

FILED
DEPARTMENT OF HEALTH
DEPUTY CLERK

CLERK: *Angel Sanders*
DATE: JUN 07 2019

STATE OF FLORIDA
BOARD OF CLINICAL SOCIAL WORK, MARRIAGE AND FAMILY THERAPY,
AND MENTAL HEALTH COUNSELING

DEPARTMENT OF HEALTH,

Petitioner,

vs.

DOAH CASE NO. 18-3636
DOH CASE NO. 2016-08678

GABRIEL L. TITO, M.F.T.I.,

Respondent.

ORDER

THIS MATTER came before the Board of Clinical Social Work, Marriage and Family Therapy, and Mental Health Counseling ("Board") pursuant to Sections 120.569 and 120.57(1), Florida Statutes, on June 4, 2019, via teleconference, for the purpose of considering the Administrative Law Judge's Recommended Order, Respondent's Exceptions to the Recommended Order, and Petitioner's Response to Respondent's Exceptions (copies of which are attached hereto as Exhibits A, B, and C, respectively). Petitioner was represented by Mary Iglehart, Assistant General Counsel. Respondent was present and was represented by Howard J. Hochman, Esq.

Upon review of the Recommended Order, the argument of the parties, and after a review of the complete record in this case, the Board makes the following findings and conclusions.

RULING ON EXCEPTIONS

For the reasons provided in Petitioner's Response to Respondent's Exceptions (Attachment C), Respondent's exception to paragraph 27 of the Recommended Order is denied.

2019 JUN 10 PM 1:40
DIVISION OF
ADMINISTRATIVE HEARINGS

FILED

FINDINGS OF FACT

1. The findings of fact set forth in the Recommended Order are approved and adopted and incorporated herein by reference.
2. There is competent substantial evidence to support the findings of fact.

CONCLUSIONS OF LAW

3. The Board has jurisdiction of this matter pursuant to Section 120.57(1), Florida Statutes, and Chapter 491, Florida Statutes.
4. The conclusions of law set forth in the Recommended Order are approved and adopted and incorporated herein by reference.

RECOMMENDATION

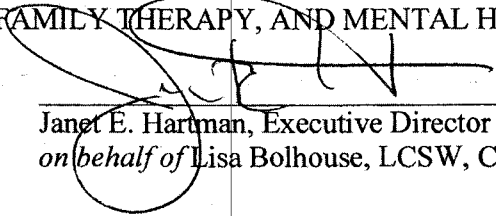
Upon a complete review of the record in this case, the Board determines that the recommended disposition of the case is accepted.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED:

5. Respondent's request for a hearing under section 120.57(1), Florida Statutes, is dismissed as untimely.

DONE AND ORDERED this 6th day of June, 2019.

BOARD OF CLINICAL SOCIAL WORK, MARRIAGE AND
FAMILY THERAPY, AND MENTAL HEALTH COUNSELING



Janet E. Hartman, Executive Director
on behalf of Lisa Bolhouse, LCSW, CHAIR

NOTICE OF RIGHT TO JUDICIAL REVIEW

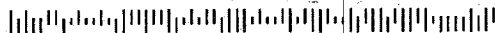
A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF HEALTH AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by: **Certified U.S. Mail** to Gabriel L. Tito c/o Howard J. Hochman, Esq., 7695 S.W. 104 Street, Suite 210, Miami, FL 33156; **U.S. Mail** to F. Scott Boyd, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; and **Email** to Mary Iglehart, Assistant General Counsel, Department of Health, at Mary.Iglehart@flhealth.gov, this 17th day of June, 2019.

Brygel Saunders

Deputy Agency Clerk



Gabriel L. Tito
c/o Howard J. Hochman, Esq.
7695 S.W. 104th St.
Suite 210
Miami, FL 33156

Certified Article Number
9414 7266 9904 2140 1172 47
SENDER'S RECORD

FILED
DEPARTMENT OF HEALTH
DEPUTY CLERK

CLERK *Amber Greene*
DATE NOV 21 2018

STATE OF FLORIDA
BOARD OF CLINICAL SOCIAL WORK, MARRIAGE AND FAMILY THERAPY
AND MENTAL HEALTH COUNSELING

DEPARTMENT OF HEALTH,

Petitioner,

v.

GABRIEL LEONARDO TITO,
Registered Marriage and
Family Therapist Intern,

Respondent /.

