STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MASSAGE THERAPY,

Petitioner,

vs. Case No. 18-2479

GARY MACNEIL, L.M.T.,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice to all parties, a final hearing was conducted in this case on September 5, 2018, in Tallahassee, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings ("DOAH"). The parties were represented as set forth below.

APPEARANCES

For Petitioner: Kristen M. Summers, Esquire
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For Respondent: John E. Terrel, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Gary MacNeil, L.M.T. ("MacNeil"), timely filed an Election of Rights requesting a formal administrative hearing, pursuant to Florida Administrative Code Rule 28-106.111(2).

PRELIMINARY STATEMENT

On or about October 25, 2016, Petitioner, Department of Health, Board of Massage Therapy (the "Department"), issued an Administrative Complaint charging MacNeil with violating certain provisions of law governing the practice of massage therapy. The Administrative Complaint was mailed to MacNeil at his address of record. MacNeil prepared and filed an Election of Rights, seeking a formal administrative hearing on the allegations raised in the Administrative Complaint. The Department rejected the Election of Rights as being untimely, and MacNeil requested an administrative hearing to contest that determination. The instant proceeding resulted.

At the final hearing, the Department called two witnesses: John Wilson, Esquire, an attorney with the Department; and Gwendolyn Bailey, operations management consultant manager. The Department offered its Exhibits 1 through 4, each of which was admitted into evidence. MacNeil testified on his own behalf and did not call any other witnesses. MacNeil's

Exhibits 5 through 8, 11, and 13 were admitted into evidence. Joint Exhibits 1 and 2 were also admitted into evidence.

A transcript of the final hearing was ordered; it was filed at DOAH on September 25, 2018. The parties agreed to submit proposed recommended orders ("PROs") within 10 days after the Transcript was filed with DOAH, in accordance with rule 28-106.216. Each party timely submitted a PRO, and each was duly considered in the preparation of this Recommended Order.

Unless specifically stated otherwise herein, all references to Florida Statutes concerning the substantive facts of this case shall be to the 2016 version, as the events at issue occurred during that year and/or prior to the 2017 version.

FINDINGS OF FACT

Based upon the evidence presented, the demeanor and credibility of the witnesses, and the entire record in this case, the following Findings of Fact are made:

1. MacNeil is a massage therapist licensed in the State of Florida. He holds license number MA 76440. At all times relevant hereto, MacNeil's address of record at the Department was 4938 Frost Lake Drive, Jacksonville, Florida 32258 (hereinafter the "Florida address"). On August 29, 2017, MacNeil officially notified the Department to change his address of record to: CMR 402 Box 949, APO AE 09180 (hereinafter the "APO address"). An APO address is an on-base

military address available to members of the armed forces and civilian contractors with the U.S. government in foreign countries.

2. On or about October 11, 2016, the Department issued an Order of Emergency Restriction of License (referred to by the parties as an emergency restriction order or "ERO"), prohibiting MacNeil from practicing massage therapy on female clients. The ERO also advised MacNeil that a proceeding seeking formal discipline of his license "would be promptly instituted and acted upon," though no specific date was provided concerning when the further disciplinary proceedings might commence. The ERO also noted that "MacNeil still maintains his address of record in Florida."

3. The ERO was sent to MacNeil at the Florida address via U.S. Postal Service certified mail, return receipt requested. MacNeil had directed the U.S. Postal Service to forward mail from the Florida address to the APO address. The ERO was mailed from Tallahassee, Florida, on October 12, 2016. It arrived at a post office in Jacksonville, Florida, on October 14, 2016, and departed from there to an international distribution center the same day. The ERO arrived in Germany on October 20, 2016, and was delivered to the APO address on October 21, 2016. All of this occurred prior to MacNeil officially changing his address of record at the Department.

4. Meanwhile, on October 13, 2016, MacNeil advised a Department investigator informally via email that he was living in Germany. He disclosed the APO address and he provided a current email address as well: GR8ISTMASSAGE@YAHOO.COM. The Department mailed and emailed the ERO to MacNeil again based on that new information. On October 28, 2016 (14 days after it was mailed), MacNeil confirmed receipt of the mailed and emailed versions of the ERO. MacNeil did not take any action during that period of time to officially change his address of record on file with the Department.

