

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND
PROFESSIONAL REGULATION,
BARBER'S BOARD,

Petitioner,

vs.

Case No. 13-4589PL

ANDREW ARCHIBALD,

Respondent.

_____ /

RECOMMENDED ORDER

This case came before Administrative Law Judge Darren A. Schwartz for final hearing by video teleconference on January 28, 2014, at sites in Tallahassee and Port St. Lucie, Florida.

APPEARANCES

For Petitioner: Mark Steven Miller, Esquire
Danijela Janjic, Esquire
Department of Business and
Professional Regulation
Suite 86
1940 North Monroe Street
Tallahassee, Florida 32399-2202

For Respondent: Andrew Archibald, pro se
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STATEMENT OF THE ISSUES

Whether Respondent committed the violations alleged in the Administrative Complaint, and, if so, what penalties should be imposed on Respondent.

PRELIMINARY STATEMENT

On August 5, 2013, Petitioner Department of Business and Professional Regulation, Barber's Board ("Petitioner"), issued a five-count Administrative Complaint against Respondent Andrew Archibald ("Archibald"). The Administrative Complaint is predicated upon allegations of the following violations of rules of the Barber's Board: (Count I) permanently laminated personal licenses, with an attached photograph, were not displayed at all times at the barber's place of employment in plain view of the work station, in violation of Florida Administrative Code Rule 61G3-19.009(1); (Count II) failing to display the barbershop's license within view of the front entrance or in the waiting area, in violation of rule 61G3-19.009(2); (Count III) failing to post the rules of sanitation, health, and safety within view of the front entrance or in the waiting area, in violation of rule 61G3-19.012(1); (Count IV) failing to post a copy of the most recent inspection report within view of the front entrance or in the waiting area, in violation of rule 61G3-19.015(1); and (Count V) failing to maintain the barbershop's portable fire

extinguishers in compliance with the State Fire Marshal's Rules and Regulations, in violation of rule 61G3-19.011(2)(c).

There is no specific allegation that Archibald personally committed, or is personally culpable for, any of the offenses which are the subject of the Administrative Complaint.

Archibald timely filed an Election of Rights form on or about September 11, 2013. On November 22, 2013, the matter was referred to the Division of Administrative Hearings ("DOAH") to assign an Administrative Law Judge to conduct the final hearing. This case was initially assigned to Administrative Law Judge John G. Van Laningham, and the final hearing was set for January 28, 2014, by video teleconference, with sites in Tallahassee and Port St. Lucie, Florida. On January 23, 2014, this matter was transferred to the undersigned for all further proceedings.

The final hearing took place on January 28, 2014, as scheduled, with both parties present. At hearing, Petitioner presented the testimony of Yvonne Grutka, and offered Exhibits 1, and 4 through 6, all of which were admitted into evidence without objection. Archibald testified on his own behalf and did not offer any additional witnesses or exhibits.

The final hearing Transcript was filed on February 11, 2014. Petitioner timely filed a Proposed Recommended Order, which was

given consideration in the preparation of this Recommended Order. Archibald did not file a proposed recommended order.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2011 Florida Statutes.

FINDINGS OF FACT

1. Petitioner is the state agency charged with the regulation of barbering and the inspection of barbershops in the state of Florida pursuant to chapter 476, Florida Statutes.

2. At all times material hereto, Archibald was licensed as a barber in the state of Florida under license number BB8890016.

3. At all times material hereto, Fresh Cut Barbershop ("barbershop") was licensed as a barbershop in the state of Florida under license number 1077801.

4. At all times material hereto, Archibald was an owner and operator of the barbershop.

5. On February 9, 2012, the barbershop was located within a shopping plaza at 6574 Northwest Selvitz Road, Port St. Lucie, Florida.

6. On February 9, 2012, a routine inspection of the barbershop was conducted by Ms. Yvonne Grutka, a trained and experienced inspector employed by Petitioner. Ms. Grutka has been employed by Petitioner as an Environmental Health Specialist for approximately 17 years, performing approximately 1,200-1,400 annual inspections.

