STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF NURSING,

Petitioner,

vs. Case No. 17-2458PL

NANCY JANE REED, R.N.,

Respondent.
_______________________________/

DEPARTMENT OF HEALTH, BOARD OF MASSAGE THERAPY,

Petitioner,

vs. Case No. 17-2459PL

NANCY JANE REED, L.M.T.,

Respondent.
_______________________________/

FINAL ORDER DENYING ATTORNEY'S FEES

In 2017, the Petitioner, the Department of Health (DOH), filed two administrative complaints against the Respondent. One was against the Respondent's registered nursing license; the other was against her massage therapy license. Both complaints alleged that the Respondent had an opioid use disorder, a sedative/hypnotic use disorder, a cannabis use disorder, an alcohol use disorder, chronic pain syndrome, anxiety disorder and/or chronic insomnia; that she was unable to practice her licensed profession with reasonable skill and safety 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; and that she should be prohibited or restricted from practicing her licensed profession, or be otherwise disciplined. The Respondent disputed the allegations and asked for a hearing.

The hearing requests were referred to the Division of Administrative Hearings (DOAH) for assignment to an Administrative Law Judge. The registered nursing license complaint was designated DOAH case 17-2458PL; the massage therapy license complaint was designated DOAH case 17-2459PL. The two cases were consolidated.

On August 9, 2017, the Respondent gave notice that she had sent DOH a "21-day letter" as a condition precedent to filing a motion for sanctions under section 57.105(4), Florida Statutes (2017).[1/] DOH filed a response in opposition, which pointed out that it would be premature to rule on the motion prior to the final orders.

The hearing was held on August 15, 2017, and a Recommended Order was entered on November 3, 2017. The Recommended Order found that the charges were not proven by clear and convincing evidence; recommended that the charges be dismissed; and reserved jurisdiction to rule on motion for sanctions under section 57.105 until 30 days after the entry of final orders.

A Final Order adopting the Recommended Order was entered by the Board of Nursing on January 2, 2018. On January 4, 2018, the Respondent updated/renewed her motion for sanctions under section 57.105, and the reservation of jurisdiction was extended. On May 11, 2018, the Board of Massage Therapy entered a Final Order adopting the Recommended Order.

A telephonic pre-hearing conference was held in these cases on June 5, 2018, to discuss the need for any evidence and any additional written or oral argument on the Respondent's Updated/Renewed Motion for Sanctions, and any other matters to facilitate its resolution. At the conference, the parties agreed that no further evidence was required and that any additional argument on entitlement to an award of attorney's fees would be made by filing proposed final orders. (With the parties' agreement, any issue as to the amount of reasonable attorney's fees was deferred until after the issuance of an order on entitlement.)

An Order Establishing Procedures was entered in accordance with the matters discussed in the conference. DOH was required to return the evidentiary record to DOAH, which has been done, and the parties were given until June 19 to file proposed final orders on entitlement.

On June 14, the Respondent filed a Motion to Conduct Discovery from Department of Health Prior to Hearing on

Entitlement of 57.105 Sanctions. The motion essentially seeks to vacate the Order Establishing Procedures, initiate discovery, and schedule an evidentiary hearing to present evidence on the actual case law considered by DOH's attorneys and presented to the probable cause panels before the administrative complaints in these cases were filed.

The Respondent's motion stated DOH's opposition, but DOH did not file a response. Instead, DOH filed a proposed final order, as has the Respondent. Both proposed final orders have been considered. As explained in the Conclusions of Law, infra, the evidence the Respondent seeks to discover and present is not relevant. No discovery or hearing is required.

FINDINGS OF FACT

1. As reflected in the final orders, DOH's claims against the Respondent were supported by many material facts.

2. The material facts supporting DOH's claims against the Respondent included the opinions of Dr. Lawrence Wilson, a qualified addiction medicine expert retained by DOH to evaluate the Respondent. Based on his thorough evaluation, Dr. Wilson diagnosed: opioid use disorder, moderate severity; sedative/hypnotic use disorder, moderate severity; cannabis use disorder, moderate severity, in remission; alcohol use disorder, mild to moderate severity; chronic pain syndrome related to degenerative joint disease and chronic migraine headaches;

hypertension; anxiety disorder, NOS; and chronic insomnia, NOS. Dr. Wilson opined that the Respondent was unable to continue her practice of nursing and massage therapy with the required skill and safety due to untreated substance use disorders and risk of impairment. He recommended that she enter treatment for substance abuse disorders, at a partial hospitalization level, at an IPN-approved treatment facility, and that she be monitored by IPN after completion of treatment. The Respondent disagreed and declined. She did not think referral to IPN was necessary.

