STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CYNTHIA L. DENBOW, A.R.N.P., C.N.M.,

Petitioner,

vs. Case No. 19-3416F

DEPARTMENT OF HEALTH, BOARD OF NURSING,

Respondent.
_____/

FINAL ORDER DENYING ATTORNEY'S FEES

On December 13, 2019, a final hearing was held via video teleconference with locations in Tallahassee and Tampa, Florida, before E. Gary Early, an Administrative Law Judge assigned by the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Suzanne Suarez Hurley, Esquire
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For Respondent: Kristen M. Summers, Esquire
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STATEMENT OF THE ISSUE

The issue to be determined is whether Petitioner, Cynthia L. Denbow, A.R.N.P, C.N.M. (Ms. Denbow or Petitioner) is

entitled to attorney's fees pursuant to section 57.105, Florida Statutes (2018),[1/] from Respondent, Department of Health (Department or Respondent), related to litigation between the parties in DOAH Case No. 18-2269PL.

PRELIMINARY STATEMENT

On March 8, 2018, the Department issued a three-count Administrative Complaint against Petitioner in DOH Case No. 2017-22543, which charged Petitioner with failing to meet the minimal standards of acceptable and prevailing nursing practice, engaging in unprofessional conduct, and making deceptive, untrue, or fraudulent representations in or related to the practice of her profession as a nurse-midwife, in violation of chapter 464, Florida Statutes. The Administrative Complaint was based on an incident in which an infant, the mother of whom was under Petitioner's care, did not survive childbirth.

On or about March 20, 2018, Respondent timely filed an Election of Rights in which she disputed the allegations contained in the Administrative Complaint, and requested a formal administrative hearing. On May 7, 2018, the Election of Rights was referred to DOAH, and was assigned to the undersigned for disposition as DOAH Case No. 18-2269PL.

On May 22, 2018, Petitioner served the Department with a Motion for Sanctions, which was the 21-day "safe harbor" notice

required by section 57.105(4), advising the Department of her belief that the agency action against her was unsupported by material facts necessary to establish the violations and that the agency action was not supported by the application of then-existing law to the material facts.

On June 26, 2018, Petitioner filed her Motion for Sanctions with DOAH, stating that the Department had not withdrawn or appropriately corrected its Administrative Complaint.

The final hearing in DOAH Case No. 18-2269PL was scheduled to be held on August 27 and 28, 2018, by video teleconference in Tallahassee and Pensacola, Florida, and was convened and concluded as scheduled. On December 26, 2018, the Recommended Order was entered, which recommended that the Department enter a final order dismissing the Administrative Complaint against Ms. Denbow. An award pursuant to section 120.57(5), Florida Statutes, being authorized only to "the prevailing party," and there being no determination of the prevailing party until the entry of a final order, the Recommended Order did not dispose of the Motion for Sanctions.

On February 25, 2019, the undersigned entered a Procedural Order on Expert Witness Fees, which provided that:

> At such time as either party requests an award of attorney's fees and costs as a result of the Department of Health's final order entered in this case, and jurisdiction is returned to determine the award, the

> allowance of expert witness fees shall be determined and taxed as costs at that time.

On March 28, 2019, the Department entered its Final Order by which it accepted the Recommended Order and dismissed the Administrative Complaint against Petitioner.

On June 25, 2019, Petitioner renewed her earlier Motion for Sanctions by filing her Updated Motion for Attorney's Fees and Costs and Motion for Payment of Reasonable Fee to Expert Witness Dr. Penny Lane, D.N.P., C.N.M. (Updated Motion). The Updated Motion asserted that Ms. Denbow was the prevailing party in the underlying proceeding and that Respondent knew or should have known that, at the time the Administrative Complaint was served, it was not supported by the material facts necessary to establish its claims and was not supported by the application of then-existing law to those material facts. The Updated Motion was opened as DOAH Case No. 19-3416F.

On July 2, 2019, the Department filed a Response to Petitioner's Motion for Attorney's Fees and Costs, and a separate Response to Petitioner's Motion for Payment of Reasonable Fee to Expert Witness Penny Lane. On July 9, 2019, Petitioner filed a responsive Addendum to Her Updated 57.105 Motion for Attorney's Fees and Costs and Memorandum of Law.

