

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

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

Petitioner,

vs.

Case No. 18-3636PL

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

Respondent.

\_\_\_\_\_ /

RECOMMENDED ORDER

On September 21, 2018, a video teleconference hearing was held at sites in Miami and Tallahassee, Florida, before Administrative Law Judge F. Scott Boyd of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Mary A. Iglehart, Esquire  
Department of Health  
Prosecution Services Unit  
4052 Bald Cypress Way, Bin C-65  
Tallahassee, Florida 32399

For Respondent: Howard J. Hochman, Esquire  
Law Offices of Howard Hochman  
7695 Southwest 104th Street, Suite 210  
Miami, Florida 33156

STATEMENT OF THE ISSUE

The issue is whether Respondent's request for a substantial interests hearing under section 120.57(1), Florida Statutes (2017),<sup>1/</sup> should be dismissed as untimely.

PRELIMINARY STATEMENT

The Department of Health (Petitioner or the Department) filed an Administrative Complaint dated September 27, 2017, with respect to the registered marriage and family therapist intern license of Mr. Gabriel Leonardo Tito (Respondent or Mr. Tito) alleging violations of statutes and administrative rules governing marriage and family therapist practice. Disputing the allegations, Respondent filed a request for an administrative hearing. Petitioner asserts the request for hearing was untimely. Respondent claims the notice was deficient and that the doctrine of equitable tolling applies. On July 16, 2018, Petitioner forwarded the case to the Division of Administrative Hearings (DOAH) for assignment of an administrative law judge. Petitioner's Motion to Bifurcate the hearing was granted to separately consider the issue of the timeliness of Respondent's request for hearing.

At the hearing on timeliness of the request, held on September 21, 2018, the parties jointly offered nine exhibits: J-1 through J-9. Respondent testified on his own behalf. The agreed facts contained in the Joint Pre-hearing Stipulation,

filed by the parties, were accepted at hearing and are reflected in the Findings of Fact below.

A one-volume Transcript of the proceeding was filed on October 17, 2018. Both parties timely submitted proposed recommended orders, which were considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. The Department is the State agency charged with regulating the practice of marriage and family therapy interns pursuant to section 20.43 and chapters 456 and 491, Florida Statutes.

2. Mr. Tito is a licensed registered marriage and family therapist intern in the state of Florida, having been issued license number IMT 1070, and practices in Pompano Beach, Florida. He is subject to regulation by the Department and the Board of Clinical Social Work, Marriage and Family Therapy and Mental Health Counseling.

3. On or about September 27, 2017, the Department filed an Administrative Complaint against Mr. Tito's license to practice as a registered marriage and family therapist intern.

4. On October 23, 2017, Mr. Tito received the Administrative Complaint sent by the Department, which included a cover letter, a settlement agreement, and an Election of Rights form. Mr. Tito signed and mailed a certified mail receipt

acknowledging his receipt of the Administrative Complaint and attachments, which the Department received on November 6, 2017.

5. Both the cover letter and the Administrative Complaint that Mr. Tito received stated that he must return the Election of Rights form to the Department within 21 days of his receipt of the Administrative Complaint if he chose to request a formal hearing.

6. The cover letter stated, in relevant part:

You must sign the Election of Rights form, and return the completed form to my office within twenty-one (21) days of the date you received it. Failure to return this form within twenty-one (21) days may result in the entry of a default judgment against you without hearing your side of the case.

7. In a portion denominated "Notice of Rights," the Administrative Complaint included the following language in bold print:

A request or petition for an administrative hearing must be in writing and must be received by the Department within 21 days from the day Respondent received the Administrative Complaint, pursuant to Rule 28-106.111(2), Florida Administrative Code. If Respondent fails to request a hearing within 21 days of receipt of this Administrative Complaint, Respondent waives the right to request a hearing on the facts alleged in this Administrative Complaint pursuant to Rule 28-106.111(4), Florida Administrative Code.

8. The Election of Rights form that Mr. Tito received stated in relevant part:

In the event that you fail to make an election in this matter within twenty-one (21) days from receipt of the Administrative Complaint, your failure to do so may be considered a waiver of your right to elect a hearing in this matter, pursuant to Rule 28-106.111(4), Florida Administrative Code, and the Board may proceed to hear your case.

