STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF NURSING,

Petitioner,

vs. Case No. 20-0895PL

BRIAN FRANCIS ANTONIAK, R.N., A/K/A BRIAN HALL, R.N.,

Respondent.
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RECOMMENDED ORDER

On June 9, 2020, an evidentiary hearing was held before Elizabeth W. McArthur, Administrative Law Judge of the Division of Administrative Hearings (DOAH), by video teleconference at sites in Sarasota and Tallahassee, Florida.

APPEARANCES

For Petitioner: Dirlie Anna McDonald, Esquire
Phillip Aaron Crawford, Esquire
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Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
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For Respondent: Sara A. Bazzigaluppi, Esquire
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STATEMENT OF THE ISSUE

The issue in this case is whether the defense of equitable tolling applies to excuse Respondent's untimely request for a disputed-fact administrative hearing on an Administrative Complaint.

PRELIMINARY STATEMENT

On July 1, 2019, the Department of Health, Board of Nursing (Petitioner), filed a two-count Administrative Complaint (Complaint) against Brian Francis Antoniak, R.N., a/k/a Brian Hall, R.N. (Respondent). The Complaint, along with a blank Election of Rights form, was served by certified mail on Respondent's then-counsel of record, Lauren Leikam (Attorney Leikam) of the Chapman Law Group (CLG). Attorney Leikam received the Complaint package on July 19, 2019.

In accordance with the Complaint's Notice of Rights, a written request for an administrative hearing to dispute the alleged facts, via a completed Election of Rights form or other written request for hearing, had to be filed with Petitioner no later than 21 days after the Complaint was received by Attorney Leikam. No completed Election of Rights form or other written request for a disputed-fact administrative hearing was timely filed with Petitioner by Respondent or on Respondent's behalf.

On November 6, 2019, Petitioner served on Attorney Leikam by email Petitioner's Motion for Determination of Waiver and for Final Order After Hearing Not Involving Disputed Issues of Material Fact (Motion for Waiver). That same day, Attorney Leikam emailed to Petitioner an Election of Rights form completed on Respondent's behalf, requesting a disputed-fact hearing on the Complaint.

On December 3, 2019, Attorney Leikam made two additional filings on Respondent's behalf, by email to Petitioner: an Answer to the Complaint; and a response to the Motion for Waiver, asserting that equitable tolling excused Respondent's untimely Election of Rights.

Following consideration of the Motion for Waiver and response, on February 19, 2020, Petitioner referred the case to DOAH.[1] Petitioner's referral letter requested assignment of an administrative law judge to conduct an evidentiary hearing on the issue of whether equitable tolling applies to excuse the untimely filing of Respondent's Election of Rights.

The hearing was initially set for April 30, 2020, but was continued on Respondent's unopposed motion, due to stay-at-home orders necessitated by the COVID-19 public health emergency. The hearing was rescheduled for June 9, 2020, and went forward as rescheduled.

Prior to the hearing, the parties filed a Joint Pre-hearing Stipulation in which they stipulated to a number of facts. The agreed facts are incorporated in the findings below, to the extent relevant.

At the hearing, it was agreed that Respondent, as the party with the burden of proof on the asserted equitable tolling defense, should present his case first. Respondent testified on his own behalf, and presented the live testimony of Attorney Leikam and Katherine Kalinowski. Respondent's Exhibits 4 through 7 and 10 through 15 were admitted into evidence. Petitioner presented the live testimony of Respondent and Attorney Leikam. Petitioner's Exhibit 5 was admitted into evidence. In addition, the parties jointly presented the deposition testimony of Kristin Teague, via Joint Exhibit 1, which was admitted in lieu of live testimony, due to the acknowledged unavailability of the witness, who lives and works in Michigan.

[1] Petitioner's referral letter identified two attorneys of record for Respondent: Attorney Leikam and Sara Bazzigaluppi, both with CLG. Thereafter, Attorney Leikam filed a motion to withdraw as an individual counsel for Respondent, because she anticipated testifying as a witness for Respondent. She reported in her motion that Respondent would continue to be represented by CLG through Sara Bazzigaluppi. In an amended motion to withdraw, Attorney Leikam added that she conferred with counsel for Petitioner, who did not object. By Order issued April 16, 2020, the amended motion was granted subject to the express assumption that Attorney Leikam, Ms. Bazzigaluppi, and CLG had addressed their professional and ethical responsibilities under The Florida Bar's rules, including obtaining Respondent's informed consent if necessary.

At the conclusion of the evidentiary hearing, the parties were informed of the ten-day timeframe after the filing of the hearing transcript at DOAH to file proposed recommended orders (PROs). The Transcript of the final hearing was filed on June 18, 2020. On June 29, 2020, both parties filed PROs, which have been considered in preparing this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the state agency charged with regulating the practice of nursing pursuant to section 20.43, Florida Statutes, and chapters 456 and 464, Florida Statutes.

2. At all times material to the Complaint, Respondent was a licensed registered nurse (R.N.) within the state of Florida.

3. On or about February 19, 2016, Respondent retained CLG to represent him in Petitioner's Case 2016-08658, the number assigned by Petitioner to an investigation that ultimately led to issuance of the Complaint.

