

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BUREAU OF
EMERGENCY MEDICAL OVERSIGHT,

Petitioner,

vs.

Case No. 18-2891PL

WILLIAM J. LITSCH, PMD,

Respondent.

_____ /

RECOMMENDED ORDER

This case was heard on July 31, 2018, by video teleconference at sites in Tallahassee and Daytona Beach, Florida, before E. Gary Early, an Administrative Law Judge assigned by the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Rose L. Garrison, Esquire
John A. Wilson, Esquire
Eric L. Fryson, Esquire
Department of Health
Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399

For Respondent: William Litsch, pro se
763 Tumblebrook Drive
Port Orange, Florida 32127

STATEMENT OF THE ISSUES

The issues to be determined are whether Respondent violated section 456.072(1)(k), Florida Statutes, by failing to repay a

student loan issued or guaranteed by the state or the Federal government in accordance with the terms of the loan as alleged in the Administrative Complaint; and, if so, the appropriate penalty.

PRELIMINARY STATEMENT

On December 13, 2017, Petitioner, Department of Health (Department or Petitioner), issued an Administrative Complaint against Respondent, William J. Litsch (Respondent), who is certified as a paramedic by the Department, certificate number PMD16223. The complaint charged that Respondent "failed to perform a statutory or legal obligation when he defaulted on a student loan provided by the state or federal government on or about June 16, 2017" in violation of section 456.072(1)(k).

On or about January 3, 2018, Respondent timely filed an Election of Rights, dated December 22, 2017, disputing that he received a student loan from the state or Federal government.

The matter was initially referred to DOAH on February 5, 2018, assigned to Judge R. Bruce McKibben as DOAH Case No. 18-0607PL, and was set for hearing to commence on April 12, 2018, by video teleconference in Tallahassee and Daytona Beach, Florida. Based on a series of motions, Orders, and responses thereto, and on Respondent's expressed desire to surrender his certification, Judge McKibben determined that "[n]o further findings of fact are required in order for Petitioner to take

action concerning the certification, and relinquished jurisdiction to the Department for disposition.

On May 23, 2018, the Department determined that disputed issues of material fact remained, and remanded the matter back to DOAH. The Order of Referral was received at DOAH on June 6, 2018. The matter was initially assigned to Judge J. Lawrence Johnston, senior Judge for DOAH's Middle District. Upon determining that the case, with Respondent residing in Volusia County, was within the territorial bounds of DOAH's Northern District, it was again assigned to Judge McKibben as DOAH Case No. 18-2891PL.

On June 15, 2018, the matter was set for hearing, to commence on July 31, 2018. On that same date, Respondent, through counsel, moved to recuse Judge McKibben. Counsel for Respondent then moved to withdraw from representation of Respondent. Judge McKibben granted the motion to withdraw on June 19, 2018.

On June 22, 2018, Judge McKibben, despite correctly determining that the Motion to Disqualify Administrative Law Judge was legally insufficient, nonetheless granted the motion, whereupon this case was transferred to the undersigned.

A series of motions and notices were filed by each of the parties leading up to the date of the final hearing, and each was disposed of by written Order. Their disposition may be

determined by reference to the docket. Among the Orders entered was an Order on Respondent's Failure to Appear at Deposition which, as a sanction for failing to appear at a deposition ordered by the undersigned and properly noticed by Petitioner, and pursuant to Florida Rule of Civil Procedure 1.380(b)(2), as adopted in Florida Administrative Code Rule 28-106.206, prohibited Respondent from introducing testimonial or documentary evidence at the final hearing.

The hearing was convened on July 31, 2018, as scheduled. At hearing, the Department called Lou Ann Standley, the Senior Educational Program Policy Development Director for the Florida Department of Education as its witness; and offered Department Exhibits 1 through 7, which were received in evidence. The exhibits consist largely of financial and educational records maintained by the Florida Department of Education and several institutions now considered to be in the Florida College System. The records were, with the exception of those from Valencia College, accompanied by certifications attesting to their status as business or public records. The certificates were found to meet the standards for self-authentication pursuant to section 90.902, Florida Statutes. The Department offered no witness testimony.