DOAH CASE NO: 18-03636PL
DOH CASE NO.: 2016-08678

**PETITIONER'S RESPONSE TO RESPONDENT'S EXCEPTION TO THE
RECOMMENDED ORDER**

Petitioner, Department of Health ("Department"), by and through the undersigned counsel, pursuant to Rule 28-106.217(3), Florida Administrative Code, hereby files its Response to Respondent's Exception to the Recommended Order, and in support thereof, states the following:

I. BACKGROUND

1. Respondent, Gabriel Leonardo Tito, R.M.F.T.I., is a registered marriage and family therapy inter in the State of Florida, having been issued license number IMT 1070.

(Recommended Order, para. 2)

2. A formal administrative hearing for the matter above was held on September 21, 2018, at locations in Tallahassee and Miami, Florida via video teleconference.

3. The administrative hearing was held to determine whether Respondent's request for a substantial interests hearing under section 120.57(1), Florida Statutes (2017), should be dismissed as untimely. (Recommended Order, p. 2)

4. On November 9, 2018, the presiding Administrative Law Judge (ALJ) entered his Recommended Order. The ALJ found that Petitioner proved that filed his request for a substantial interests hearing more than 21 days after Respondent received the Administrative Complaint; therefore, Respondent waived his right to a hearing. (Recommended Order, p. 11)

5. The ALJ recommended that the Board of Clinical Social Work, Marriage and Family Therapy and Mental Health Counseling (Board) enter a final order dismissing as untimely Respondent's request for a substantial interests hearing under Section 120.57(1), Florida Statutes (2017). (Recommended Order, p. 12)

6. On November 19, 2018, Respondent filed exceptions to the Recommended Order with the Board.

II. APPLICABLE STANDARD OF REVIEW

7. The ALJ and the Board have distinct roles in formal administrative hearings.

8. It is the function of the ALJ to consider all of the evidence presented, resolve conflicts in the evidence, assess the credibility of witnesses, draw permissible inferences from the evidence, and complete a recommended order consisting of findings of fact, conclusions of law, and a recommended penalty. See, e.g., § 120.57(k), Fla. Stat (2018); Heifetz v. Dep't. of Bus. Reg., 475 So. 2d 1277, 1281 (Fla. 1st DCA 1985) (citing State Beverage Dep't v. Ernal, Inc., 115 So. 2d 566 (Fla. 3d DCA 1959)); Goss v. Dist. School

Bd. of St. John's County, 601 So. 2d 1232, 1234 (Fla. 5th DCA 1992); and Bejarano v. Dep't of Educ., Div. of Vocational Rehab., 901 So. 2d 891, 892 (Fla. 4th DCA 2005). If the evidence presented supports two inconsistent findings, it is the ALJ's role to decide the issue one way or the other. Heifetz, 475 So. 2d at 1281. The agency may not reject the hearing officer's finding unless there is no competent, substantial evidence from which the finding could reasonably be inferred. Id.

9. Parties may file exceptions to findings of fact and conclusions of law contained within the ALJ's recommended order. § 120.57(1)(k), Fla. Stat. (2018). Exceptions shall identify the disputed portion of the recommended order by page number or paragraph, shall identify the legal basis for the exception, and shall include any appropriate and specific citations to the record. Id., Fla. Admin. Code R. 28-106.217(1) (2018).

10. The Board cannot reject or modify the ALJ's findings of fact unless it first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. § 120.57(1)(l), Fla. Stat. (2018).

11. Competent evidence is evidence sufficiently relevant and material to the ultimate determination "that a reasonable mind would accept it as adequate to support the conclusion reached." City of Hialeah Gardens v. Miami Dade Charter Found., 857 So. 2d 202, 204 (Fla. 3d DCA 2003) (citing DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla.

1957)). Substantial evidence is evidence that provides a factual basis from which a fact at issue may reasonably be inferred. *Id.*

12. The Board may only reject or modify an ALJ's conclusions of law and interpretations of administrative rules if the Board has substantive jurisdiction. *See, e.g.,* § 120.57(1)(l), Fla. Stat. (2018); *Barfield v. Dep't of Health*, 805 So. 2d 1008 (Fla. 1st DCA 2001); *Deep Lagoon Boat Club, Ltd. v. Sheridan*, 784 So. 2d 1140 (Fla. 2nd DCA 2001). "Jurisdiction" has been interpreted to mean "administrative authority" or "substantive expertise." *See Deep Lagoon Boat Club, Ltd.*, 784 So. 2d at 1142.

