthy evaluation.

25. Respondent files this exception because, among other things, the finding of the Court was not in accord with the testimony given at Final Hearing and because competent, substantial evidence at the Final Hearing was omitted. Penansky clearly and specifically testified at Final Hearing that she continued to use alcoholic mouthwash at work in 2006. (See T Vol II, pp 355, 356, 369 & 370). On the basis that she testified that she was not using alcoholic mouthwash in 2006, which was not her testimony, the Court negated Dr. Johnson's conclusions. This was error.

Dr. Johnson did not conclude in his January 2, 2007 report "that the use of mouthwash was the reason for the smell of alcohol on her breath." He stated in his Discussion that her dentist had confirmed periodontal disease, that she used mouthwash daily and that there is a convincing alternative to the odor of alcohol on her breath. After requiring Penansky to sit for a battery of Psychological tests, he concluded that her behavioral and historical record of stability is consistent with the [multiple] psychological testing protocol findings and is obviously not similar to the personal and professional histories one sees in an individual suffering from addictions.

26. Respondent files this exception because, among other things, the finding of the Court was not in accord with the testimony given at Final Hearing and because competent, substantial evidence was omitted. Dr. Nicholas Anthony, Ph.D. was hired by Dr. Johnson to conduct multiple psychological tests on Penansky as part of a full workup. In his testimony, Dr. Anthony explained carefully that it was error for Dr. Brown to assume that Penansky's brother was an alcoholic when she never said that he was and that a propensity for addiction may be passed from parent to child, not from brother to sister. There was never any evidence that Penansky's parents were alcoholics. Dr. Anthony correctly reported no family history to Dr. Johnson along with all of the other test results.

27. See #26. Also, it appears that Dr. Anthony erred in referring to diabetes in Penansky's brother. However, he did not mention diabetes in his live testimony which was videotaped and provided to the Court on DVD.

28. Respondent files this exception because, among other things, the finding of the Court was not in accord with the testimony given at Final Hearing and because competent, substantial evidence at the Final Hearing was omitted. Dr. Anthony, in his testimony explained that by giving all of the named tests, a better view of the whole person could be obtained. Said Dr. Anthony, the Rorschach test gives insight into how they analyze and how they see the world.

29. Respondent files this exception because, among other things, the finding of the Court was not in accord with the testimony given at Final Hearing and because competent, substantial evidence was omitted. Dr. Johnson explained that the MCMI and MMPI results combined provides a snapshot of the person's psychological state at the time. They tell a lot about personality structure, what people are likely to do or unlikely

to do, how they see the world, whether or not they have been honest with the testing. The MMPI-2 in particular can provide information regarding whether the person is trying to fool the test.

30 & 31. Respondent files this exception because, among other things, the findings of the Court takes out of context the testimony given at Final Hearing by Dr. Anthony, leaves out his full analysis and cuts out a small portion of one test which leaves the reader unable to draw any conclusion. It erroneously assumes that Dr. Anthony was incompetent in his analysis.

32. Respondent files this exception because, among other things, the finding of the Court was not in accord with the testimony given by Dr. Anthony and Dr. Johnson and because competent, substantial evidence was omitted. Dr. Johnson explained in his testimony that Dr. Anthony's test results were important but that he also spoke with Penansky's employer and contacted her dentist for records as well as performing his own clinical examination. His report clearly states that these combined findings by him and Dr. Anthony indicated no Axis I diagnosis.

33. Respondent files this exception because, among other things, the finding of the Court was not in accord with the testimony given and because competent, substantial evidence at the Final Hearing was omitted. A careful look at Dr. Anthony's evaluation and testing procedures proves that he adjusted the scores appropriately for defensiveness before they were provided to Dr. Johnson.

34. Respondent files this exception because, among other things, the finding of the Court was not in accord with the testimony given and because competent, substantial evidence was omitted. Dr. Johnson did not "rely" on the use of mouthwash as explaining "the smell of alcohol" on Penansky's breath. Ms. Penansky's account of

her family did not lack credibility. Dr. Johnson is trained in the interpretation of psychological testing and is experienced in treating patients with addictions. Dr. Johnson's opinion is highly credible.

35. Respondent files this exception because, among other things, the finding of the Court is improper and/or there is a more reasonable interpretation of the applicable law. It may not be necessary to wait for a patient to be harmed to determine whether a nurse can practice with reasonable skill and safety by reason of use of alcohol but the Court should not make this determination based on a subjective smell by one or two people in the workplace.

