STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MEDICINE,

Petitioner,

vs. Case No. 11-1600PL

ROGER L. GORDON, M.D.,

Respondent.

FINAL ORDER DENYING RESPONDENT'S MOTION FOR ATTORNEY FEES

This case is before the undersigned on Respondent's Motion for Attorney Fees ("Motion"), which Roger L. Gordon, M.D. ("Dr. Gordon"), filed pursuant to section 57.105, Florida Statutes, on September 7, 2011. Petitioner Department of Health ("Department") timely submitted its Response to Respondent's Motion for Sanctions Pursuant to F.S. 57.105 on September 15, 2011. The matter is fully briefed and decidable on the papers.

In the underlying proceeding, the Department alleged that Dr. Gordon had committed medical malpractice in connection with a breast augmentation procedure performed on patient "D.V." in November 2004, and that he had failed to maintain medical records justifying the course of D.V.'s treatment. Based on these charges, the Department sought to impose discipline against Dr. Gordon's medical license.

At the final hearing on August 24, 2011, the Department attempted to introduce the medical records (the "Records") relating to D.V.'s treatment at the Florida Center for Cosmetic Surgery, which facility is also known as the South Florida Center for Cosmetic Surgery. For reasons set forth in the Recommended Order issued on September 20, 2011, the Department's efforts to admit the Records into evidence over Dr. Gordon's hearsay objection were not successful. As a result, the Department's case essentially collapsed for lack of proof.

In his Motion, Dr. Gordon argues that he is entitled to an award of fees under section 57.105 primarily on the following grounds:

> Petitioner should have known at the time this matter was referred to DOAH, and certainly knew prior to trial that there was no way to confirm the authenticity or completeness of the [Records]. The Department also knew that the [R]ecords were inadmissible to support findings of fact in this case, and without the medical records it was unlikely that the allegations . . . could be established by clear and convincing evidence.

Motion at 3. In other words, according to Dr. Gordon, the Department should have known that necessary evidence (the Records) would be rejected——and thus that its case was doomed.

Section 57.105(1)(a) provides that the prevailing party is entitled to an award of attorney's fees if the losing party pressed forward with a claim or defense that was "not supported by the material facts necessary to establish [it]." Notably, Dr. Gordon does not argue that the material facts failed to support the underlying disciplinary action; rather, he contends that evidence in the Department's possession (i.e., the Records), which was needed to establish the Department's material allegations, was obviously inadmissible.

Dr. Gordon's position raises an interesting issue, which is whether, under section 57.105(1)(a), the term "material facts" is synonymous with, e.g., "admissible evidence" or "findings of fact," as Dr. Gordon would have it, or rather should be applied less technically to include "historical facts"——a broader concept that might take into account the losing party's reasonable understanding of the actual events of the past. Curiously, neither party argues the point, although it is fairly debatable. On the one hand, allegations for which there is no admissible proof cannot become material findings of fact in support of a claim or defense. Thus, a claim or defense which rests upon factual allegations that cannot be proved for lack of admissible evidence is, in a sense, not supported by the material facts, regardless of what actually happened as a matter of historical fact. On the other hand, there is plainly a difference between having <u>no</u> proof and having insufficient <u>admissible</u> proof——and between proved (or provable) facts and

actual historical facts. In this case, for example, the Department had proof but was unable to get it admitted into evidence. As a result, the undersigned could not make findings of fact for the Recommended Order based upon the Records. The Department, however, no doubt had developed a reasonable understanding of the historical facts (="material facts"?) based on those Records. Suppose, then, that the charges were supported by the material historical facts as revealed in the Records. Were that so, should the Department's inability to overcome the hearsay objection to the admission of the Records be deemed sufficient grounds under section 57.105(1)(a) to order the payment of Dr. Gordon's attorney's fees?

The undersigned will sidestep the foregoing question by assuming for argument's sake (without deciding) that the answer is a qualified "yes"——that is: Yes . . . if the Department knew or should have known that the Records could not possibly be received in evidence over Dr. Gordon's hearsay objection. The undersigned can make such an assumption because, even under this pro-prevailing party interpretation of section 57.105(1)(a), he concludes that——for purposes of awarding Dr. Gordon his attorney's fees——the prosecution was sufficiently supported by the material facts to avoid sanction.

To be sure, the Department knew that Dr. Gordon would resist the introduction of the Records; he had not kept this strategic goal a secret, having moved in limine to have the Records excluded. For this reason, the Department should have been prepared to deal with the inevitable hearsay objection. In fact, it was clear that the Department had given the matter some thought, for at hearing arguments intended to make the Records admissible were advanced. Maybe the Department should have known, however, that the arguments it presented in this regard would likely be rejected. At any rate, if the arguments the Department presented were the only arguments available, then Dr. Gordon's Motion would be more compelling.

But the Department left other arguments on the table——arguments that, while perhaps not slam-dunks, offered at least a reasonable possibility of success. The undersigned will mention three, those being the ones whose absence surprised him most.