3. Based on the facts known to DOH, including Dr. Wilson's opinion and recommendation, probable cause was found, and DOH filed administrative complaints charging that the Respondent was unable to practice nursing or massage therapy with reasonable skill and safety 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. The Respondent disputed the charges and asked for a hearing.

4. In addition to the administrative complaints, DOH entered emergency orders restricting the Respondent's practice of nursing and massage therapy pending disposition of the charges in the administrative complaints. The Respondent did not appeal the emergency orders and did not ask for a separate hearing to dispute the facts alleged in support of the emergency orders.

5. The Respondent contends that Dr. Wilson admitted in a deposition taken in anticipation of the hearing on the administrative complaints that the Respondent could probably practice her professions safely. That is not a fair reading of the deposition testimony. Dr. Wilson testified that anxiety syndrome alone would not make the Respondent unsafe to practice. Joint Ex. 7, at p. 81. He also testified that she could practice safely if she was being treated and monitored. Id. at p. 98. However, he maintained his opinion and recommendation during the deposition and at the hearing that she was unsafe to practice without treatment and monitoring.

6. The Respondent testified at the hearing and disputed some of the material facts supporting DOH's claims. The Respondent also retained her own expert, Dr. James Edgar, who testified to dispute Dr. Wilson's opinions. As reflected in the final orders, Dr. Edgar is a board-certified psychiatrist. He is not board-certified in addiction medicine or addiction psychiatry; does not complete continuing education or self-study related to substance use disorders; and does not hold the kinds of certifications Dr. Wilson has. However, he has performed evaluations of licensed health care providers for PRN and IPN, which are Florida's programs for impaired physicians and nurses, and for private attorneys who represented licensees, for over

42 years. Based on his expertise, he was allowed to present his opinion testimony.

7. In light of all the evidence (not only the material facts supporting DOH's claims against the Respondent, but also the testimony of the Respondent and her expert), it was found that Dr. Wilson's ultimate opinions on whether the Respondent was "safe to practice nursing or massage therapy" were based on his "suspicions" and the "possibility" or "risk" of impairment. It also was found that Dr. Wilson's opinions appeared to be influenced by his honest and genuine belief as a physician that the Respondent would benefit from the care and treatment she could receive as a participant in IPN. It was found that his belief may well have been correct, and that there may well be a risk that problems might arise in the future. However, the evidence taken as a whole was not clear and convincing that the Respondent, at the time of the hearing, was unable to practice nursing and massage therapy with reasonable skill and safety 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.

CONCLUSIONS OF LAW

8. Under section 57.105, if all other statutory prerequisites are met, the Respondent is entitled to be awarded a reasonable attorney's fee, including prejudgment interest, if DOH

or its attorneys knew or should have known that DOH's claims against the Respondent, when initially presented or at any time before the hearing either: (a) were not supported by the material facts necessary to establish the claims; or (b) would not be supported by the application of then-existing law to those material facts. The Respondent has the burden of proof by a preponderance of the evidence. See § 120.57(1)(j), Fla. Stat. (2017). See also Fla. Dep't of Transp. v. J.W.C., Co., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Dep't of HRS, 348 So. 2d 349 (Fla. 1st DCA 1977).

9. The Respondent contends that Barthlow v. Jett, 930 So. 2d 739 (Fla. 1st DCA 2006), supports sanctions based on claims made in the emergency restriction orders entered against her. It does not. Actually, that case does not even address a motion for sanctions for claims made in emergency restriction orders. Besides, by the time the Respondent served her motion for sanctions and gave notice under section 57.105(4), both the time for requesting a hearing to dispute facts alleged in the emergency restriction orders and the time for appealing from those orders had long since expired. The Respondent did not prevail against DOH on the emergency restriction orders, only on the administrative complaints. For these reasons, no sanctions can be imposed under section 57.105 for claims made in the emergency restriction orders.