The final hearing in this proceeding was scheduled to be conducted by video teleconference in Tallahassee and Tampa,

Florida, on December 13, 2019. On December 9, 2019, a Joint Pre-hearing Stipulation was filed. The Joint Pre-hearing Stipulation made no mention of the expert witness fee to Penny Lane, and that matter has, by agreement of the parties, been resolved.

The final hearing was convened and concluded on December 13, 2019, as scheduled. Petitioner testified on her own behalf, and presented the testimony of Evelyn Moya, Esquire, who was accepted as an expert witness; Kristen Summers, Esquire; and her counsel, Suzanne Hurley, Esquire. Petitioner's Exhibits 1, 2, 4 through 6, and 12 through 18 were received in evidence. Respondent presented the testimony of Ms. Summers and Daniel Russell, Esquire, who was accepted as an expert witness. Respondent's Exhibits 1 through 4 were received in evidence. In addition, official recognition was taken of the record of DOAH Case No. 18-2269PL.

The parties did not file a transcript of the final hearing. Both parties filed Proposed Final Orders on December 10, 2020, which have been considered in the preparation of this Final Order.

FINDINGS OF FACT

1. The Recommended Order in DOAH Case No. 18-2269PL, including the Preliminary Statement, the Findings of Fact, and the Conclusions of Law contained therein, and the Department's

Final Order in DOAH Case No. 18-2269PL are incorporated herein by reference as the facts underlying this Final Order.

Stipulated Facts

2. Respondent is the state agency responsible for regulating the practice of nursing pursuant to chapters 456 and 464, Florida Statutes.

3. Petitioner is an Advanced Registered Nurse Practitioner (ARNP) and Certified Nurse Midwife (CNM), who must comply with section 464.012 regarding the practice of ARNPs and with Florida Administrative Code Rule 64B9-4, which requires CNMs to comply with standards set by the American College of Nurse Midwives (ACNM).

4. The Administrative Complaint in the underlying case was presented to the Florida Board of Nursing Probable Cause Panel (Probable Cause Panel) on March 8, 2018.

5. The Probable Cause Panel found probable cause and authorized the filing of the Administrative Complaint in the underlying case.

6. Joanna Mitrega, A.P.R.N., Respondent's expert, reviewed the facts of the underlying case.

7. Ms. Mitrega issued an opinion finding that the Petitioner fell below the standard of care in the treatment of Patient A.R. on February 8, 2018.

8. Ms. Mitrega is a certified nurse midwife with significant experience in the practice of nursing as it relates to hospital labor and delivery.

9. On May 22, 2018, Petitioner served her proposed Motion for Sanctions on Respondent, along with a letter and documents.

10. On June 26, 2018, 35 days later, Petitioner filed her Motion for Sanctions with DOAH.

11. On March 28, 2019, the Final Order of the Board of Nursing was filed in DOAH Case No. 18-2269PL, which accepted the recommendation that the Administrative Complaint be dismissed.

12. Petitioner is the prevailing party for the purposes of section 57.105.

13. On June 25, 2019, Petitioner filed the Updated Motion.

14. On July 9, 2019, Petitioner filed an Addendum to her Updated Motion for Sanctions (Attorney's Fees and Costs) and Memorandum of Law.

15. An attorney's fee of $250/Hour is a reasonable rate.

Other Relevant Facts

16. The undersigned was the presiding officer in the case below. A review of the Recommended Order and the record in DOAH Case No. 18-2269PL indicates that there were a number of elements of the care and treatment of A.R. that were problematic, including the failure to perform a physical exam, digital or otherwise, for more than an hour after A.R. arrived

at the birthing center, and having A.R. push (for a disputed number of times) after the child was discovered to be in the vertex position.