5. MacNeil had begun using the APO address due to the fact that his wife had begun working as a civilian contractor with the United States government at Ramstein Air Base in Germany. The APO was assigned to Mrs. MacNeil, but MacNeil considered the APO address his mailing address as well and received all his mail at that address. MacNeil and his wife were estranged at the time, and although they lived in the same house and were raising a child together, they were not living as a traditional married couple. For example, MacNeil resided in the basement of their house; his wife occupied the third floor. MacNeil described it as, "we're managing the household and living separate lives."

6. On November 7, 2016, MacNeil was barred from entering Ramstein Air Base based on allegations made by a client at the on-base massage establishment where he was employed. In order to

access his mail after that date, his wife would have to pick up his mail from the APO box and deliver it to MacNeil at their house.

7. On October 25, 2016, the Department issued an Administrative Complaint against MacNeil to commence the disciplinary proceedings warned about in the ERO. The Administrative Complaint was mailed to MacNeil at his address of record, i.e., the Florida address, even though the Department had been made aware (albeit somewhat informally) that MacNeil was residing in Germany at that time and was using the APO address.[1/] However, since MacNeil still had not taken action to officially change his address of record in the Department's database, the Department acted within its rights to use the Florida address to notify MacNeil about the action it was taking. MacNeil could have officially changed his address via written, mailed request, or by way of on-line access, but did not do either until August 2017, well after the facts at issue in this proceeding. The Department did not provide evidence as to why it did not email the Administrative Complaint to MacNeil just as it had the ERO. Although it would seem logical and reasonable to get the Administrative Complaint to MacNeil that way, there does not appear to be any requirement that the Department do so.

8. The Department correctly presumed the Administrative Complaint would be forwarded from the Florida address to the APO

address, and it did arrive there sometime in November 2016. The date the Administrative Complaint arrived at the APO address is not particularly significant; the "delivery" date at issue is the date the package was signed for at the address to which it had ultimately been delivered. Mrs. MacNeil picked up the Administrative Complaint from the APO address on November 28, 2016, and signed the receipt acknowledging delivery on that date. The Administrative Complaint was deemed delivered when she signed the receipt. Pursuant to rule 28-106.111(2), MacNeil had 21 days after delivery, i.e., until December 19, 2016, to file a request for a formal administrative hearing or otherwise contest the allegations in the Administrative Complaint.

9. MacNeil asserts, without independent corroboration, that his wife did not actually give him the Administrative Complaint until January 12, 2017, well after the Election of Rights was due, and that he moved expeditiously to submit a timely response, i.e., within 21 days thereafter. The evidence fails to show what transpired between the date Mrs. MacNeil signed the receipt and the date MacNeil claims he received it. Did Mrs. MacNeil intentionally or negligently withhold the Administrative Complaint from MacNeil? Did MacNeil receive it but forget about it until January 12, 2017? Did Mrs. MacNeil deliver it to MacNeil's portion of the shared home, but he did not find it until later? The evidence fails to establish exactly what

transpired, thus, there is insufficient evidence to justify the tardy filing of the Election of Rights. MacNeil testified at final hearing via telephone, so it was not possible for the undersigned to fully gauge his demeanor or credibility. Thus, the facts speak for themselves without further illumination.

10. The Election of Rights form wherein MacNeil requested a formal administrative hearing was filed at the Department on January 24, 2017--36 days after Mrs. MacNeil acknowledged receipt of the Administrative Complaint, but only 12 days after she allegedly gave the Administrative Complaint to her husband. Mrs. MacNeil did not testify at final hearing to confirm the date she turned the Administrative Complaint over to MacNeil, so there is no way to verify the exact date MacNeil received the notice from his wife. The Department therefore deems the date of delivery to be November 28, 2016, i.e., the date Mrs. MacNeil signed the receipt. That is consistent with the statutes and rules governing the Department's actions as discussed in the Conclusions of Law herein, as well as its practices and procedures.

11. In the Election of Rights form mailed to the Department, MacNeil again affirmed the APO address as his current address. It is reasonable to conclude that MacNeil believed any mail sent to that address would be accessible to him. In fact,

when asked at final hearing why he used the APO address, he said, "That's where I receive my mail. All my mail goes there."

