STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARLY DELIS CUETO,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 11-1728
	)	
DEPARTMENT OF HEALTH, BOARD OF PHYSICAL THERAPY PRACTICE,	)	
	)	
Respondent.	)	
_____	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes,[1] before Stuart M. Lerner, a duly-designated administrative law judge of the Division of Administrative Hearings (DOAH), on August 19, 2011, by video teleconference at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: James M. Barclay, Esquire
Clark, Partington, Hart, Larry, Bond & Stackhouse
106 East College Avenue, Suite 600
Tallahassee, Florida 32156

Javier Talamo, Esquire
Kravitz & Talamo, LLP
7600 West 20th Avenue, Suite 213
Hialeah, Florida 33016

For Respondent: Morris Shelkofsky, Esquire
Assistant General Counsel
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1703

STATEMENT OF THE ISSUE

Whether Respondent should take final action to deny the renewal of Petitioner's license to practice physical therapy on the ground that Petitioner has been terminated for cause from the Florida Medicaid program, as proposed in Respondent's December 16, 2009, Notice of Intent to Deny Renewal.

PRELIMINARY STATEMENT

On December 16, 2009, Respondent issued a Notice of Intent to Deny Renewal of Petitioner's license to practice physical therapy (December 16, 2009, Notice), the body of which read as follows:

> Under section 456.0635, Florida Statutes, a license to practice a health care profession may not be renewed under certain circumstances. The Florida Department of Health has reason to believe that you have been terminated for cause from the Florida Medicaid program under section 409.913, Florida Statutes.
>
> WHEREFORE, the determination was made to DENY your eligibility to renew your license.

The December 16, 2009, Notice, which was mailed to Petitioner on December 17, 2009, was accompanied by a Notice of Right to Hearing, which advised Petitioner of her right to a hearing on the intended action and further advised her that the intended

action would "constitute[] final agency action if no request for a hearing [was] received on or before the 21st day after [Petitioner's] receipt of th[e] [N]otice."

On January 8, 2010, Petitioner, through counsel, filed a Petition for Formal Administrative Hearing (Petition), requesting that Respondent "refer [the Petition] to the Division of Administrative Hearings for the holding of a hearing and the issuance of a recommended order favorable to Petitioner" finding: "that section 456.0635 does not permit a license to practice a health care profession to not be renewed under circumstances as alleged[;] that [Petitioner] was not terminated for cause from the Florida Medicaid Program under section 409.913[;] that the Board may not deny renewal of a physical therapy license absent an application[;] that [Respondent] utilized unadopted rules in the allegations in the Board Notice[;] [and] that [Respondent] has not treated substantially similar licensees in the same manner." The matter was referred to DOAH, as requested, but not until April 11, 2011, and was docketed as DOAH Case No. 11-1728.

At the time of the referral, there were already two cases involving Petitioner and Respondent pending before DOAH: DOAH Case Nos. 11-1271PL and 11-1272PL. The final hearing in these two license disciplinary cases, which had been consolidated, was set for May 17, 2011. DOAH Case No. 11-1271PL concerned a two-

count Administrative Complaint issued October 21, 2009, against Petitioner, alleging that she had been convicted of a crime directly relating to the practice of physical therapy, and that she had failed to report this conviction as required. DOAH Case No. 11-1272PL concerned a single-count Administrative Complaint issued April 21, 2010, against Petitioner, alleging that Petitioner was subject to disciplinary action pursuant to sections 456.072(1)(kk) and 486.125(1)(k), Florida Statutes (2009), because, "[o]n October 6, 2009, [the Agency for Health Care Administration had] entered a Final Order against [her] terminating her for cause from the Florida Medicaid program pursuant to Section 409.913, Florida Statutes," and her eligibility to participate in the program had not been restored.

On April 26, 2011, Petitioner filed an Agreed Motion to Continue, requesting that the final hearing in the instant case not be held until DOAH Case Nos. 11-1271PL and 11-1272PL were decided "because moving forward in this case depends on the outcome in [DOAH] [C]ase[] [Nos.] 11-1271[PL] and 11-1272[PL]." On May 4, 2011, the previously assigned administrative law judge issued an Order Placing Case in Abeyance in the instant case. The Order directed the parties to "confer and advise the [administrative law judge] in writing no later than one week after the recommended orders are entered in DOAH Case Nos.