7. Due to the nature of the allegations of the Administrative Complaint, the physical layout of the barbershop, including the specific locations of the front entrance, work stations, and waiting area, is important to a clear understanding and resolution of the issues. However, insufficient evidence was presented at hearing in this regard.

8. Moreover, insufficient evidence was presented as to the number of barbers who worked at the barbershop (and thus number of personal licenses); the identities of the barbers; where specifically within the barbershop they worked; and whether the barbers who worked at the barbershop were independent contractors or employees of the business.

9. The scant evidence presented at hearing demonstrates that on February 9, 2012, the premises upon which the barbershop was physically located was leased from the owner of the shopping plaza. A separate beauty supply business, which was owned by Archibald's ex-wife, was located at the front of the leased premises. The barbershop was located in a smaller area at the back of the leased premises. Both businesses were accessible to customers through a single entry door at the front of the leased space where the beauty supply store was located.

10. Petitioner failed to clearly and convincingly establish that the barbershop was open for business during the February 9, 2012, inspection. During Ms. Grutka's February 9, 2012,

inspection, the only persons present at the barbershop were Archibald and another unidentified barber. No evidence was presented that this "other barber" was affiliated with the barbershop in any way. No physical description of this person or his/her clothing was provided. It could be that this barber was just visiting, and was unaffiliated with the barbershop. No customers were present. The time of commencement and duration of the inspection is unknown.

11. On the date of the February 9, 2012, inspection, the property upon which the barbershop was located was in foreclosure. As a result, Archibald was planning to vacate the premises and move the barbershop to another location. During the inspection, boxes of items were on the floor, and other items were removed from walls, evidencing Archibald's intent to vacate the premises.

12. Archibald was present on the date of the inspection. Archibald testified he is unsure whether the barbershop was open for business on February 9, 2012, because of his intent to vacate the building. On rebuttal, Ms. Grutka did not "recall" whether she "saw boxes or not." When asked specifically whether she recalled Archibald saying that he was in the process of moving, Ms. Grutka merely replied: "No. He may have. I really don't recall."^{1/}

13. With respect to the allegation regarding the improper display of personal licenses, Ms. Grutka testified on direct examination that during the February 9, 2012, inspection, she did not observe personal licenses posted with both the photograph and lamination. She testified that the licenses had the photograph or the lamination on "it, but one of the items was missing." However, no evidence was presented by Petitioner on direct examination as to the specific location of the alleged lack of personal licenses, or the number or identities of the licensees for which personal licenses were purportedly not properly displayed.

14. It was only on cross-examination that Ms. Grutka referred to Archibald's personal license, at which time she testified merely that she recalled seeing his personal license located in the "back" of the premises. Archibald testified that he believes the license was displayed in the barbershop area, which was located in the "back end" of the building. Importantly, Ms. Grutka never testified specifically that Archibald's license was improperly displayed in any way. In sum, Petitioner failed to prove by clear and convincing evidence that Respondent's personal license, or, for that matter, the personal licenses of any other barbers who worked at the barbershop were improperly displayed.

15. With respect to the issues of the display of the barbershop license, rules of sanitation, and most recent inspection report, Ms. Grutka testified that during the February 9, 2012, inspection, she did not observe a barbershop license displayed visibly within view of the "front door," or the rules of sanitation, health, and safety visibly within view of the "front door" or "waiting area." Nor did Ms. Grutka observe the most recent inspection form prior to the February 9, 2012, inspection displayed within view of the "front entrance" or the "waiting area." According to Ms. Grutka, she did not observe the barbershop license and rules of sanitation, health, and safety, anywhere at the barbershop on the day of the inspection.