17. Non-expert testimony was inconsistent, e.g., whether and how A.R. was manifesting her pain; whether vital signs were checked on arrival at the birthing center; whether A.R. was advised of the options for safe delivery, based on the nature of the delivery and its imminence, and issues of birth in an ambulance; the number of contractions and discrepancies in their charting; the nature and content of conversations between Petitioner and hospital staff; and more. Evidentiary issues with charting and recording the events were complicated by the fact that records were not completed until after A.R. was received at the hospital, and that records bore dates up to 11 days after the incident, facts that would not have been facially apparent. Each of these disputed facts, none of which were implausible or shown to be driven by an effort to conceal the truth, required a determination of the stressors and circumstances to evaluate whose testimony to accept. The facts of DOAH Case No. 18-2269PL were far from clear-cut, and the undersigned struggled with the decision of how to weigh and evaluate the testimony and evidence, acknowledging that "differences in time, tone, and substance were, more likely than not, an artifact of the stress and tumult of the moment."

18. The testimony of experts was conflicting. The opinions offered by the Department's witness, Ms. Mitrega, did not waver, but ultimately the basis for those opinions was determined to be less than substantiated. As evidence was introduced at the hearing, and later carefully evaluated, the weight of her testimony was reduced to "near zero." However, the perception of the undersigned during the hearing in DOAH Case No. 18-2269PL, was that Ms. Mitrega's testimony was not entirely expected by the Department. Ms. Summers's credible testimony at the hearing in this matter substantiated that perception. It is not unheard of for lawyers to be surprised by their witness's testimony, even when professionally discussed and evaluated beforehand. That Ms. Mitrega may have veered off track at the hearing is not determinative of whether the Administrative Complaint, as pled, was not supported by the material facts necessary to establish a potential violation, or would not be supported by the application of chapter 464 to those facts.

19. The Department was not acting without cause in DOAH Case No. 18-2269PL. The Department offered admissible evidence in support of its allegations. Had the case been evaluated under a lesser standard of proof than "clear and convincing evidence," or the testimony of witnesses been weighed differently, the outcome may have turned. That is, however, not

an issue for, or a finding of, this proceeding. Rather, the issue is whether the Administrative Complaint lacked factual support or a legal basis, and was, therefore, sanctionable under section 57.105. Under the facts elicited and the law pled in DOAH Case No. 18-2269PL, it did not.

CONCLUSIONS OF LAW

Jurisdiction and Burden of Proof

20. DOAH has jurisdiction in this proceeding pursuant to sections 57.105(5), 120.569, and 120.57(1), Florida Statutes (2019). The Administrative Law Judge has final order authority in this matter. § 57.105(5), Fla. Stat. (2019).

21. As the party asserting the affirmative of the issue, Petitioner has the burden to demonstrate, by a preponderance of the evidence, both entitlement to and reasonableness of the attorneys' fees sought. Dep't of Transp. v. J.W.C., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981); § 120.57(1)(j), Fla. Stat.

22. Section 57.105 provides, in pertinent part, that:

> (1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee, . . . on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:

> (a) Was not supported by the material facts necessary to establish the claim or defense; or
>
> (b) Would not be supported by the application of then-existing law to those material facts.
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> * * *
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> (4) A motion by a party seeking sanctions under this section must be served but may not be filed with or presented to the court unless, within 21 days after service of the motion, the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected.
>
> (5) In administrative proceedings under chapter 120, an administrative law judge shall award a reasonable attorney's fee and damages to be paid to the prevailing party in equal amounts by the losing party and a losing party's attorney or qualified representative in the same manner and upon the same basis as provided in subsections (1)-(4). Such award shall be a final order subject to judicial review pursuant to s. 120.68 . . . .

Timeliness of Motion

23. Unlike some other attorneys' fees provisions,[2/] section 57.105 contains no specific instruction as to when or how a request for attorneys' fees shall be made. The language quoted above, that the award of fees in an administrative proceeding shall be awarded "in the same manner and upon the same basis" as the procedures established for civil proceedings, requires consideration. The Florida Supreme Court in Stockman v. Downs, 573 So. 2d 835, 837 (Fla. 1991), held:

> [A] claim for attorney's fees, whether based on statute or contract, must be pled. The fundamental concern is one of notice. Modern pleading requirements serve to notify the opposing party of the claims alleged and prevent unfair surprise. 40 Fla. Jur. 2d Pleadings Section 2 (1982). Raising entitlement to attorney's fees only after judgement fails to serve either of these objectives. The existence or nonexistence of a motion for attorney's fees may play an important role in decisions affecting a case. For example, the potential that one may be required to pay an opposing party's attorney's fees may often be determinative in a decision on whether to pursue a claim, dismiss it, or settle. A party should not have to speculate throughout the entire course of an action about what claims ultimately may be alleged against him. Accordingly, we hold that a claim for attorney's fees, whether based on statute or contract, must be pled. Failure to do so constitutes a waiver of the claim.