11-1271PL and 11-1272PL, as to the status of this matter and as to the length of time required for the final hearing in this cause and several mutually-agreeable dates for scheduling the final hearing should one be necessary."

On July 19, 2011, the administrative law judge in DOAH Case Nos. 11-1271PL and 11-1272PL issued a Recommended Order, in which he made the following "[r]ecommendation":

> Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Physical Therapy Practice enter a final order finding Marly Delis Cueto guilty of the offense described in section 486.125(1)(c), Florida Statutes, i.e., being convicted of a crime that directly relates to the practice of physical therapy; guilty of the offense defined in section 456.072(1)(x), namely failing to timely report a criminal conviction to the Board; and guilty of the offense defined in section 486.125(1)(k), in consequence of having been terminated from the Medicaid program, which latter constitutes a disciplinable offense under section 456.072(1)(kk). It is further RECOMMENDED that the Board impose an administrative fine of $14,000 and suspend Cueto's physical therapy license for two years, to be followed by two years of probation on such reasonable terms and conditions as the Board establishes, which may include the requirement that Cueto pay in full the $28,000 she has been ordered to remit to AHCA as restitution of the stolen funds.[2]

The Recommended Order contained the following Findings of Fact and Conclusions of Law pertaining to the charge that Petitioner had been terminated for cause from the Florida Medicaid program:

FINDINGS OF FACT

7. On September 30, 2009, AHCA entered a Final Order terminating Cueto from participation as a provider in the Florida Medicaid program. AHCA imposed this sanction against Cueto pursuant to Florida Administrative Code Rule 59G-9.070(8) (2008)——as it was authorized to do under section 409.913(13), Florida Statutes (2009)——because she had been convicted of grand theft on November 5, 2008. As of the final hearing in this case, Cueto had not been reenrolled as a Medicaid provider.

* * *

18. In the Administrative Complaint which initiated Case No. 11-1272PL, the Department charged Cueto under section 456.072(1)(kk), Florida Statutes (2009), which provides:

> Being terminated from the state Medicaid program pursuant to s. 409.913, any other state Medicaid program, or the federal Medicare program [shall constitute grounds for discipline], unless eligibility to participate in the program from which the practitioner was terminated has been restored.

Cueto was in fact terminated from the state Medicaid program pursuant to section 409.913, and she had not been reenrolled therein at the time of the final hearing in this case. She is therefore guilty of the offense defined in section 456.072(1)(kk), Florida Statutes (2009).

19. Cueto contends that she was not terminated from Medicaid "for cause" as the Department has alleged. Section 456.072(1)(kk) does not require, as a prerequisite to imposing discipline, that the Medicaid provider have been terminated for cause. Nevertheless, Cueto was terminated for cause, that being her

conviction for grand theft, which crime relates to the practice of physical therapy. At the time AHCA terminated Cueto's participation as an enrolled provider, the penalty guidelines then in effect for violations of Medicaid-related laws required that the sanction of termination be imposed for a violation of section 409.913(13)(b), which statute directs AHCA to immediately terminate the participation of a Medicaid provider who has been convicted of a crime relating to the practice of the provider's profession. See Fla. Admin Code R. 59G-9.070(8)(a)2. (2008). The same rule defined "termination" as "a twenty-year preclusion from any action that results in a claim for payment to the Medicaid program as a result of furnishing, supervising a person who is furnishing, or causing a person to furnish goods or services." Fla. Admin Code R. 59G-9.070(2)(y).

20. The Department might have alleged that Cueto's termination had been for cause because under the Board's current disciplinary guidelines, which took effect on June 30, 2010, a termination for cause from the Medicaid program warrants a harsher penalty than does a termination "not . . . for cause." Fla. Admin. Code R. 64B17-7.001(1)(ff)(2010). Although this Board rule does not define "cause," AHCA's current disciplinary guidelines, which became effective on September 7, 2010, provide that a "termination pursuant to this rule is also called a 'for cause' or 'with cause' termination." Fla. Admin. Code R. 59G-9.070(3)(p)(2010). Neither rule, however, applies in this case, which must be decided under the disciplinary guidelines in effect at the time the offense was committed. See Orasan v. Ag. for Health Care Admin., 668 So. 2d 1062, 1063 (Fla. 1st DCA 1996); Willner v. Dep't of Prof'l Reg., 563 So. 2d 805, 806 (Fla. 1st DCA 1990).