16. However, Ms. Grutka's testimony is unreliable and cannot be credited because of insufficient evidence of the physical layout of the premises. In fact, Ms. Grutka testified that she could not recall whether the "waiting area" was in the front of the building, the back of the building, or in both areas. Moreover, Ms. Grutka did not "recall" if the most recent inspection report was posted anywhere else in the barbershop. The unreliability of Ms. Grutka's testimony is further demonstrated through the following exchange, which occurred during Archibald's cross-examination of her:

Q: Questions for - - You said you never seen any of our license or anything in the back end?

A: Yes, they were up - - not in the back. Your personal licenses I remember, you know, were in the back, but I don't recall the inspection sheet and stuff being moved to the back of the shop"

17. Further undercutting the reliability of Ms. Grutka's testimony is her statement that the rule regarding the display of a barbershop license requires that the license be visibly within view of the front door. Contrary to Ms. Grutka's testimony, rule 61G3-19.009(2) states that "[t]he shop license shall be displayed within view of the front entrance or in the waiting area." Apparently, Ms. Grutka did not even consider whether the license was displayed in the "waiting area," because she could not identify the location of the "waiting area."

18. Moreover, Ms. Grutka testified that she wrote in the report that the shop license was not "anywhere to be found in the shop." However, a review of the inspection report does not support her testimony. In fact, a section within the inspection report titled: "Remarks," was left blank. Nothing was written in the inspection report indicating that the shop license was nowhere in the barbershop. In sum, there is insufficient clear and convincing evidence to conclude that the barbershop license, rules of sanitation, or most recent inspection report were not properly displayed.

19. Finally, during the February 9, 2012, inspection, Ms. Grutka testified she did not observe a recent sticker on the

portable fire extinguisher indicating that it had been inspected. According to Ms. Grutka, portable fire extinguishers must be inspected on an annual basis, "as per the Fire Marshall, and they would have a sticker on them indicating that they had been inspected."

20. At hearing, Archibald did not admit to the allegations of the Administrative Complaint. Rather, Archibald persuasively explained that if personal and business licenses and the rules of sanitation and most recent inspection report were not displayed during the February 9, 2012, inspection, it was because the property was in foreclosure, items had been removed from the walls, items were placed in boxes, and he was planning on moving the barbershop to another location. In fact, the barbershop vacated the premises sometime in 2013, and relocated to another shopping plaza.

21. At the conclusion of the February 9, 2012, inspection, Ms. Grutka prepared and signed an inspection report indicating the violations noted in the report, and she informed Archibald of the alleged violations. Archibald acknowledged his receipt of the report.

22. No evidence was presented indicating that a follow-up inspection of the barbershop was ever scheduled or occurred. No citation has ever been issued for the February 9, 2012, inspection.

23. No evidence was presented establishing a prior history of persistent or flagrant violations of the same nature as those alleged in the Administrative Complaint. The evidence at hearing established that even if personal and business licenses, the rules of sanitation, and the most recent inspection report were not properly displayed on the date of the February 9, 2012, inspection, it was an isolated incident.^{2/}

24. Importantly, the facts adduced at hearing do not clearly and convincingly establish that Archibald personally engaged in any misconduct resulting in the five charges which are the subject of the Administrative Complaint. The evidence failed to establish, clearly and convincingly, that Archibald personally committed, or is personally culpable for, a disciplinary offense which is the subject of the Administrative Complaint.

CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2011).

26. Section 476.204, Florida Statutes (2011), under which Archibald has been charged, provides, in pertinent part:

476.204 Penalties.-

(1) It is unlawful for any person to:

* * *

(i) Violate or refuse to comply with any provision of this chapter or chapter 455 or a rule or final order of the board.

27. Barber "means a person who is licensed to engage in the practice of barbering in this state" under chapter 476, Florida Statutes. § 476.034(1), Fla. Stat. (2011).

28. Barbershop "means any place of business wherein the practice of barbering is carried on." § 476.034(3), Fla. Stat. (2011).