The court went on to hold that once pled, proof of attorneys' fees could be presented after judgment, upon motion within a reasonable time.

24. The “safe harbor” provision quoted above requires a party seeking fees to serve the motion but not file it until at least 21 days later, allowing the challenged claim or contention to be withdrawn or corrected. In compliance with this provision, it is undisputed that Petitioner served Respondent with her motion for fees on May 22, 2018.

25. The purpose of the “safe harbor” period established in section 57.105(4), which requires that a party first serve a

motion seeking fees, followed by its filing 21 days later, is to afford a party a last clear chance to withdraw a meritless claim. Global Xtreme, Inc. v. Advanced Aircraft Ctr., Inc., 122 So. 3d 487, 490 (Fla. 3rd DCA 2013). The "safe harbor" is strictly enforced. See Dunkin' Donuts Franchised Rests., LLC v. 330545 Donuts, Inc., 27 So. 3d 711, 713-14 (Fla. 4th DCA 2010); Montgomery v. Larmoyeux, 14 So. 3d 1067, 1072 (Fla. 4th DCA 2009); Anchor Towing, Inc. v. Fla. Dep't of Transp., 10 So. 3d 670, 672 (Fla. 3d DCA 2009). Petitioner cannot, after the litigation that is the focus of the request for attorney's fees has concluded, change the basis of her section 57.105 Motion for Sanctions. Thus, any grounds pled in the Updated Motion that exceed the grounds identified in the Motion for Sanctions may not form a basis for an award of fees in this action.

26. The notice requirement brings section 57.105 within an exception recognized by Stockman itself, at page 838:

> Where a party has notice that an opponent claims entitlement to attorney's fees, and by its conduct recognizes or acquiesces to that claim or otherwise fails to object to the failure to plead entitlement, that party waives any objection to the failure to plead a claim for attorney's fees.

27. Respondent, aware of Petitioner's motion for fees, did not object during hearing to Petitioner's failure to plead entitlement.

Standard

28. DOAH Case No. 18-2269PL was decided on the application of the "clear and convincing" burden of proof. As set forth in the Recommended Order, that burden:

> [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)).

29. It is well established that "section 57.105 does not require a finding of frivolousness to justify sanctions, but only a finding that the claim lacked a basis in material facts or then-existing law." Martin Cty. Conser. Alliance v. Martin

Cty., 73 So. 3d 856, 858 (Fla. 1st DCA 2011); see also Gopman v. Dep't of Educ., 974 So. 2d 1208, 1210 (Fla. 1st DCA 2008).

30. The standard under section 57.105 is to be applied on a case-by-case basis. In that regard:

> While the revised statute incorporates the "not supported by the material facts or would not be supported by application of then-existing law to those material facts" standard instead of the "frivolous" standard . . . , an all encompassing definition of the new standard defies us. It is clear that the bar for imposition of sanctions has been lowered, but just how far it has been lowered is an open question requiring a case by case analysis.

Wendy's v. Vandergriff, 865 So. 2d 520, 524 (Fla. 1st DCA 2003) (citing Mullins v. Kennelly, 847 So. 2d 1151, 1155 n.4. (Fla. 5th DCA 2003)).

31. The term "supported by the material facts" in section 57.105(1)(a) means that the "party possesses admissible evidence sufficient to establish the fact if accepted by the finder of fact." Albritton v. Ferrera, 913 So. 2d 5, 7 n.1 (Fla. 1st DCA 2005).