> 23. Cueto was terminated from the Medicaid program in September 2009. Rule 64B17-7.001 (2007), which was in effect at that time, does not prescribe a punishment for the offense defined in section 456.072(1)(kk), Florida Statutes (2009). Cueto can be sanctioned for this offense, however, through section 486.125(1)(k), Florida Statutes (2009), which, as the Department alleged in the Administrative Complaint, provides that a violation of chapter 456 is grounds for discipline.
>
> 24. Under the disciplinary guidelines in effect in September 2009, the range of penalties for a first offense involving section 486.125(1)(k) is "from a minimum fine of $1,000 and/or a letter of concern, up to a maximum fine of $5,000 and/or suspension of license for two years followed by two years of probation." Fla. Admin. Code R. 64B17-7.001(1)(x)(2007).

(A final order has yet to be issued in DOAH Case Nos. 11-1271PL and 11-1272PL. Pursuant to section 120.569(2)(l)2., Florida Statutes, one must be issued no later than October 17, 2011.)

On July 26, 2011, the parties filed a Joint Status Report in the instant case, advising that "th[is] matter is still unresolved" and a one-day hearing would be necessary.

As noted above, the final hearing in this case was held on August 19, 2011. Two witnesses, Michael West and Petitioner, testified at the hearing. In addition to Mr. West's and Petitioner's testimony, three exhibits (Petitioner's Exhibit 1, and Respondent's Exhibits 1 and 2) were offered and received into evidence.

With input from the parties, the undersigned set the deadline for the filing of proposed recommended orders at 20 days from the date of the filing of the hearing transcript with DOAH.

The hearing Transcript, consisting on one volume, was filed with DOAH on September 6, 2011. Both parties timely filed their Proposed Recommended Orders on September 26, 2011.

FINDINGS OF FACT

Based on the evidence adduced at hearing, and the record as a whole, the following findings of fact are made:

1. Petitioner is now, and has been at all times material to the instant case, a Florida-licensed physical therapist. Petitioner has not applied to renew her license, which is due to expire on November 30, 2011.

2. Petitioner formerly participated as a provider in the Florida Medicaid program.

3. On July 20, 2009, the Agency for Health Care Administration (AHCA) sent Petitioner a letter, advising her (in the letter's first paragraph) of the following:

> Our records indicate that you were convicted on November 5, 2008 [of] grand theft. In accordance with Sections 409.913, Florida Statutes (F.S.), and Rule 59G-9.070, Florida Administrative Code (F.A.C.), the Agency for Health Care Administration (Agency) is hereby terminating your participation in the Medicaid program. This includes any action that results in a claim for payment to the

> Medicaid program as a result of furnishing, supervising a person who is furnishing, or causing a person to furnish goods or services.

The letter further advised Petitioner that she had the right to request an administrative hearing on this "intended action" within 21 days of her receipt of the letter and that, if she failed to timely exercise this right, "the action set forth in the [letter would] be conclusive and final."

4. Not having received a hearing request from Petitioner, AHCA, on October 6, 2009, issued a Final Order (AHCA's Final Order) terminating Petitioner from the Florida Medicaid program. The body of AHCA's Final Order provided as follows:

> THIS CAUSE is before me for issuance of a Final Order. In a letter dated July 20, 2009, Marly Cueto (Respondent) was informed that the State of Florida, Agency for Health Care Administration (Agency) was imposing a sanction of termination from participation in the Florida Medicaid program pursuant to Rule 59G-9.070, Florida Administrative Code.
>
> Pursuant to Section 409.913(6), Florida Statutes, the letter was sent to Respondent at the address last shown on the provider enrollment file. The letter contained full disclosure and notice regarding Respondent's administrative hearing and due process rights. To date, Respondent has not requested a hearing to dispute the facts contained in the letter; and, the timeframe within which Respondent had to request a hearing has expired.