This is a case where the proceedings implicate the loss of livelihood, thus an elevated standard is necessary to protect the rights and interests of the accused. This is particularly true when the Department prosecuted as if all allegations by Suncoast, Ms. Penansky's employer, were true when the Termination Letter itself was a clear fabrication that was provided to the Department of Health in contravention to specific clauses in the Drug Free Workplace Act as well as Suncoast's own internal policies and procedures (which included references to the Act).

EXCEPTIONS TO CONCLUSIONS OF LAW

37. The conclusions of law here are mere restatements of decisions affecting the Administrative Court by our Florida Supreme Court and District Courts. The "conclusion" in this instance leaves out how the Court interpreted these decisions.

The Emergency Suspension Order and subsequent proceedings implicated and have resulted in the loss of livelihood for seven months already for Ms. Penansky. Such a serious and livelihood-threatening result is why the Florida Supreme Court in *Department of Banking and Finance v. Osborne Stern and Company*, 670 So.2d 932

(Fla. 1995), has required such an elevated standard. The Court must protect such licensee's rights and interests. An Administrative Decision to take away a license must also be supported by competent, substantial evidence. *See Id.* at FN2, 670 So.2d at 933.

In *Slomowitz v. Walker*, 429 So. 2d 797 (Fla. 4th DCA 1989), The Court explained in dicta "We communicate with words...and this forces us to verbalize standards for the subjective feeling of probability engendered by evidence. ..."Clear and convincing" has been defined as evidence making the truth of the facts asserted 'highly probable,' ...having a 'high capability of inducing belief' ...[and] leaving 'no substantial doubt.'" *See Slomowitz*, 429 So.2d at 799.

The Court, in *Slomowitz* further cited Blacks Law Dictionary (4th ed. 1968) for the definition of clear evidence as 'evidence which is positive, precise and explicit which tends to directly establish the point to which it is adduced and is sufficient to make out a prima facie case. *See Id.* The Court has not explained how the evidence adduced rose to meet this standard. Further, it does not explain how IPN-Approved Addictionologist, Raymond Johnson, M.D.'s opinion was dismissed when it clearly created substantial doubt in the Department's allegations.

Finally, the Department did not allege in the Administrative Complaint that Penansky had trembling hands in 2006 and, thus, trembling hands may not be utilized in the prosecution for a violation of a 2006 statute.

39. The Court recommends that the Agency rule by clear and convincing evidence that Penansky violated Section 464.018(1) (j.), Florida Statutes. The conclusion of law at this number of the Court's Recommendations is improper and/or there is a more reasonable interpretation of the applicable statute as explained in the

Respondent's lengthy analysis of the law in her Proposed Recommended Order as well as the attached Appendix which summarized all cases which alleged a breach of the same statute at both the Board of Medicine and the Board of Nursing since 1987, incorporated here by reference.

There must be, but was not, an act that placed patients in jeopardy. A smell alone cannot rise to the standard of proof. Ms. Penansky's speech was not unclear in 2006 and there was no testimony at Final Hearing proving it was. Any tremors in Penansky's hands were never diagnosed as being related to alcoholism and the Department's own expert testified that the tremor could have been caused by multiple other factors. Thus, the ruling of the Court is not based on competent, substantial evidence and does not comply with other essential requirements of law.

Florida law is clear that a smell by someone else cannot amount to a breach of Section 464.018(1)(j), F.S. The question remains as to whether a new allegation of "shaky speech," not pled in the Administrative Complaint, and undiagnosed tremors of someone's hands along with someone else alleging a smell rises to the necessary standard of proof.

In its RECOMMENDATION, the Court appears to lean toward the side of the minimum recommended guidelines in the Florida Administrative Code but adds a punitive measure, direct supervision. The Respondent takes exception to these recommendations, particularly direct supervision which is entirely unnecessary considering the clear facts which demonstrated that Penansky never at any time acted outside of professional standards of behavior and considering that all of her Employment Evaluations were excellent or outstanding.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Notice of Exceptions filed by Respondent has been provided this 17th day of July, 2007 by facsimile and U.S. mail to Heidi Maynard, Asst. General Counsel, 4052 Bald Cypress Way, Bin #C-65, Tallahassee, FL 32399-3265.

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