32. In conducting this evaluation, it must be determined if the party or its counsel knew or should have known that the claim or defense asserted was not supported by the material facts necessary to establish the claim or defense or by the application of then-existing law to the material facts. Read v. Taylor, 832 So. 2d 219 (Fla. 4th DCA 2002). "[A]n award of fees

is not always appropriate under section 57.105, even when the party seeking fees was successful in obtaining the dismissal of the action or summary judgment in an action." Id. at 222; see also Mason v. Highlands Cty. Bd. of Cty. Comm'rs, 817 So. 2d 922, 923 (Fla. 2d DCA 2002)("Failing to state a cause of action is not in and of itself a sufficient basis to support a finding that a claim was so lacking in merit as to justify an award of fees pursuant to section 57.105.").

33. As set forth by the Fifth District Court of Appeal:

> The central purpose of section 57.105 is, and always has been, to deter meritless filings and thus streamline the administration and procedure of the courts. . . . "The purpose of section 57.105 is to discourage baseless claims, stonewall defenses and sham appeals in civil litigation by placing a price tag through attorney's fees awards on losing parties who engage in these activities." . . . . Although the statute . . . "must be read in light of concerns that it will spawn satellite litigation and chill vigorous advocacy," any interpretation of the statute must give effect to its central goal of deterrence.
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> * * *
>
> [The] dispute . . . is a classic "he said, she said," wherein the credibility of the witnesses would have been weighed by the trier of fact had the matter proceeded to trial. The fact that the witnesses provided contradictory evidence does not necessarily compel the court to the conclusion that the action lacked factual support and was therefore sanctionable under section 57.105.

Mullins v. Kennelly, 847 So. 2d at 1154-1155 (citations omitted).

34. Section 57.105 is not a penalty for failing to prevail, rather it is a deterrent against meritless, frivolous, baseless, or non-judiciable claims. Where the non-prevailing party presents competent, substantial evidence in support of claims presented, and the trier-of-fact determines the issues adversely to the non-prevailing party based on conflicting evidence, section 57.105 does not authorize an award of attorney's fees. See Siegel v. Rowe, 71 So. 3d 205, 213 (Fla. 2d DCA 2011). As a general proposition, section 57.105 should be applied with restraint. Minto PBLH, LLC v. 1000 Friends of Fla., Inc., 228 So. 3d 147 (Fla. 4th DCA 2017).

CONCLUSION

35. As applied to this case, there were allegations that were not supported by the applicable "clear and convincing" quantum of proof. See DOAH Case No. 18-2269PL, Recommended Order ¶¶ 41, 54, 58, 59, 78, 93, and 98. Nonetheless, the Department presented admissible evidence sufficient to establish the facts alleged if it had been accepted by the undersigned. The finding that the Department did not prove its case by clear and convincing evidence is not the same as a finding that the allegations in support of the Administrative Complaint were lacking in merit.

36. Based upon a full review and consideration of the record in DOAH Case No. 18-2269PL, the undersigned concludes that, although the Recommended Order in that case did not uphold the Department's proposed agency action, the material facts relied upon by the Department and the application of chapter 464, i.e., the then-existing law, to those material facts by the Department were not so lacking in merit as to warrant an award of attorney's fees or costs under section 57.105. Furthermore, the undersigned concludes that no action taken by the Department was so clearly and obviously lacking as to be untenable.

37. Based on the Findings of Fact and legal authority set forth herein, the Motion for Sanctions, filed on June 26, 2018; Petitioner Cynthia Denbow's Updated Motion for Attorney's Fees and Costs and Motion for Payment of Reasonable Fee to Expert Witness Dr. Penny Lane, D.N.P., C.N.M., filed on June 25, 2019; and Petitioner Cynthia Denbow's Addendum to Her Updated 57.105 Motion for Attorney's Fees and Costs, filed on July 9, 2019, are DENIED.

DONE AND ORDERED this 24th day of January, 2020, 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 24th day of January, 2020.

ENDNOTES

[1/] Unless otherwise indicated, all references to the Florida Statutes are to the 2018 codifications. It should be noted that the applicable provisions of section 57.105 have not changed since 2010.

[2/] Compare section 57.111(4)(b)2., providing that an application for attorneys' fees must be made within 60 days after the small business party becomes a prevailing party.

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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 one copy of a Notice of Administrative Appeal with the agency clerk of the Division of Administrative Hearings 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 Administrative Appeal must be filed within 30 days of rendition of the order to be reviewed.