FINDINGS OF FACT

1. A letter was sent to Respondent at the address last shown on the provider enrollment file that imposed a sanction of termination from participation in the Florida Medicaid program pursuant to Rule 59G-9.070, Florida Administrative Code.

2. The letter disclosed the Respondent's administrative and due process rights.

3. The Respondent has not disputed imposition of the sanction as set forth in the letter.

CONCLUSIONS OF LAW

4. The Agency incorporate[s] and adopts the statements and conclusions of law as set forth in the aforementioned letter.

5. The sanction as set forth in the letter is final

ORDER

BASED on the foregoing, it is ORDERED and ADJUDGED that Respondent is terminated from participation in the Florida Medicaid program pursuant to Rule 59G-9.070, Florida Administrative Code.

Appended to the body of AHCA's Final Order was a notice of Petitioner's right to seek judicial review of the Order and a certificate certifying that the Order had been served on Petitioner by United States Mail.

5. Petitioner did not appeal AHCA's Final Order.

6. In its December 16, 2009, Notice, Respondent has cited Petitioner's termination from the Florida Medicaid program,

which was effectuated by AHCA's Final Order, as the reason it intends to deny the renewal of Petitioner's license to practice physical therapy.

7. Petitioner has applied to reenroll in the Florida Medicaid program. Her application is pending.

CONCLUSIONS OF LAW

8. Respondent is a creature of statute, specifically section 20.43(3)(g)26., Florida Statutes. As such, it has only that authority the Legislature has delegated to it, and it must exercise that delegated legislative authority within, and not stray beyond, the boundaries and parameters established by the Legislature. See Cape Coral v. GAC Utils., Inc., 281 So. 2d 493, 495-496 (Fla. 1973)("All administrative bodies created by the Legislature are not constitutional bodies, but, rather, simply mere creatures of statute. This, of course, includes the Public Service Commission. As such, the Commission's powers, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State.")(citations omitted); Ocampo v. Dep't of Health, 806 So. 2d 633 (Fla. 1st DCA 2002) ("An agency can only do what it is authorized to do by the Legislature."); Fla. Dep't of Ins. v. Bankers Ins. Co., 694 So. 2d 70 (Fla. 1st DCA 1997)("In determining the extent of an agency's authority or jurisdiction, we start with the proposition that agencies are creatures of statute. Their

legitimate regulatory realm is no more and no less than what the Legislature prescribes by law."); Schiffman v. Dep't of Prof'l Reg., Bd. of Pharmacy, 581 So. 2d 1375, 1379 (Fla. 1st DCA 1991)("An administrative agency has only the authority that the legislature has conferred it by statute."); and Gardinier, Inc. v. Fla. Dep't of Pollution Control, 300 So. 2d 75, 76 (Fla. 1st DCA 1974)("It has long been established law that a statutory agency possesses no inherent powers. Its powers are derivative only, depending upon the statute by which it is created. Its powers are limited to those granted, either expressly or by necessary implication, by the statute of its creation.").

9. In determining where the bounds of its statutory authority lie, Respondent must strive to ascertain what the Legislature intended in this regard. Cf. Larimore v. State, 2 So. 3d 101, 106 (Fla. 2008) ("A court's purpose in construing a statute is to give effect to legislative intent, which is the polestar that guides the court in statutory construction."). "Legislative intent must be derived primarily from the words expressed in the statute [in question]. If the language of the statute is clear and unambiguous," these words must be given effect. Dep't of Rev. v. Fla. Mun. Power Agency, 789 So. 2d 320, 323 (Fla. 2001). Where there is such clarity and lack of ambiguity, "there is no reason to resort to rules of statutory construction."[3] Gervais v. City of Melbourne, 890 So. 2d 412,

414 (Fla. 5th DCA 2004); see also State v. Jett, 626 So. 2d 691, 693 (Fla. 1993)("It is a settled rule of statutory construction that unambiguous language is not subject to judicial construction, however wise it may seem to alter the plain language."); Fla. Dep't of Children & Family Servs. v. P. E., 14 So. 3d 228, 234 (Fla. 2009) ("Legislative intent guides statutory analysis, and to discern that intent we must look first to the language of the statute and its plain meaning. Where the statute's language is clear or unambiguous, courts need not employ principles of statutory construction to determine and effectuate legislative intent.") (citation omitted); and Metro. Cas. Ins. Co. v. Tepper, 2 So. 3d 209, 213 (Fla. 2009) ("When a statute's language is plain and unambiguous, there can be no resort to statutory construction.").