The one-volume final hearing Transcript was filed on August 22, 2018. The Department timely filed a Proposed

Recommended Order that was considered in preparation of this Recommended Order. Respondent did not file a post-hearing submittal.

The Department purchased Respondent's student loan obligations from the lender upon default on November 10, 2016, at which time the actions alleged in the Administrative Complaint became fixed. This proceeding is governed by the law in effect at the time of the commission of the acts alleged to warrant discipline. See McCloskey v. Dep't of Fin. Servs., 115 So. 3d 441 (Fla. 5th DCA 2013). Thus, references to statutes and rules are to the versions in effect on that date, unless otherwise noted.

FINDINGS OF FACT

1. The Department of Health, Bureau of Emergency Medical Oversight, is the state agency charged with the investigation and prosecution of complaints against licensed paramedics pursuant to chapters 456 and 401, Florida Statutes.

2. At all times material to this proceeding, Respondent was a paramedic in the state of Florida, holding certificate number PMD 16223. Respondent's license is currently active and does not expire until December 1, 2018.

3. Respondent's current address of record is 763 Tumblebrook Drive, Port Orange, Florida 32127.

4. The Florida Department of Education (DOE) is the state agency responsible for guaranteeing student loans in cooperation with the United States Department of Education under the Federal Family Education Loan Program.

5. As the guarantor of a student loan, DOE is bound to purchase the debt of a borrower who fails to satisfy their loan obligations.

6. On July 7, 1993, Respondent executed an "Application/Promissory Note for a Florida Stafford Loan" with a requested loan amount of \$3,500.00. The stated purpose of the loan was "for [Respondent's] attendance at Daytona Beach Community College [DBCC] for the term(s) that begins on 8/93 and ends on 4/94." The lender was Chase Manhattan Bank, Lender Code 807807. The loan proceeds were, as is normal for student loans, paid directly to DBCC on Respondent's behalf for his tuition, fees, and educational expenses.

7. On January 7, 1994, Respondent executed an "Application and Promissory Note for Federal Stafford Loans" for a subsidized Federal Stafford Loan, with a requested loan amount of \$1,750.00, with a loan period of January 1994 to May 1994. Pursuant to the Borrower Certification and School Certification, the loan proceeds were for Respondent's attendance at DBCC. The lender was "Chase," Lender Code 807807. The loan proceeds were, as is

normal for student loans, paid directly to DBCC on Respondent's behalf for his tuition, fees, and educational expenses.

8. On June 1, 1994, Respondent executed an "Application and Promissory Note for Federal Stafford Loans" for a subsidized Federal Stafford Loan, with a requested loan amount of \$3,500.00, with a loan period of August 1994 to May 1995. Pursuant to the Borrower Certification and School Certification, the loan proceeds were for Respondent's attendance at DBCC. Respondent requested a deferment of repayment for applicable in-school and grace periods. The lender was Chase Manhattan Bank, Lender Code 807807. The loan proceeds were, as is normal for student loans, paid directly to DBCC on Respondent's behalf for his tuition, fees, and educational expenses.

9. On May 30, 1995, Respondent executed an "Application and Promissory Note for Federal Stafford Loans" for a subsidized Federal Stafford Loan, with a requested loan amount of \$3,500.00, with a loan period of August 1995 to "end of deferment." The loan proceeds were for Respondent's attendance at DBCC. Respondent requested a deferment of repayment for applicable in-school and grace periods. The lender was Chase Manhattan Bank, Lender Code 807807. The loan proceeds were, as is normal for student loans, paid directly to DBCC on Respondent's behalf for his tuition, fees, and educational expenses.