13. While the ALJ may provide recommendations on the interpretation of laws and administrative rules, the Board has ultimate discretion over matters of substantive jurisdiction. However, the Board may only reject or modify the ALJ's conclusions of law if the Board:

- a) states with particularity its reasons for rejecting or modifying such conclusions of law or interpretation of administrative rule; and
- b) makes a finding that the substituted conclusions of law or interpretation of administrative rule is as reasonable or more reasonable than that which was rejected.

§ 120.57(1)(l), Fla. Stat. (2012-2013); *Barfield*, 805 So. 2d at 1011.

III. PETITIONER'S RESPONSES TO RESPONDENT'S EXCEPTIONS TO CONCLUSION OF LAW

Respondent's First Exception

14. Respondent takes exception to the ALJ's conclusion of law in paragraph 27 that the ALJ found as a matter of law that either Respondent either, "failed to read the entire packet or... chose, after reading it, to disregard the clear instructions because they

were not repeated on the form..." Respondent further excepts the ALJ's finding that, "It cannot be said that Respondent's ignorance was 'excusable' or 'blameless'."

15. The parties stipulated that Respondent received the cover letter, administrative complaint, and election of rights form on October 23, 2017. (J. Stip. p. 5; J. Exh. 1).

16. The cover letter, which Respondent admitted to reading carefully, clearly explained he must return his election of rights to the Department within 21 days of his receipt of the administrative complaint. (Tr. pp. 15, 24-25; J. Exh. 1, p. 2). The administrative complaint, which Respondent also admitted to reading carefully, further clearly specified that the form must be received by the Department within 21 days of his receipt of the administrative complaint. (Tr. pp. 15; 24-25; J. Exh. 1, p 11).

17. The ALJ's point in paragraph 27 of the Recommended Order is that Respondent's failure to follow the clear directions provided by the all of the paperwork he received and admitted to reading is not excusable simply because one of the forms lacked specificity. As the ALJ pointed out, if Respondent had only received the election of rights form, Respondent's argument would have been much more persuasive. However, Respondent both received and read the cover letter and administrative complaint contemporaneously, and those forms provided clear, specific instructions with which Respondent did not comply. (T. p. 15, 24-25; J. Exh. 1). Respondent's failure to follow clear instructions is neither blameless or excusable. (R.O. para. 27).

18. The Board may only reject or modify an ALJ's conclusion of law if the Board has substantive jurisdiction. The Board does not have jurisdiction to re-weigh evidence,

including the credibility of witness testimony. Additionally, there is competent, substantial evidence in the record to support the ALJ's conclusion of law that Respondent failed to follow the clear directions provided by the all of the paperwork he received. On that basis, Respondent's Exception should be denied.

19. Should the Board determine that it has substantive jurisdiction, Respondent's Exception should be denied because Respondent's conclusion is not as reasonable or more reasonable than the ALJ's conclusion of law.

IV. CONCLUSION

20. For the foregoing reasons, Petitioner respectfully urges the Board to deny Respondent's Exception and accept the ALJ's Recommended Order in its entirety.

/s/ Mary A. Iglehart

Mary A. Iglehart, Esquire
Prosecution Services Unit
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399
Florida Bar #93590
Telephone: (850) 558-9856
Email: Mary.Iglehart@flhealth.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy hereof has been furnished to counsel for Respondent, Howard J Hochman, Esq., by electronic mail to hoch3333@aol.com, this 21st day of November, 2018.

Mary A. Iglehart

Mary A. Iglehart, Esquire
Assistant General Counsel

**STATE OF FLORIDA
BOARD OF CLINICAL SOCIAL WORK, MARRIAGE AND FAMILY THERAPY
AND MENTAL HEALTH COUNSELING**

DEPARTMENT OF HEALTH

Petitioner

L.T.-DOAH CASE NO.: 18-3636PL
DOH CASE NO.: 2016-08678

v.

GABRIEL LEONARDO TITO, M.F.T.I.
Respondent

RESPONDENT'S EXCEPTIONS

Respondent, GABRIEL LEONARDO TITO, pursuant to Section 120.57(1)(k) Florida Statutes and Rule 28-106.217(1) F.A.C. files his Exceptions in this cause:

DESIGNATIONS

The letter "T" followed by the pertinent page reference will be used to designate references to the transcript of the Final Hearing in this cause held on September 21, 2018. The Department of Health will be referred to herein as "Department" and the Respondent Gabriel Leonardo Tito will be referred to as either "Tito" or "Respondent".