10. Regardless of Respondent's views regarding the wisdom or legal propriety of the choices the Legislature has made in defining the scope of Respondent's authority (as expressed in the statutory provisions the Legislature has enacted), Respondent is obligated to respect, and act in accordance with, these legislative choices and to not ignore or disregard them. See Palm Harbor Special Fire Control Dist. v. Kelly, 516 So. 2d 249, 250 (Fla. 1987) ("[I]t is axiomatic that an administrative agency has no power to declare a statute void or otherwise

unenforceable."); State v. Bales, 343 So. 2d 9, 11 (Fla. 1977) ("Questions as to wisdom, need or appropriateness [of a legislative enactment] are for the Legislature."); and Barr v. Watts, 70 So. 2d 347, 351 (Fla. 1953) ("The people of this state have the right to expect that each and every such state agency will promptly carry out and put into effect the will of the people as expressed in the legislative acts of their duly elected representatives. The state's business cannot come to a stand-still while the validity of any particular statute is contested by the very board or agency charged with the responsibility of administering it and to whom the people must look for such administration.").

11. Among the powers the Legislature has delegated to Respondent is the authority to issue licenses permitting physical therapists to practice physical therapy in the State of Florida, which licenses must be renewed every two years. §§ 456.004(1) and 486.085(2), Fla. Stat.

12. Through the enactment of section 456.0635(2)(b) (by section 24 of chapter 2009-223, Laws of Florida), the Legislature has made the choice (clearly expressed by the plain and unambiguous language of the statute) to limit Respondent's exercise of this authority by prohibiting Respondent, starting July 1, 2009,[4] the effective date of the statute, from issuing an initial or renewal physical therapist license to "any

applicant . . . who has been: [t]erminated for cause from the Florida Medicaid program pursuant to s. 409.913,[5] unless the applicant has been in good standing with the Florida Medicaid program for the most recent 5 years."[6] Respondent must "refuse to issue or renew a license" sought by such an applicant. It is powerless to carve out any exception to section 456.0635(2)(b) and license a physical therapist that the Legislature, in that statutory provision, has made ineligible for licensure, however wise or just it might seem to Respondent to take such action. See Cortes v. Bd. of Regents, 655 So. 2d 132, 136 (Fla. 1st DCA 1995) ("The legislature may authorize administrative agencies to interpret, but never to alter statutes.") (citations omitted); and Commercial Coating v. Dep't of Envtl. Reg., 548 So. 2d 677, 679 (Fla. 3d DCA 1989) ("Administrative agencies entrusted with authority to carry out statutory provisions are similarly prohibited from giving the statute an amendatory construction.").

13. That being said, not every termination from the Florida Medicaid program is fatal, under section 456.0635(2)(b), to Respondent's ability to exercise its licensure authority. Only those terminations that are "for cause . . . pursuant to s. 409.913" can have such a lethal consequence. A termination is "for cause" if it is "based on some fault or shortcoming of the person being [terminated]." In re Brookover, 352 F.3d 1083,

1087 (6th Cir. 2003). A physical therapist who has been terminated from the Florida Medicaid program pursuant to section 409.913(13)(b)[7] for having been "[c]onvicted of a criminal offense under federal law or the law of any state relating to the practice of [physical therapy]" (as has Petitioner) has been terminated "for cause . . . pursuant to s. 409.913" and, consequently, is not a physical therapist to whom Respondent may grant an initial or renewal license, unless the physical therapist has been reinstated to the program and "been in good standing . . . for the most recent 5 years."

14. A licensed physical therapist seeking the renewal of his or her license must submit to Respondent an application for renewal, accompanied by the appropriate renewal fee ($75.00 for an active license and $50.00 for an inactive license or a retired license). § 486.085(1); and Fla. Admin. Code R. 64B17-2.005(1)-(3). "A license which is not renewed at the end of the biennium as prescribed by the Department[8] shall automatically revert to delinquent status. Delinquent status automatically revokes the privilege to practice in Florida. The delinquency fee is $55.[00]." Fla. Admin. Code R. 64B17-2.005(4). The "[f]ailure by a delinquent licensee to become active or inactive before the expiration of the current licensure cycle renders the license null without further action by [Respondent]." Fla. Admin. Code R. 64B17-2.005(8).