29. The purpose of the rules and statutes governing barbering and barbershops is to insure that the public is protected from the incompetent practice of barbering, to protect the public safety, to educate the license holder, and to correct inappropriate conduct on his part. § 476.024, Fla. Stat. (2011). "However, restrictions should be imposed only to the extent necessary to protect the public from recognized dangers and in a manner which will not unreasonably affect the competitive market." Id.

30. Section 476.184, Florida Statutes (2011), under which Archibald has been charged in Counts I and II of the Administrative Complaint, governs the display of licenses in a barbershop, and provides, in pertinent part:

476.184 Barbershop licensure; requirements; fee; inspection; license display.-

* * *

(10) Each barbershop shall display, in a conspicuous place, the barbershop license and each individual licensee's certificate.

31. Florida Administrative Code Rule 61G3-19.009, under which Archibald has been charged in Counts I and II of the Administrative Complaint, further provides, as follows:

61G3-19.009 Display of License.

(1) A current personal license shall be displayed at all times at the barber's place of employment in plain view of the work station. The license or registration on display shall be the original certificate or a duplicative issued by the Department and shall have attached a 2" by 2" photograph taken within the previous two years of the individual whose name appears on the certificate. The certificate with photograph attached shall be permanently laminated as of July 1, 2008.

(2) The shop license shall be displayed within view of the front entrance or in the waiting area.

32. Rule 61G3-19.0123, under which Archibald has been charged in Count III of the Administrative Complaint, governs the posting of sanitation, health, and safety rules, and provides, as follows:

61G3-19.012 Posting of Sanitation, Health, and Safety Rules Required.

The owner or manager of every barbershop shall keep a copy of the rules of sanitation,

health, and safety adopted by the Board posted within view of the front entrance or in the waiting area in each barbershop for the information and guidance of the persons employed therein and the public generally.

33. Rule 61G3-19.015(1), under which Archibald has been charged in Count IV of the Administrative Complaint, governs the posting of inspection reports, and provides, as follows:

61G3-19.015 Inspections.

(1) Inspections conducted by the Department of Business and Professional Regulation of barbershops to determine whether such barbershops are in compliance with the applicable provisions of Chapter 476, F.S., and the rules promulgated thereunder shall be conducted biennially, effective July 1, 2010, on a random unannounced basis, unless otherwise practicable. A copy of the inspection report shall be posted within view of the front entrance or in the waiting area of the barbershop for public viewing.

34. Rule 61G3-19.011(2)(c), under which Archibald has been charged in Count V of the Administrative Complaint, governs the maintenance of portable fire extinguishers, and provides, as follows:

61G3-19.011 Barbershop Requirements.

(2) Each barbershop and each barber shall take reasonable steps to insure that the shop and individual service area, respectively is maintained and operated in a safe and sanitary manner. Such steps shall include the following:

* * *

(c) Maintenance of portable fire extinguishers, type, placement and number

required needed to protect the public and property, shall be in compliance with the State Fire Marshal's Rules and Regulations, Chapter 4A-21, F.A.C.;

35. Due process prohibits an agency from taking disciplinary action against a licensee based on conduct not specifically alleged in an administrative complaint. Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); Bridlewood Group Home v. Agency for Persons with Disabilities, 2013 Fla. App. LEXIS 20108 (Fla. 2nd DCA December 20, 2013); Kinney v. Dep't of State, Div. of Licensing, 501 So. 2d 129 (Fla. 5th DCA 1987).

36. Moreover, vicarious liability and respondeat superior principles are inapplicable to this proceeding. To impose discipline against Archibald's license, Petitioner must clearly and convincingly prove misconduct personal to the licensee. Brother J. Inc. v. Dep't of Bus. and Prof. Regulation, Div. of Alcoholic Beverages and Tobacco, 962 So. 2d 1037 (Fla. 1st DCA 2007); Pic N' Save Central Fla., Inc. v. Dep't of Bus. Regulation, Div. of Alcoholic Beverages and Tobacco, 601 So. 2d 245, 249-56 (Fla. 1st DCA 1992). This means that a licensee cannot be punished unless it is established that he personally committed, or is personally culpable for, a disciplinary offense. Personal culpability attaches, for example, when a licensee knows, or should know, about the misconduct of his employees;

negligently fails to train or supervise employees; negligently overlooks, condones, or fosters the wrongdoing of employees; or fails to exercise due diligence in preventing misconduct. Pic N' Save, 601 So. 2d at 250.