12. Meanwhile, on or about January 10, 2017, the Department learned that MacNeil had been barred from the Air Force base (although the ban had been imposed several months prior). MacNeil did not notify the Department that his ouster from the base in any way affected his ability to receive mail sent to the APO address.

13. On January 30, 2017, the Department sent MacNeil a letter rejecting the Election of Rights, deeming it untimely filed. The rejection letter was mailed to MacNeil at the APO address, i.e., the address MacNeil had provided in the late-filed Election of Rights. Again, it appears that MacNeil anticipated continued access to the APO address.

14. On February 2, 2017, an attorney representing MacNeil complained to the Department that the Administrative Complaint had not been properly served on MacNeil because it had been sent to Mrs. MacNeil's APO box and that Mrs. MacNeil was not part of MacNeil's household. Those representations contradict MacNeil's testimony that the APO address was his address and that he and his wife were still married and shared a residence.

15. It is clear from the evidence that MacNeil's Election of Rights did not arrive at the Department before the date it was due under the rules. The evidence at final hearing failed to

persuasively establish exactly when MacNeil first had physical possession of the Administrative Complaint. Therefore, the date on which the Administrative Complaint was picked up from the APO address and signed for by Mrs. MacNeil is the most reasonably inferred date of receipt.

16. It is inexplicable that the Department personnel were in email contact with MacNeil on October 28, 2016--the very day the Administrative Complaint was mailed to MacNeil--but did not either: 1) advise MacNeil that the Administrative Complaint was being mailed; or 2) attach a copy of the Administrative Complaint to the email. There is no requirement that the Department do so, but under the circumstances it would seem to have been a reasonable course of action. (And, service by email would not constitute adequate service anyway.) That fact does not affect the recommendation made below, but it is notable.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2018).

18. Section 120.57(1)(j), Florida Statutes (2018), dictates that in formal administrative hearings, "Findings of fact shall be based upon a preponderance of evidence, except in penal or licensure disciplinary proceedings or except as otherwise

provided by statute . . . ." The question arises in the instant proceeding whether it is a "penal or licensure disciplinary" proceeding. There is no doubt that the Administrative Complaint, which started the string of events leading to the instant action is disciplinary in nature. The Administrative Complaint sought to impose a range of potential disciplinary actions, up to and including revocation of MacNeil's license.

19. Licensure revocation actions are entitled to an exception from the preponderance of evidence standard set forth in the statute. Instead, the clear and convincing evidence standard applies to that kind of action. Haines v. Dep't of Child. & Fams., 983 So. 2d 602, 605 (Fla. 5th DCA 2008). Conversely, the exception does not apply to licensure application proceedings. Fla. Dep't of Child. & Fams. v. Davis Family Day Care Home, 160 So. 3d 854, 856-57 (Fla. 2015). See also Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932, 935 (Fla. 1996).

20. To resolve the question in this matter, we must turn to the "nature of the proceedings and the matter at stake." Id. at 933 (citing Bowling v. Dep't of Ins., 394 So. 2d 165, 171 (Fla. 1st DCA 1981). The issue at this stage of the proceeding is one of procedure only, i.e., whether MacNeil timely filed his request for a hearing. No evidence was taken as to any disciplinary action against MacNeil's license at this point. If MacNeil was

to prevail in the present case, then he might be entitled to a disciplinary proceeding. In the present case, however, which addresses solely the issue of timeliness of the Election of Rights, the preponderance of evidence standard applies.

21. Rule 28-106.111 states:

> (2) Unless otherwise provided by law, persons seeking a hearing on an agency decision which does or may determine their substantial interests shall file a petition for hearing with the agency within 21 days of receipt of written notice of the decision.
>
> * * *
>
> (4) Any person who receives written notice of an agency action and who fails to file a written request for a hearing within 21 days waives the right to request a hearing on such matters. This provision does not eliminate the availability of equitable tolling as a defense.

22. Section 456.035, Florida Statutes (2018), states in pertinent part:

> (1) Each licensee of the department is solely responsible for notifying the department in writing of the licensee's current mailing address and place of practice . . . .
>
> (2) Notwithstanding any other law, service by regular mail to a licensee's last known address of record with the department constitutes adequate and sufficient notice to the licensee for any official communication to the licensee by the board or the department except when other service is required under s. 456.076.