15. Should a licensee make a "sufficient application for the renewal of [his or her] license" prior to the "end of the biennium" period, the "license shall not expire until the application for renewal has been finally acted upon by [Respondent] or, in case the application is denied or the terms of the license are limited, until the last day for seeking review of the [final] agency order or a later date fixed by order of the reviewing court." § 120.60(4).

16. If Respondent is presented with an application for the renewal of a license that it believes it is without authority to grant because the application is from a section 456.0635(2)(b)-disqualified physical therapist, Respondent must, before taking final action on the application, comply with the notice requirements of section 120.60(3), which provides, in pertinent part, as follows:

> Each applicant shall be given written notice, personally or by mail that the agency intends to . . . deny . . . the application for license. The notice must state with particularity the grounds or basis for . . . denial of the license . . . . Unless waived, a copy of the notice shall be delivered or mailed to each party's attorney of record and to each person who has made a written request for notice of agency action. Each notice must inform the recipient of the basis for the agency decision, inform the recipient of any administrative hearing pursuant to ss. 120.569 and 120.57 or judicial review pursuant to s. 120.68 which may be available, indicate the procedure that must

> be followed, and state the applicable time limits. The issuing agency shall certify the date the notice was mailed or delivered, and the notice and the certification must be filed with the agency clerk.

17. At any administrative hearing held on the matter, Respondent bears the burden of proving that the applicant "has been: [t]erminated for cause from the Florida Medicaid program pursuant to s. 409.913." See Dep't of Banking & Fin., Div. of Secs. & Investor Prot. v. Osborne Stern and Co., 670 So. 2d 932, 934 (Fla. 1996) ("'The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue.'"); M. H. v. Dep't of Child. & Fam. Servs., 977 So. 2d 755, 761 (Fla. 2d DCA 2008) ("[I]f the licensing agency proposes to deny the requested license based on specific acts of misconduct, then the agency assumes the burden of proving the specific acts of misconduct that it claims demonstrate the applicant's lack of fitness to be licensed."); and Fla. Dep't of HRS v. Career Serv. Comm'n, 289 So. 2d 412, 414 (Fla. 4th DCA 1974) ("[T]he burden of proof is 'on the party asserting the affirmative of an issue before an administrative tribunal.'"). Once Respondent makes such a showing, the burden shifts to the applicant to demonstrate that he or she has been reinstated to the Florida Medicaid program and "has been in good standing . . . for the most recent 5 years." See State v. Hicks, 421 So. 2d 510, 511 (Fla. 1982) ("We find that as used in

section 810.02(1), the word 'unless' is a qualifier to the primary sentence of the statute, separating the consent phrase from the enacting clause and making consent an affirmative defense."); Baeumel v. State, 7 So. 371, 372 (Fla. 1890) ("[I]f there is an exception in the enacting clause, the party pleading must show that his adversary is not within the exception; but, if there be an exception in a subsequent clause, or a subsequent statute, that is [a] matter of defen[s]e, and is to be shown by the other party.") (internal quotations omitted); Royal v. State, 784 So. 2d 1210, 1211 (Fla. 5th DCA 2001) ("It has long been the rule that if there is an exception in an enacting clause, the party pleading must show that his adversary is not within the exception. If the exception is found in a subsequent clause or statute, however, it is a matter of defense.") (citations omitted); and D. R. v. State, 734 So. 2d 455, 459 (Fla. 1st DCA 1999) ("In subsection (1) of the burglary statute, the term 'unless' qualifies the primary sentence and separates the consent provision from the enacting clause. Consent to enter is an affirmative defense to burglary.").

18. In the instant case, Respondent (through its December 16, 2009, Notice) notified Petitioner that, pursuant to section 456.0635, it intended to deny the renewal of her license to practice physical therapy. An administrative hearing on this

proposed agency action was thereafter held, at Petitioner's request.