37. Significantly, moreover, to establish a licensee's personal liability in regard to a violation for which discipline may be imposed, Petitioner must present evidence of the minimum standards of conduct against which the licensee's performance can be judged. As the court stated in Pic N'Save:

Proof by clear and convincing evidence of a licensee'[s] negligent training or lack of diligence in supervising its employees requires more than merely proving that three illegal sales occurred on the licensee's premises during a six-month period. The imposition of personal responsibility on the licensee for illegal sales by its employees requires proof of minimum standards of conduct, either by adopted rules, communicated agency policy, or expert testimony, against which the licensee's alleged misconduct can be judged. Otherwise, determining when a licensee is to be held responsible for employee misconduct will become simply a matter of personal opinion held by the hearing officer or the Division on a case-by-case basis without any firm standard for uniformity in application or enforcement.

Id. at 256.

38. In certain cases, the agency's proof might be assisted by the application of a permissible inference. For example, the fact-finder may infer that the licensee failed to satisfy the

minimum standards of conduct if his employee's wrongful actions were persistent, flagrant, or carried out in a "practiced manner." Id. at 252-54.^{3/}

39. Finally, in a proceeding, such as this one, to suspend, revoke, or impose other discipline upon a professional license is penal in nature. State ex rel. Vining v. Fla. Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, to impose discipline, Petitioner has the burden of proving by clear and convincing evidence the allegations set forth in the Administrative Complaint against Archibald. Dep't of Banking & Fin., Div. of Secs. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987). This is a heavy burden. Fla. Bd. Of Bar Examiners re: J.J.T., 761 So. 2d 1094, 1095 (Fla. 2000); Smith v. DHRS, 522 So. 2d 956, 958 (Fla. 1st DCA 1988).

40. The "clear and convincing evidence" standard requires that the evidence be found credible, the facts to which the witnesses testify must be distinctly remembered, the testimony must be precise and explicit, and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy or ambiguity, as to the truth of the allegations sought to be established. In re

Davey, 645 So. 2d 398, 404 (Fla. 1994); Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

41. Applying the foregoing legal principles to the instant case, the Administrative Complaint should be dismissed on numerous grounds. First, the Administrative Complaint does not sufficiently allege a basis for imposing discipline against Archibald. Nowhere in the Administrative Complaint is there any allegation that Archibald personally committed, or is personally culpable for, a disciplinary offense which is the subject of the Administrative Complaint. Petitioner did not orally or by written motion request at the hearing an amendment to the Administrative Complaint to allow such an allegation. Thus, Archibald was not put on proper notice of the claims against his personal license that could potentially result in a finding of guilt.

42. Even if the Administrative Complaint sufficiently alleged facts upon which disciplinary action could be taken against Archibald's license (which it does not), as set forth in the findings of fact contained herein, the undersigned has determined, as a matter of ultimate fact, that Petitioner failed to establish, by the requisite level of proof, that Archibald is guilty of the offenses of which he stands accused.

43. When Ms. Grutka testified, she failed to testify as to facts which were distinctly remembered. Her testimony was not

precise and explicit, but rather general, ambiguous, confusing and vague in nature. This is understandable because for some reason not apparent from the evidence, the Administrative Complaint was not issued until more than one and a half years after the February 9, 2012, inspection, and there was no follow-up inspection. By the time this case went to hearing, almost two years had elapsed since the inspection, and Ms. Grutka had conducted more than 2,000 inspections.