RESPONDENT'S EXCEPTIONS

1. Respondent hereby files his Exception to Paragraph 27 of the Recommended Order which appears at pages 10 and 11 of the same. Paragraph 27 states:

"Respondent was not entitled to read only the Election of Right form, but is held to have received all of the information accompanying the Administrative Complaint. Takes as a whole, Respondent's obligation to return the completed form in order to request a hearing was clearly set forth. If Respondent failed to read the entire packet or if he chose, after reading it, to disregard the clear instructions because they were not repeated on the form, it was his own fault. It cannot be said under these circumstances that Respondent's ignorance was "excusable" or "blameless"." (Italics provided)

Respondent asserts that the portion of paragraph 27 in italics is inconsistent with and contradicted by the actual Record in this cause. Tito specifically testified that he received a letter from the Department of Health's attorney signed by Elana Jones identified in the Record as Joint Exhibit 1, page 2. (T-15) The following testimony transpired:

- A: Yes, I received it.
 Q: Okay. And did you read it?
 A: Yes.
 Q: And did you read the enclosures that came with it?
 A: Yes, I did.
 Q: Okay. Did you particularly read the administrative complaint?
 A: Yes.
 Q: And did you also particularly read the election of rights form?
 A: Yes, I did.
 Q: Okay. When you read the administrative complaint, did you come to a conclusion as to whether or not you're at fault or guilty of the charges that were in the administrative complaint?
 A: I -- I challenged that because I wasn't guilty of that. (T-15)

2. Accordingly, the assertion that Respondent "failed to read the entire packet" is not supported by the Record and this Exception should be granted.
3. Paragraph 27 essentially contains disjunctive conclusions that either Respondent failed to read the entire packet, which has been rebutted above, or if "he chose, after reading it", to disregard the clear instructions because they were not repeated on the form, it was his own fault."
4. Mr. Tito testified that:
 Q: Okay. Why did you send it certified mail instead of just plain mail.
 A: To show that I was doing the election within the 21 days, that's what I understood.
 Q: Okay.
 A: And I did it on the day 18th and I sent it to Tallahassee, certified.
 Q: Okay. And if you knew that this form required you to have this form reach the department within 21 days, what would you have done?
 A: I would have faxed it. I would have faxed it and send the certified as well.
5. "Accordingly, the notion that Tito cavalierly disregarded any instructions, cover letters or other materials has been specifically rebutted by his testimony.
6. Ironically, the Administrative Law Judge confirmed that if one relied upon the Election of Rights Form, that form does not clearly state that it must be completed and returned to the Department before the deadline. Specifically, at paragraph 24 the Administrative Law Judge stated:
 "Were the Election of Rights form, the only notice of rights provided to Respondent, his argument would have to be seriously considered. The form does not clearly state that it must be completed and returned to the Department before the deadline, but only that Respondent must "make an election" within that time. The reference to rule 28106.111(4) offers scant clarification, because the language there about "filing" is not equated to "receipt" by the Department in that rule at all, but rather only in rule 28-106.104(1).

Further, and importantly, section 120.569 requires that the notice itself to include the procedure and time limits to request a hearing, not simply a reference to them.”

ARGUMENT

7. Florida statute 120.569(2)(c) and Rule 28-106.111(4) F.A.C. specifically provide that the availability of equitable tolling as a defense to an untimely filing of a petition has not been eliminated and remains in full force and effect.
8. For the reasons addressed above, the Respondent was understandably confused and misled to think that the election of his right within 21 days would preserve his right to a substantial interest hearing and accordingly, and contrary to paragraph 27 his ignorance was excusable and blameless within the meaning of Major League Baseball v. Morseny 797 So2d 1071, 1077 (Fla. 2001), Machules v. Department of Administration 523 So2d 1132 (Fla. 1988)
9. It should also be noted although not addressed in the Recommended Order that the Department has acknowledged that it would suffer no prejudice if the Doctrine of Equitable Tolling was applied in this cause.

WHEREFORE Respondent prays for the approval of his Exceptions, a finding that the Doctrine of Equitable Tolling is applicable and that a Final Order be entered remanding this matter for a substantial interest hearing under 120.57(1) Florida Statutes .

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was sent via email to: at Mary.Iglehart@flhealth.gov and via facsimile to the Agency Clerk at (850) 413-8743 on this 19th day of November, 2018.

LAW OFFICES OF HOWARD J. HOCHMAN
 Attorney for Respondent
 7695 S.W. 104 Street, Suite 210
 Miami, FL 33156
 Phone: (305) 663-3333, Fax: (305) 662-8787
hoch3333@aol.com

By: /s/HowardJ. Hochman
 HOWARD J. HOCHMAN, ESQUIRE
 Florida Bar No. 156295