19. At the hearing, Respondent proved that Petitioner had been "[t]erminated for cause [by AHCA] from the Florida Medicaid program pursuant to s. 409.913" (as alleged in Respondent's December 16, 2009, Notice) on October 6, 2009,[9] a showing which absolutely negates the possibility that she "has been in good standing with the Florida Medicaid program for the most recent 5 years" (since this termination occurred less than five years ago). Accordingly, were Respondent an applicant for renewal of her license, Respondent would be statutorily barred, pursuant to the clear directive issued by the Legislature in section 456.0635(2)(b), from renewing her license. Petitioner, however, has not applied for license renewal, and thus there is no renewal application for Respondent to deny. Under the statutory framework, the filing of such an application is a prerequisite to the exercise of Respondent's authority to grant or deny the renewal of a license.

20. In view of the foregoing, the undersigned agrees with Petitioner that Respondent is without authority to, and therefore cannot and should not, take the final action proposed in the December 16, 2009, Notice--denying the renewal of Petitioner's license.[10]

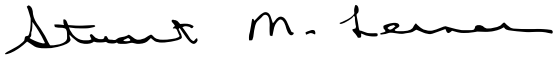
21. Petitioner has requested an award of attorney's fees and costs; however, she has not cited, nor is the undersigned aware of, any statutory provision under which she would be entitled to such an award under the particular facts and circumstances of this case.

RECOMMENDATION

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

RECOMMENDED that Respondent issue a final order declining to deny the renewal of Petitioner's license to practice physical therapy in the absence of a renewal application,[11] and finding that Petitioner has not demonstrated an entitlement to an award of attorney's fees and costs.

DONE AND ENTERED this 29th day of September, 2011, in Tallahassee, Leon County, Florida.



STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of September, 2011.

ENDNOTES

[1] Unless otherwise noted, all references by the undersigned in this Recommended Order to Florida Statutes are to Florida Statutes (2010).

[2] Respondent had "proposed that [Petitioner's] license be revoked and that she be required to pay an administrative fine of $10,000." The administrative law judge acknowledged that "this [proposed] penalty comes within the applicable range of penalties and hence is within the Board's discretion to impose," but determined that "it is harsher than necessary to protect the public."

[3] While "[i]t is a fundamental rule of statutory construction that, if at all possible, a statute should be construed to be constitutional," (Caple v. Tuttle's Design-Build, 753 So. 2d 49, 51 (Fla. 2000)), an agency is "without power to construe an unambiguous statute in a way which would extend, modify, or limit [the statute's] express terms or its reasonable and obvious implications [even if the agency believes that such a construction is necessary to cure a perceived constitutional defect]. To do so would be an abrogation of legislative power." Am. Bankers Life Assurance Co. v. Williams, 212 So. 2d 777, 778 (Fla. 1st DCA 1968).

[4] Another statutory provision which became effective July 1, 2009, section 456.072(1)(kk), allows, but does not require, Respondent to take disciplinary action (as described in section 456.072(2)) against a licensed physical therapist (outside the license renewal process) for "being terminated from the state Medicaid program pursuant to s. 409.913"; under section 456.072(1)(kk), unlike under section 456.0635(2)(b), restoration of the physical therapist's "eligibility to participate in the [Florida Medicaid] program" is an absolute defense, regardless of whether the physical therapist "has been in good standing with the Florida Medicaid program for the most recent 5 years."

[5] Under section 456.0635(2)(b), it is the termination, not the conduct underlying the termination, that triggers the statute's mandatory prohibition.

[6] Section 456.0635 reads, in its entirety, as follows:

> (1) Medicaid fraud in the practice of a health care profession is prohibited.

(2) Each board within the jurisdiction of the department, or the department if there is no board, shall refuse to admit a candidate to any examination and refuse to issue or renew a license, certificate, or registration to any applicant if the candidate or applicant or any principal, officer, agent, managing employee, or affiliated person of the applicant, has been:

(a) Convicted of, or entered a plea of guilty or nolo contendere to, regardless of adjudication, a felony under chapter 409, chapter 817, chapter 893, 21 U.S.C. ss. 801-970, or 42 U.S.C. ss. 1395-1396, unless the sentence and any subsequent period of probation for such conviction or pleas ended more than 15 years prior to the date of the application;

(b) Terminated for cause from the Florida Medicaid program pursuant to s. 409.913, unless the applicant has been in good standing with the Florida Medicaid program for the most recent 5 years;

(c) Terminated for cause, pursuant to the appeals procedures established by the state or Federal Government, from any other state Medicaid program or the federal Medicare program, unless the applicant has been in good standing with a state Medicaid program or the federal Medicare program for the most recent 5 years and the termination occurred at least 20 years prior to the date of the application.