10. The law is clear that, under section 57.105, the Respondent does not have to prove that the administrative complaints were entirely frivolous, or that no justiciable issues were presented. Sanctions can be imposed if DOH knew or should have known that any claim made in the administrative complaints, and not withdrawn in response to notice given under the safety-harbor provision in subsection (4) of the statute, was not supported by the material facts necessary to establish the claim, or would not be supported by the application of then-existing law to those material facts. See Boca Burger, Inc. v. Richard Forum, 912 So. 2d 561, 570 (Fla. 2005); Albritton v. Ferrera, 913 So. 2d 5, 6 (Fla. 1st DCA 2005).

11. In addition, it is clear that Wright v. Yurko, 446 So. 2d 1162, 1166 (Fla. 5th DCA 1984)(stating that the standard for establishing probable cause is extremely low and easily satisfied), is inapplicable to section 57.105, as amended in 1999. DOH now appears to concede as much (not mentioning it in its proposed order, after citing it in its response in opposition to the Respondent's updated/renewed motion for sanctions).

12. The phrase "supported by the material facts" means that "the party possesses admissible evidence sufficient to establish the fact if accepted by the finder of fact." Abritton v. Ferrera, 913 So. 2d at 7 n.1. The test is not whether the losing party's evidence was more persuasive to the fact finder. Id.

See also Minto PBLH, LC v. 1000 Friends of Fla., Inc., 228 So. 3d 147 (Fla. 4th DCA 2017)(quoting Kowallek v. Rehm, 189 So. 3d 262, 263-64 (Fla. 4th DCA 2016)); Siegel v. Rowe, 71 So. 3d 205, 212 (Fla. 2d DCA 2011); Cullen v. Marsh, 34 So. 3d 235, 242 (Fla. 3d DCA 2010); Read v. Taylor, 832 So. 2d 219, 222 (Fla. 4th DCA 2002).

13. According to the final orders in this case, DOH's evidence was insufficient, taking in consideration all the other evidence, to be clear and convincing to the finder of fact. However, DOH had admissible evidence sufficient to establish the facts alleged in the administrative complaints, if the evidence had been accepted.

14. The Respondent cites Lortz v. Department of Health, 700 So. 2d 383, 384 (Fla. 1st DCA 1997), in support of her argument that DOH never had admissible evidence to prove the Respondent's "true inability" to practice her professions safely. Lortz is not on point. In that case, a physician was charged with being "unable to practice medicine with reasonable skill and safety." Id. The court held that the hearing officer did not find a "true inability" to practice medicine with reasonable skill and safety, but rather only that "respondent's personality disorder impairs his ability to practice medicine with reasonable skill and safety." Id. According to the Lortz opinion, the hearing officer's finding was based on the testimony of a forensic

psychiatrist who was "very concerned" and "would not feel comfortable" with the physician practicing without treatment ("individual psychotherapy," "group therapy," and "educational rehabilitation") needed "in order to deal with his anger, in order to become more in touch with his feelings so that he did not act out inappropriately." Id. The court held that the evidence was insufficient to support a finding of a "true inability" to practice medicine with reasonable skill and safety. In contrast, in this case, ample evidence to support such a finding was known to and presented by DOH, including Dr. Wilson's opinion that the Respondent could not practice with reasonable skill and safety without treatment and monitoring.

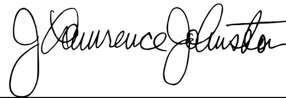
15. The Respondent's belated motion to initiate discovery and schedule an evidentiary hearing appears to be based on her faulty reading of the Lortz decision. In any event, there is no need to consider the knowledge of individual DOH attorneys as to the applicable law, or to consider the specific law presented to the probable cause panels by these attorneys before the administrative complaints cases were filed. The relevant questions under section 57.105(1)(b) are whether the claims presented by DOH were supported by the application of the then-existing law, regardless what specific case law was known to DOH's attorneys or presented to the probable cause panels. Nor can the Respondent argue that this evidence is relevant under

section 57.105(3)(a) because DOH is not making a good faith argument for the extension, modification, or reversal of existing law or the establishment of new law. For these reasons, the evidence the Respondent seeks to discover and present in a hearing is not relevant or necessary.

DISPOSITION

Based on the foregoing Findings of Fact and Conclusions of Law, the Respondent's updated/renewed motion for sanctions under section 57.105 is denied.

DONE AND ORDERED this 17th day of July, 2018, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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ENDNOTE

[1/] All statutory references are to the 2017 codification of the Florida Statutes.

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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 administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the District Court of Appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.