At the bottom of the Election of Rights form was a notation that the form could be mailed or faxed and provided addresses and telephone numbers.

9. Mr. Tito wrote a letter to the Department requesting a formal hearing and mailed that to the Department along with an executed Election of Rights form.

10. The Department received Mr. Tito's letter and Election of Rights form on November 20, 2017, 28 days after Mr. Tito received a copy of the Administrative Complaint.

11. The cover letter, copy of the Administrative Complaint with Notice of Rights, and Election of Rights form together gave Mr. Tito sufficient written notice of intended agency action that affected his substantial interests. These documents informed him of his right to an administrative hearing, indicated the procedures he must follow to obtain the hearing, and stated the time limits that applied.

#### CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this

proceeding in accordance with sections 120.569 and 120.57(1), Florida Statutes (2018).

13. The Administrative Complaint alleges that Respondent violated provisions of the Florida Statutes and administrative rules that would subject him to the imposition of penalties. Respondent has standing to request a hearing on whether his request for hearing was made within the 21-day period or equitable tolling should apply to extend the time for filing, and, if either is shown, on the allegations of the Administrative Complaint. Nicks v. Dep't of Bus. & Prof'l Reg., 957 So. 2d 65, 68 (Fla. 5th DCA 2007); Phillip v. Univ. of Fla., 680 So. 2d 508, 509 (Fla. 1st DCA 1996).

14. Petitioner has the burden to show that notice of intended action was received and that Respondent's request for hearing was untimely. Respondent, as the party seeking equitable tolling, has the burden of proof as to that issue. Menominee Indian Tribe of Wis. v. United States, 136 S. Ct. 750, 755-56 (2016). The standard of proof for each of the parties is a preponderance of the evidence. § 120.57(1)(j), Fla. Stat.

15. The requirement that a hearing must be requested within 21 days of receipt of the notice of agency action is clear. Florida Administrative Code Rule 28-106.111 provides in relevant part:

(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 decision 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.

16. The filing of a request for hearing takes place when the request for hearing is received by the agency. Rule 28-106.104(1) provides: In construing these rules or any order of a presiding officer, filing shall mean received by the office of the agency clerk during normal business hours or by the presiding officer during the course of a hearing. See also Riverwood Nursing Ctr., LLC v. Ag. for Health Care Admin., 58 So. 3d 907, 911 (Fla. 1st DCA 2011) (written petition for hearing must be received by the agency clerk within 21 days).

17. The "mail box rule" (that portion of Florida Administrative Code Rule 28-206.103 providing that five days should be added to the 21-day time limit when service has been made by regular U.S. mail) does not apply to service of an Administrative Complaint or other documents offering a point of entry for administrative proceedings. Watson v. Brevard Cnty. Clerk, 937 So. 2d 1264, 1266 (Fla. 5th DCA 2006). Respondent

argues, however, that the notice documents in this case failed to meet the requirements of section 120.569, and therefore the mail box rule should be found to be applicable.

18. This argument is rejected. The notice of intended agency action includes all of the documents provided to Respondent on October 23, 2017, including the cover letter, copy of the Administrative Complaint with Notice of Rights, and the Election of Rights form. These documents gave Mr. Tito sufficient written notice of the intended agency action that affected his substantial interests, as required by section 120.569. These documents informed him of his right to an administrative hearing, indicated the procedures he must follow to obtain the hearing, and stated the time limits that applied. The mail box rule does not apply, and Respondent's request for an administrative hearing was received by the Department, and so filed, after the 21-day deadline.

19. Section 120.569(2)(c) provides that a request for hearing "shall be dismissed . . . if it has been untimely filed." (Emphasis added). The statute goes on to expressly note that this does not eliminate the availability of equitable tolling as a defense.

20. In Machules v. Department of Administration, 523 So. 2d 1132, 1134 (Fla. 1988), the Florida Supreme Court stated:

Generally, the 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.

21. There is no argument, or evidence to suggest, that Respondent was prevented from asserting his rights, or timely asserted them in the wrong forum, but Respondent does argue that he was misled or lulled into inaction by Petitioner.