10. On August 19, 1996, Respondent executed an "Application and Promissory Note for Federal Stafford Loans" for a subsidized Federal Stafford Loan, with a requested loan amount of \$3,500.00, with a loan period of August 1996 to May 1997. The loan proceeds were for Respondent's attendance at Valencia Community College on Respondent's behalf for his tuition, fees, and educational expenses. Respondent requested a deferment of repayment for applicable in-school and grace periods. The lender was Chase Manhattan Bank, Lender Code 807807. The loan proceeds were, as is normal for student loans, paid directly to Valencia Community College.

11. On August 22, 1997, Respondent executed an "Application and Promissory Note for Federal Stafford Loans" for a subsidized Federal Stafford Loan, with a requested loan amount of \$3,500.00, with a loan period of August 1997 to May 1998. The loan proceeds were for Respondent's attendance at DBCC. Respondent requested a deferment of repayment for applicable in-school and grace periods. The lender was Chase Manhattan Bank, Lender Code 807807. The loan proceeds were, as is normal for student loans, paid directly to DBCC on Respondent's behalf for his tuition, fees, and educational expenses.

12. Between August 22, 1997, and June 14, 2005, the evidence demonstrates that Respondent made no payments on any of the above-referenced loans.

13. On June 14, 2005, Respondent filed an on-line Federal Consolidation Loan Application and Promissory Note by which Respondent consolidated his outstanding student loans. By the time the loans were being consolidated, they were held by the Sallie Mae Trust. Respondent's total loan amount after consolidation was \$17,500.00. Pursuant to the Loan Consolidation Disclosure Statement and Repayment Schedule, the first of 180 monthly payments of \$128.75^{1/} on the consolidated student loans was scheduled for August 21, 2005.

14. DOE was the guarantor of all of Respondent's student loans, including the consolidated student loan.

15. The Federal Family Education Loan Program Claim Form demonstrates that Respondent received a deferment of payment for 59 months, followed by forbearance from payment of 63 months -- a total of 10 years and two months. As a result, Respondent's payment due date was extended to October 21, 2015.

16. In the more than 25 years since Respondent made application for his first student loan, he has yet to repay any of the loan proceeds paid to DBCC and Valencia Community College on his behalf for tuition, fees, and educational expenses.

17. An educational loan default occurs when a borrower fails to make required payments on a loan for 270 days. On November 3, 2016, having received no payments from Respondent on

his loan since payments became due on October 21, 2015, the lender submitted a default claim to DOE.

18. On November 10, 2016, DOE determined Respondent defaulted on his student loan obligations and purchased Respondent's debt from the lender. At the time of the default, Respondent's full \$17,500.00 principal balance remained, as well as \$3,794.90 of capitalized interest and \$995.71 of unpaid interest.

19. Respondent has made no payments against his student loan obligations since DOE purchased his student loan obligations on November 10, 2016.

CONCLUSIONS OF LAW

A. Jurisdiction

20. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 456.073(5), 120.569, and 120.57(1), Fla. Stat. (2018).

21. The Department has authority to investigate and file administrative complaints charging violations of the laws governing paramedics. § 456.073, Fla. Stat. (2018).

B. Standards

22. Section 456.072(1)(k) provides, as grounds for which the Department may impose disciplinary sanctions, that:

The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:

* * *

(k) Failing to perform any statutory or legal obligation placed upon a licensee. For purposes of this section, failing to repay a student loan issued or guaranteed by the state or the Federal Government in accordance with the terms of the loan or failing to comply with service scholarship obligations shall be considered a failure to perform a statutory or legal obligation, and the minimum disciplinary action imposed shall be a suspension of the license until new payment terms are agreed upon or the scholarship obligation is resumed, followed by probation for the duration of the student loan or remaining scholarship obligation period, and a fine equal to 10 percent of the defaulted loan amount. Fines collected shall be deposited into the Medical Quality Assurance Trust Fund.

C. Burden and Standard of Proof

23. The Department bears the burden of proving the specific allegations that support the charges alleged in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Fox v. Dep't of Health, 994 So. 2d 416 (Fla. 1st DCA 2008); Pou v. Dep't of Ins. & Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998).

24. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and

to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). The clear and convincing evidence level of proof:

[E]ntails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.

Clear and convincing evidence requires that the evidence must be found to be 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, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting, with approval, Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); see also In re Henson, 913 So. 2d 579, 590 (Fla. 2005).

"Although this standard of proof may be met where the evidence is in conflict, it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

25. A proceeding to suspend, revoke, or impose other discipline upon a license is penal in nature. State ex rel.

Vining v. Fla. Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973). Penal statutes must be construed in terms of their literal meaning, and words used by the Legislature may not be expanded to broaden the application of such statutes. Thus, the provisions of law upon which this disciplinary action has been brought must be strictly construed, with any ambiguity construed against Petitioner. Elmariah v. Dep't of Bus. & Prof'l Reg., 574 So. 2d 164, 165 (Fla. 1st DCA 1990); see also Griffis v. Fish & Wildlife Conserv. Comm'n, 57 So. 3d 929, 931 (Fla. 1st DCA 2011); Beckett v. Dep't of Fin. Servs., 982 So. 2d 94, 100 (Fla. 1st DCA 2008); Whitaker v. Dep't of Ins., 680 So. 2d 528, 531 (Fla. 1st DCA 1996); Dyer v. Dep't of Ins. & Treasurer, 585 So. 2d 1009, 1013 (Fla. 1st DCA 1991).

26. The allegations of fact set forth in the Administrative Complaint are the grounds upon which this proceeding is predicated. Trevisani v. Dep't of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005); see also Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996). Thus, the scope of this proceeding is properly restricted to those matters as framed by Petitioner. M.H. v. Dep't of Child. & Fam. Servs., 977 So. 2d 755, 763 (Fla. 2d DCA 2008).

D. Evidence

27. As is to be expected, the evidence in this case consists almost exclusively of documentary evidence of the

loans. Other than Respondent, who exercised his right to refuse to testify, it is inconceivable that there would be an individual with a specific recollection of loans taken out or consolidated between 1993 and 2005 for the huge Stafford guaranteed loan program.

28. Section 120.569(1)(g), Florida Statutes, provides that "evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their affairs shall be admissible, whether or not such evidence would be admissible in a trial in the courts of Florida." The evidence in this case, consisting primarily of properly authenticated business records of the DOE used in the administration of the Stafford loan program, and records of DBCC and Valencia Community College regarding Respondent's attendance and loan history with each of those institutions, is evidence that reasonably prudent persons would rely upon in determining the existence and amount of Respondent's Stafford student loans.

29. In addition to the provisions of section 120.569(1)(g), the loan applications constitute "business records" pursuant to section 90.803(6), in that they are:

[R]ecord[s] . . . of acts, events, conditions, opinion, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make

such memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or as shown by a certification or declaration that complies with paragraph (c) and s. 90.902(11), unless the sources of information or other circumstances show lack of trustworthiness.

The loan documents were authenticated by the testimony of Ms. Standley and by certificates that met the standards for self-authentication pursuant to section 90.902. Thus, the applications and promissory notes may be used as substantive evidence of the loans.

30. The authenticated loan records also contain statements made by Respondent that constitute admissions pursuant to section 90.803(18). As such, Respondent's assertions contained in the loan documents may be used as substantive evidence of the existence of the loans.

31. Finally, the official transcripts and records documenting Respondent's attendance at DBCC and Valencia Community College constitute "[r]ecords, reports, statements reduced to writing, or data compilations, in any form, of public offices or agencies, setting forth . . . matters observed pursuant to duty imposed by law as to matters which there was a duty to report," and as such constitute public records pursuant to section 90.803(8). The records were authenticated by certificates that met the standards for self-authentication

pursuant to section 90.902. Thus, the official transcripts and records may be used as substantive evidence of Respondent's attendance and loan history with those educational institutions.

E. Allowable Inference

32. Respondent, as was his right, repeatedly declined to respond to Petitioner's discovery based on his Fifth Amendment privilege against self-incrimination. As a result, Respondent did not testify at the final hearing.