See also Griffis v. State, 90 So. 3d 320 (Fla. 1st DCA 2012), where in a somewhat similar situation the court said, "[t]he Department mailed its final order to the last known address of record for Griffis and the time for Griffis is not tolled by any requirement that the Department conduct an additional search for his mailing address or whereabouts."

23. The Griffis case is also consistent with Florida Administrative Code Rule 64B7-24.021(1), which states:

> "[T]he reporting requirements of section 456.035, F.S., require each licensee to provide to the Board a current mailing address and 'place of practice.' The current mailing address and place of practice may be one and the same, or may be two different addresses if the licensee does not receive mail at his or her place of practice."

There is no indication in the record whether MacNeil provided an address for his "place of employment," even before he was ousted from the military base. The only addresses available to the Department for MacNeil were the Florida address and the APO address.

24. MacNeil cited Department of Revenue v. Baker, 232 So. 3d 1045 (Fla. 4th DCA 2017), in support of his position in this matter. Baker clearly stands for the proposition that service of notice to an individual by a state agency is valid "if sent to the most recent residential or employer address filed with [the Department]." The Baker decision does cite to dicta from Vosilla

v. Rosado, 944 So. 2d 289 (Fla. 2006), addressing instances in which a property appraiser had reason to know or suspect that an address was incorrect. In that case, the service was deemed inadequate. That scenario is distinguishable from the instant case in which the Florida address was the official address of record and the Department knew that mail sent to that address was being forwarded to the APO address.

25. Section 120.569(2)(c) provides that a request for an administrative hearing "shall be dismissed . . . if it has been untimely filed." (Emphasis added). The statute notes, however, that the defense of equitable tolling is available. See Pro Tech Monitoring, Inc. v. Dep't of Corr., 72 So. 3d 277, 281 (Fla. 1st DCA 2011).

26. "The equitable tolling doctrine has been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum." (Citations omitted.) Machules v. Dep't of Admin., 523 So. 2d 1132, 1134 (Fla. 1988).

27. In the present case, MacNeil was put on notice that an administrative action was forthcoming when he received the ERO. He was ultimately advised of that action at the very address he had provided to the Department. There is no legitimate basis for equitable tolling in this case.

28. The evidence in this case is clear that the Department mailed the Administrative Complaint to MacNeil's "last known address of record," that the Administrative Complaint was received and signed for at that address by MacNeil's wife on November 28, 2016, and that MacNeil's request for a hearing was not filed within 21 days thereafter.

29. MacNeil's assertion that he did not receive the Administrative Complaint until January 12, 2017, is not sufficiently strong to refute the application of the Department's statutory and regulation standards. Absent verification from his wife, MacNeil's self-serving testimony is not persuasive.

30. Further, even if the Department had considered MacNeil's October 13, 2016, email to have been an official change of address, the Administrative Complaint would have gone to the APO address, precisely where it ultimately arrived. MacNeil should have provided an address to which he had unfettered access.

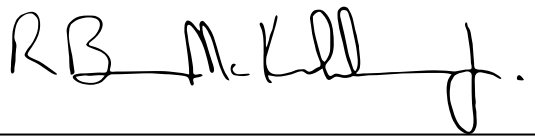
31. This is a case where strict application of the law may result in denial of a person's potential right to redress concerning actions against his license. While harsh, perhaps draconian, the law must nonetheless be followed. And while the law is clear, the Department might take into account its failure to email the Administrative Complaint to MacNeil when it issues its final order in this matter.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is hereby RECOMMENDED that:

Petitioner, Department of Health, Board of Massage Therapy, enter a final order deeming the Election of Rights filed by Respondent, Gary MacNeil, as not timely filed.

DONE AND ENTERED this 19th day of October, 2018, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of October, 2018.

ENDNOTE

[1/] The Department did not consider using MacNeil's actual physical address for mail, as that address had never been officially disclosed. And, as MacNeil said at final hearing, "If [mail] is being sent from the States, it is more efficiently sent through the APO than . . . to my Germany address. The APO is cheaper and it's quicker."

COPIES FURNISHED:

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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.