22. Equitable tolling requires no showing of deception or misconduct on the part of Petitioner. Rather, the running of the time to file is judicially halted based on equitable grounds centered on Respondent's "excusable ignorance" of the limitations period and on "lack of prejudice" to Petitioner.

Machules, 523 So. 2d. at 1134.

23. Respondent argues that he was misled by the wording on the Election of Rights form, quoted above, warning him that he would waive his right to elect a hearing should he "fail to make an election in this matter within twenty-one (21) days."

Respondent maintains that he interpreted the phrase "make an election" to require only that he check the desired box within the allotted time and notes that the form says nothing about returning it to the Department within that same time.

24. Were the Election of Rights form the only notice of rights provided to Respondent,<sup>2/</sup> 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 28-106.111(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 the notice itself to include the procedure and time limits to request a hearing, not simply a reference to them.

25. The Election of Rights form was not the only notice provided to Respondent, however. It is undisputed that he also received, as part of the package of documents constituting notice, a cover letter and the Notice of Rights accompanying the Administrative Complaint. In these additional documents, as shown in the language quoted above, he was clearly informed that the request for hearing had to be returned to, or received by, the Department within the 21-day period.

26. The issue, then, is whether Respondent's asserted ignorance of the fact that the Department had to receive his request for hearing within the 21-day time period was "excusable" or "blameless" under these circumstances. Major League Baseball v. Morsani, 790 So. 2d 1071, 1076 n.11 (Fla. 2001).

27. Respondent was not entitled to read only the Election of Rights form, but is held to have received all of the

information accompanying the Administrative Complaint. Taken 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."

28. The doctrine of equitable tolling does not apply to excuse the late filing of Respondent's request for an administrative hearing.

29. Section 120.569(2)(c), provides: "Dismissal of a petition shall, at least once, be without prejudice to petitioner's filing a timely amended petition curing the defect, unless it conclusively appears from the face of the petition that the defect cannot be cured." A defect of untimeliness cannot be cured and, therefore, dismissal of the request for hearing with prejudice is appropriate.

30. Respondent's request for hearing must be dismissed because it was filed with the Department more than 21 days after Respondent received the Administrative Complaint. Under rule 28-106.111(4), Respondent waived his right to a hearing.

RECOMMENDATION

In view of the foregoing Findings of Fact and Conclusions of Law, it is:

RECOMMENDED that Respondent's request for a substantial interests hearing under section 120.57(1), Florida Statutes, should be dismissed as untimely.

DONE AND ENTERED this 9th day of November, 2018, in Tallahassee, Leon County, Florida.

*F. Scott Boyd*

---

F. SCOTT BOYD  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 9th day of November, 2018.

ENDNOTES

<sup>1/</sup> All citations to the Florida Statutes and to administrative rules are to those in effect in November of 2017, the time relevant to the execution and receipt of the Election of Rights form.

<sup>2/</sup> It is recommended that the Department amend its form to clearly state that the Election of Rights form must be received by the Department within 21 days, so that, even standing alone, the form provides clear notice of the procedure and applicable time limit.

COPIES FURNISHED:

Howard J. Hochman, Esquire  
Law Offices of Howard Hochman  
Suite 210  
7695 Southwest 104th Street  
Miami, Florida 33156  
(eServed)

Lealand L. McCharen, Esquire  
Florida Department of Health  
Bin C-65  
4052 Bald Cypress Way  
Tallahassee, Florida 32399-3265  
(eServed)

Mary A. Iglehart, Esquire  
Department of Health  
Prosecution Services Unit  
Bin C-65  
4052 Bald Cypress Way  
Tallahassee, Florida 32399  
(eServed)

Jennifer Wenhold, Executive Director  
Board of Clinical Social Work, Marriage and  
Family Therapy and Mental Health Counseling  
Department of Health  
4052 Bald Cypress Way, Bin C-08  
Tallahassee, Florida 32399-3257  
(eServed)

Louise Wilhite-St Laurent, Interim General Counsel  
Department of Health  
4052 Bald Cypress Way, Bin C-65  
Tallahassee, Florida 32399  
(eServed)

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.