33. Respondent's assertion of his Fifth Amendment privilege against self-incrimination permits the fact finder to draw adverse inferences from his silence. "[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." Omulepu v. Dep't of Health, 2018 Fla. App. LEXIS 8894, at *4 (Fla. 1st DCA June 22, 2018) (quoting Baxter v. Palmigiano, 425 U.S. 308, 318 (1976)).

34. Given the competent and substantial documentary evidence establishing the existence and legitimacy of Respondent's student loans, the only rational conclusion to be drawn from Respondent's assertion of his Fifth Amendment privilege is that he is aware of his obligation to pay his student loans and has not done so.

F. Analysis

35. The Administrative Complaint alleges that Respondent failed to repay a student loan issued or guaranteed by the state or the Federal government in accordance with the terms of the loan.

36. The evidence in this case clearly and convincingly establishes that Respondent took out a series of Stafford loans from 1993 through 1998 to pay his educational expenses at DBCC and Valencia Community College.

37. The evidence in this case clearly and convincingly establishes that Respondent consolidated his loans on June 14, 2005, with a principal amount of \$17,500.00.

38. The evidence in this case clearly and convincingly establishes that Respondent has never made a payment on any of the loans.

39. The evidence in this case clearly and convincingly establishes that Respondent's student loans were initially guaranteed by the state of Florida, on behalf of the Federal Stafford Loans program. On November 10, 2016, upon notification of default by the lender, DOE paid the lender, and assumed ownership of the debt obligations.

40. Based on the full record of this proceeding, the Department proved by clear and convincing evidence that Respondent failed to repay student loans guaranteed by DOE.^{2/}

41. Section 456.072(4) provides that the Board shall assess costs related to the investigation and prosecution, in addition to other discipline imposed for violating a practice act.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Health, Bureau of Emergency Management Oversight, enter a final order: finding that Respondent failed to repay a student loan issued or guaranteed by the state or the Federal government in accordance with the terms of the loan; imposing a suspension of Respondent's paramedic certification until new loan payment terms are agreed upon, followed by probation for the duration of the student loan; imposing a fine equal to 10 percent of the defaulted loan amount calculated as of the date of the Final Order, to be deposited into the Medical Quality Assurance Trust Fund; and requiring Respondent to pay the costs related to the investigation and prosecution.

DONE AND ENTERED this 12th day of September, 2018, in
Tallahassee, Leon County, Florida.



E. GARY EARLY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of September, 2018.

ENDNOTES

^{1/} The 180th and final payment was to be \$129.36.

^{2/} Respondent maintained throughout this proceeding that section 456.072(1)(k) is an unconstitutional statute, designed to extort money not owed by him. Since Respondent refused, on Fifth Amendment grounds, to explain his assertion, the basis for his claim that he does not owe any money remains unknown. It should be acknowledged that the following exchange between Respondent and Ms. Standley occurred at the end of her testimony:

Q. Okay. So neither -- just to review, neither the State or federal government has sued to enforce a claim against me, that you're aware of, but you have contacted the Department of Health and attempted to have my license revoked on an unconstitutional law put forth by the State of Florida in an attempt to coerce money from me, correct?

A. Yes.

As can be gathered from a review of the transcript, Ms. Standley's testimony was frequently interrupted, and likely

frustrating. The question itself, though not objected to, was compound and confusing. More to the point, Ms. Standley's statement as to the constitutionality of the law or its purpose is given no weight. As was explained to Respondent on more than one occasion, the constitutionality of section 456.072(1)(k) is beyond the scope of this proceeding, but is a matter that can be taken up on in the event of an appeal under Section 120.68, Florida Statutes. See Fla. Hosp. v. Ag. for Health Care Admin., 823 So. 2d 844, 849 (Fla. 1st DCA 2002); Carrollwood State Bank v. Lewis, 362 So. 2d 110, 113-12 (Fla. 1st DCA 1978).

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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.