44. As detailed in the findings of fact contained herein, the evidence adduced at hearing failed to clearly and convincingly establish that the barbershop was open for business during the February 9, 2012, inspection. The only persons present during the inspection were Ms. Grutka, Archibald, and an unidentified barber, whose identity and purpose for being at the premises are unknown. On the date of the inspection, the property upon which the barbershop was located was in foreclosure. The un rebutted evidence established that boxes of items were on the floor because Archibald planned on vacating the premises.

45. The purpose of the rules and statutes governing barbering and barbershops is not met by subjecting an individual licensee to discipline for the alleged improper display of items in a barbershop, where the business is not open for business on

the date of the inspection, and the licensee is packing up items intending to move the business to another location.

46. Moreover, as detailed in the findings of fact contained herein, the evidence adduced at hearing failed to clearly and convincingly establish that Archibald's personal license (or those of any other barbers who worked at the barbershop for that matter), were improperly displayed; that the business license was improperly displayed; and that the most recent inspection report and rules of sanitation, were improperly displayed.

47. Even if Petitioner had submitted clear and convincing evidence that other personal licenses (besides Archibald's license) were not properly displayed, and that the barbershop license, rules of sanitation, and most recent inspection report were also not properly displayed (which it did not), the Administrative Complaint should still be dismissed because, as detailed in the findings of fact contained herein, the evidence adduced at hearing failed to clearly and convincingly establish that Archibald personally committed, or is personally culpable for, the disciplinary offense. In making these ultimate factual determinations, the undersigned notes that Petitioner presented no proof of minimum standards of conduct -- either by adopted rules, communicated agency policy, or expert testimony -- against which the licensee's alleged misconduct could be judged. Instead, the Board would have shown merely an isolated instance

of items not being displayed. There is simply no proof whatsoever that Archibald or any other employee of the barbershop flagrantly, persistently, or skillfully (in a "practiced" manner) improperly displayed the items which are the subject of the Administrative Complaint.

48. Finally, the undersigned will briefly address Count V of the Administrative Complaint, and Petitioner's assertion that Archibald is guilty of violating rule 61G3-19.011 because the portable fire extinguisher lacked the requisite recent inspection sticker. Archibald cannot be found guilty on Count V because rule 61G3-19.011 purports to incorporate an administrative rule of another agency (chapter 4A-21), that no longer exists.

49. Incorporation by reference occurs when legislation references material outside of itself and indicates expressly or by implication that the material should be treated as if it were fully set forth in the legislation. F. Scott Boyd, Looking Glass Law: Legislation by Reference in the States, 68 La. L. Rev. 1201, 1210 (2008). The Administrative Procedures Act ("APA") addresses the subject of incorporation by reference in its provisions governing rulemaking. Section 120.54(1)(i), Florida Statutes (2011), provides, in pertinent part, as follows:

(i) 1. A rule may incorporate material by reference but only as the material exists on the date the rule is adopted. For purposes of the rule, changes in the material are not

effective unless the rule is amended to incorporate the changes.

2. An agency rule that incorporates by specific reference another rule of that agency automatically incorporates subsequent amendments to the referenced rule unless a contrary intent is clearly indicated in the referencing rule. A notice of amendments to a rule that has been incorporated by specific reference in other rules of that agency must explain the effect of those amendments on the referencing rules.

50. In the present case, nowhere in rule 61G3-19.011 is there a requirement that portable fire extinguishers be inspected, and that an inspection sticker be placed on a portable fire extinguisher. Petitioner seeks to rely on chapter 4A-21, which is purportedly incorporated by reference into rule 61G3-19.011. However, chapter 4A-21 of the Florida Administrative Code no longer exists. Chapter 4A-21 was not a rule adopted by the Petitioner, and at no time was rule 61G3-19.011 amended to incorporate any other provision of the Florida Administrative Code. Thus, rule 61G3-19.011 provides no basis for discipline against Archibald's personal license.^{4/} Even if it did, Petitioner's claim against Archibald would fail for the same reasons Counts I-IV fail.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding

Respondent not guilty on all counts of the Administrative Complaint.