(3) Licensed health care practitioners shall report allegations of Medicaid fraud to the department, regardless of the practice setting in which the alleged Medicaid fraud occurred.

(4) The acceptance by a licensing authority of a candidate's relinquishment of a license

> which is offered in response to or anticipation of the filing of administrative charges alleging Medicaid fraud or similar charges constitutes the permanent revocation of the license.

[7] Section 409.913(13)(b) provides as follows:

> The agency shall immediately terminate participation of a Medicaid provider in the Medicaid program and may seek civil remedies or impose other administrative sanctions against a Medicaid provider, if the provider or any principal, officer, director, agent, managing employee, or affiliated person of the provider, or any partner or shareholder having an ownership interest in the provider equal to 5 percent or greater, has been:
>
> Convicted of a criminal offense under federal law or the law of any state relating to the practice of the provider's profession.

[8] The "end of the [current] biennium as prescribed by the Department" is November 30, 2011. See Fla. Admin. Code R. 64B-9.001(4).

[9] That neither AHCA's October 6, 2009, Final Order, nor AHCA's earlier notice of proposed agency action (its July 20, 2009, letter to Petitioner), contained the actual words "for cause" does not mean that Petitioner's termination from the Florida Medicaid program cannot be characterized as a termination "for cause." Cf. Underwood v. Underwood, 64 So. 2d 281, 288 (Fla. 1953)("At the very outset we dispose of the legal effect of the use of the word 'alimony' in the agreement and decree. It is not what it is called but what it is that fixes its legal status. It is the substance and not the form which is controlling."); State v. Townsend, 40 So. 3d 103, 105 (Fla. 2d DCA 2010) ("[I]t is the nature of the search, not the label the officer places upon it, that controls."); and Boca Raton Artificial Kidney Ctr., Inc. v. Dep't of HRS, 475 So. 2d 260, 261-262 (Fla. 1st DCA 1985)("Although the CON in question does not so state, it represents preliminary agency action. That the actual certificate fails to state that it is a 'notice of intent to issue CON' or that it is 'subject to administrative review'

does not change the character of the certificate as preliminary agency action.").

[10] However, the additional assertions made by Petitioner in her Petition that Respondent "utilized unadopted rules in the allegations in the [December 16, 2009] Notice[;] [and] that [Respondent] has not treated substantially similar licensees in the same manner" find no support in the record. ("[S]tatements addressed to a specific party [in a notice of proposed disciplinary or other agency action, such as the December 16, 2009, Notice] about specific instances of conduct that the [agency] believes are violations of [or contrary to] a specified statutory provision . . . are not rules." Bacchus v. Dep't of Bus. & Prof'l Reg., Case No. 06-4816RX, 2007 Fla. Div. Adm. Hear. LEXIS 55 *31 (Fla. DOAH January 30, 2007), aff'd, 982 So. 2d 1180 (Fla. 1st DCA 2008).)

[11] In the absence of a renewal application filed prior to November 30, 2011, Petitioner's license will, pursuant to Florida Administrative Code Rule 64B17-2.005(4), "automatically revert to delinquent status," and she will no longer have "the privilege to practice in Florida."

COPIES FURNISHED:

James M. Barclay, Esquire
Clark, Partington, Hart, Larry,
Bond & Stackhouse
106 East College Avenue, Suite 600
Tallahassee, Florida 32156

Javier Talamo, Esquire
Kravitz & Talamo, LLP
7600 West 20th Avenue, Suite 213
Hialeah, Florida 33016

Morris Shelkofsky, Esquire
Assistant General Counsel
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1703

Allen Hall, Executive Director
Board of Physical Therapy Practice
Department of Health
4052 Bald Cypress Way, Bin C05
Tallahassee, Florida 32399-3255

Nicholas Romanello, General Counsel
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1701

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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