Admissions By a Party-Opponent. Dr. Gordon argued that the Department could not establish the predicate for the business record exception for lack of a proper custodian. The Department disputed this contention but ultimately proved Dr. Gordon correct. In so doing, the Department seemed to have forgotten

the other hearsay exceptions. The Department could have contended, for example, that at least some of the Records contain admissions under section 90.803(18), Florida Statutes. Of course, the Department would have needed to demonstrate the authenticity of the Records pursuant to section 90.901; that is, someone would have had to testify that the Records are what the Department claims, i.e., D.V.'s medical records. This is a less demanding showing than that required to lay the foundation for the business record exception, however, and the Department probably could have made it. Assuming, as seems likely, that the Records contain some of Dr. Gordon's own statements or other statements attributable to him, such statements might then have come into evidence under section 90.803(18).

Waiver of the Right Against Self-Incrimination. Presumably, had he testified, Dr. Gordon could have established the facts necessary to admit the Records under section 90.803(6). Through his counsel, however, Dr. Gordon threatened to take the Fifth if called as a witness at hearing. Thus, by threatening to remain silent, Dr. Gordon complicated (and eventually thwarted) the Department's job of establishing the foundation for admitting the Records under the business record exception.

Arguably, however, Dr. Gordon had waived the privilege he threatened to invoke. This is because, on March 29, 2007, Dr. Gordon——through his then-attorney——had served a discovery response in which he had admitted or denied 22 factual matters set forth in the Department's First Request for Admissions. He had done this without objecting on grounds of self-incrimination, even though the matters closely tracked the allegations of the Administrative Complaint. In so doing, Dr. Gordon clearly waived the privilege with regard to the particular admissions. See, e.g., Hargis v. Fla. Real Estate Comm'n, 174 So. 2d 419, 422 (Fla. 2d DCA 1965); see also Purcell v. Dep't of Bus. & Prof'l Reg., 708 So. 2d 1019 (Fla. 5th DCA 1998).

It is a closer question whether Dr. Gordon, having voluntarily answered the Department's request for admissions, waived his right to remain silent later in the proceeding——e.g., at hearing——regarding the subjects of his admissions, such that he could be compelled to give further testimony about the details of those subjects. Compare, e.g., State ex rel. Montgomery v. United Cancer Found., 693 N.E.2d 1149 (Ohio App. 1997), with Haas v. Bowman, 62 Pa. D. & C.4th 1 (C.P. Allegheny 2003). The undersigned need not explore that legal issue in

detail here, for no decision in the matter is required. It suffices to say that the Department could have made a reasonable argument that Dr. Gordon had waived his Fifth Amendment privilege regarding the details of his admissions. Had the argument succeeded, the Department likely could have gotten the Records into evidence.

To Supplement or Explain. The Department could have argued that the Records, or some of them, were admissible under section 120.57(1)(c), which permits hearsay to be "used for the [limited] purpose of supplementing or explaining other evidence." Here, the "other evidence" would have been Dr. Gordon's admissions as set forth in his Response to Request for Admissions. Some of the Records seem plainly to have been admissible to explain or supplement the admissions because, in at least one instance, the admissions specifically referred to the Records. Dr. Gordon had admitted without qualification the following matter:

> 6. According to her medical records, Patient D.V. tolerated the procedure well, with an estimated blood loss of 100 cc. Patient D.V. was discharged home at approximately 11:45 a.m.

Had the Department pursued this angle, it might have been able to admit enough of the Records to provide a basis in the evidence for its expert witness's testimony.

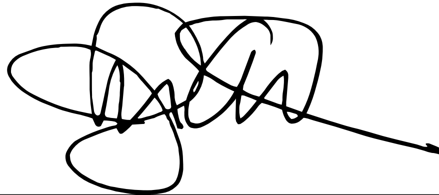
The undersigned is not suggesting that most or all of the Records necessarily would have been admitted under one or more of the foregoing arguments——Dr. Gordon's able counsel might well have advanced persuasive counterarguments had the need arisen. Nor is the undersigned suggesting that, had the Records been admitted, the Department would have prevailed on the merits. The purpose of the discussion above is narrower——to show that, contrary to Dr. Gordon's contention, the Department should not have known that all attempts to offer the Records as evidence would be hopeless. Indeed, if anything, the Department should have been able successfully to move at least some of the Records into evidence; its failure to do so was not the result of the Records being patently inadmissible. Section 57.105 does not, however, authorize sanctions against a party for losing a case it might have won. Therefore, attorney's fees will not be awarded pursuant to section 57.105(1)(a).

As a secondary basis for an award, Dr. Gordon argues that the Department unreasonably delayed the underlying proceeding. This argument implicitly invokes section 57.105(2), which makes a party liable for damages resulting from improper delay stemming from "any action" of that party "taken primarily for the purposes of unreasonable delay." Dr. Gordon has not, however, identified any "action" of the Department that unreasonably slowed the proceeding; he complains, instead, of inaction on the Department's part, the failure to move things forward expeditiously. Further, the Department's alleged procrastination apparently occurred while the Department was acting in its regulatory capacity, not as a litigant. Dr. Gordon has not pointed to any dilatory action which the Department allegedly took as a litigant. Therefore, attorney's fees will not be awarded pursuant to section 57.105(2).

Upon consideration, it is

ORDERED that the Motion is denied.

DONE AND ORDERED this 4th day of October, 2011, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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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 the original notice of appeal with the Clerk of the Division of Administrative Hearings and a 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 30 days of rendition of the order to be reviewed.