DONE AND ENTERED this 26th day of February, 2014, in Tallahassee, Leon County, Florida.



DARREN A. SCHWARTZ
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of February, 2014.

ENDNOTES

^{1/} The undersigned has considered, and rejected, Petitioner's contention that the barbershop "was open for business as the lights were on, the door was opened, and there were people inside." That lights were on, a door was opened, and there were people inside does not, clearly and convincingly, establish that the barbershop was open for business during the inspection, particularly when the totality of the testimony presented at the hearing is considered. Moreover, a careful review of page 32 of the Transcript, upon which Petitioner relies, demonstrates that the question posed by Petitioner's counsel to Ms. Grutka in support of Petitioner's position was patently leading, further discounting the weight that should be given to her answer.

^{2/} Notably, Ms. Grutka conducted a prior inspection of the barbershop in March 2010, at which time she noted that a portable fire extinguisher was not "maintained in accordance with rule 61G-19.011(2)(c)." This was the only violation that a Notice of Noncompliance was issued for at the time of the March 2010, inspection. When Ms. Grutka returned for a follow-up inspection

after the March 2010, inspection, she did not see that the violation had been cured so she imposed a \$50.00 fine, which was due to be paid by August 30, 2010. However, the fine for the fire extinguisher violation was not paid until August 29, 2012. Ms. Grutka testified that the 2010 violation has nothing to do with the February 9, 2012, inspection. Ms. Grutka also performed two other inspections of the barbershop prior to the February 9, 2012, inspection. No evidence was presented by Petitioner demonstrating that any violations were found during these two other inspections. Finally, Ms. Grutka performed an inspection of the barbershop in 2013, after the business moved to a new location. The only alleged violation in 2013, albeit at a new location, pertained to a sink, which is unrelated to any of the charges which are the subject of the Administrative Complaint.

^{3/} Petitioner incorrectly contends that Pic N' Save is distinguishable because Archibald was not "sanctioned for actions of his employee," rather, "the Department took action against Archibald based on his own conduct as a barber shop owner and a licensed barber." To suggest that Petitioner took action against Archibald because he is an owner of the barber shop is simply another way of saying that Archibald is vicariously liable or responsible for the actions of someone else based on a theory of respondeat superior. To accept Petitioner's argument would render Pic N Save meaningless. Furthermore, as detailed in the findings of fact, no persuasive clear and convincing evidence was presented to demonstrate that Archibald personally committed, or is personally culpable for, a disciplinary offense which is the subject of the Administrative Complaint, such that he could be found guilty pursuant to the standards enunciated in Pic N' Save.

Furthermore, Petitioner's reliance on Beshore v. Dep't of Fin. Servs., 928 So. 2d 411 (Fla. 1st DCA 2006), is misplaced. In that case, "Appellant directly represented an unauthorized insurer." Thus, the clear and convincing evidence was that the Appellant personally committed the offense for which he was charged. In the instant case, no such persuasive clear and convincing evidence was presented.

Finally, Petitioner mistakenly suggests that Pic N' Save is inapplicable to the instant matter because Petitioner has announced in its Proposed Recommended Order that it seeks only a monetary penalty against Archibald. The specific type of remedy sought in a disciplinary proceeding is irrelevant to the determination of whether Pic N' Save applies or not. Rather, it is the penal nature of the licensure disciplinary proceeding

which is controlling. Dias de la Portilla v. Fla. Elections Comm'n., 857 So. 2d 913, 917-18 (Fla. 3d DCA 2003).

^{4/} Furthermore, a reference generally to an entire chapter of the Florida Administrative Code, such as 4A-21, is too broad to inform Archibald of the specific law allegedly violated. Dep't. of Ins. and Treasury v. Nat'l. Fire and Safety Corp., et al., Case No. 97-2921 (Fla. DOAH Dec. 12, 1997).

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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