4. In late May 2018, Attorney Leikam assumed the role as the CLG attorney with primary responsibility for Respondent's case, and informed Petitioner. At that time, the status of the case was characterized as "pre-probable cause." Attorney Leikam represented then to Petitioner that she "will be representing this client in all matters pending before the Department."

5. On November 9, 2018, CLG legal assistant Katherine Kalinowski testified that she closed CLG's file on Respondent's case. However, she did not follow CLG procedures, in that she did not ensure that a withdrawal letter was sent to Respondent before CLG closed its file.

6. On July 1, 2019, Petitioner filed its Complaint against Respondent.

7. Although Attorney Leikam was still counsel of record for Respondent for all matters pending before the Department, including Case 2016-08658, the Department sent the Complaint and Election of Rights form to Respondent directly.

8. When Respondent received the Complaint package, he called CLG and was referred to Attorney Leikam.

9. Attorney Leikam determined that, although CLG had attempted to close its file, since no withdrawal letter was sent to Respondent, "we are still on it."

10. Attorney Leikam sent an email to counsel for Petitioner to complain of the improper attempt to serve Respondent with the Complaint, when she was still counsel of record for Respondent, as she had previously informed Petitioner.

11. Petitioner acknowledged and rectified this mistake by serving the Complaint and Election of Rights form by certified mail to Attorney Leikam, which she received on July 19, 2019. The parties agree that this second attempt to serve the Complaint constitutes the proper service on Respondent.

12. The last page of the Complaint—page 11—set forth the **NOTICE OF RIGHTS** in bold type, informing Respondent that a written request for an administrative hearing must be received by Petitioner within 21 days after receipt of the Complaint.

13. There is no claim by Respondent in this case that the Notice of Rights was unclear regarding the deadline to request a hearing or the manner in which a hearing must be requested. Respondent knew that there was *a* deadline to request an administrative hearing, but he did not know when the actual deadline was. He admitted he only "vaguely" reviewed the Complaint, and probably did not make it to the last page. (Tr. 126-27). Instead, he relied on Attorney Leikam to timely submit whatever was necessary to protect his rights.[2]

[2] Upon determining that CLG had not effectively terminated its representation of Respondent, Attorney Leikam immediately notified Respondent that further retainer payments were required. As of July 22, 2019, Attorney Leikam noted as follows in CLG's internal File Notes: "Client never paid but now that we've been served [with the Complaint], I don't want to miss the deadline. I completed only the election of rights form. I am not sending the answer to the [Complaint] until the client pays."

14. To meet the 21-day deadline, a completed Election of Rights or other written hearing request had to be received by Petitioner no later than Friday, August 9, 2019 (21 days after July 19, 2019). The 21-day window to request an administrative hearing was closed on and after Monday, August 12, 2019.[3]

15. Neither Respondent nor Attorney Leikam submitted a completed Election of Rights or other written request for an administrative hearing to Petitioner by any means—electronic mail, in-person delivery, U.S. mail, or facsimile—within 21 days after the Complaint and Election of Rights form were received by Attorney Leikam.

16. On November 6, 2019—89 days after the deadline to request an administrative hearing—Petitioner's counsel sent an email to Attorney Leikam to serve Petitioner's Motion for Waiver, which was attached. The Motion for Waiver, filed with the Board of Nursing, sought a determination that Respondent waived his right to a disputed-fact administrative hearing by not timely filing an Election of Rights or other written request for a disputed-fact hearing.

17. That same day, after receiving the Motion for Waiver, Attorney Leikam responded by email to Petitioner's counsel, submitting for the first time a completed Election of Rights form on Respondent's behalf to dispute the facts alleged in the Complaint.

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[3] The parties stipulated that the 21-day period to request an administrative hearing "expired" August 12, 2019. The stipulation is not entirely clear. The ambiguity was reconciled based on the parties' other stipulation that the Complaint was properly served on Attorney Leikam on July 19, 2019. As a simple application of the computation of time rule, 21 days after Friday, July 19, 2019, was Friday, August 9, 2019. Thus, August 9, 2019, was the last day to file the request for hearing; the 21-day time period was "expired" as of Monday, August 12, 2019. *See* Fla. Admin. Code R. 28-106.103. Petitioner's PRO interpreted the ambiguous stipulation differently, proposing a finding that the 21-day deadline to file a hearing request was on Monday, August 12, 2019. (Pet. PRO ¶ 5). Respondent's PRO adhered to the ambiguous stipulation, proposing a finding that the 21-day response time "expired on August 12, 2019." (Resp. PRO ¶ 8). This discrepancy is inconsequential, as the findings herein demonstrate, because no hearing request was filed by August 9, 2019, August 12, 2019, or on any date close to either of those dates (if "close" mattered).

18. Attorney Leikam represented to Petitioner's counsel that she had completed the Election of Rights form on or about July 21, 2019, and that her then-legal assistant, Tawanna Hackley, had submitted the completed form by email to Petitioner on July 23, 2019.

19. Petitioner ran email searches and reported to Attorney Leikam that no emails were received from Ms. Hackley or from anyone else at CLG submitting a completed Election of Rights or otherwise requesting an administrative hearing to dispute the Complaint against Respondent.

20. On December 3, 2019, Attorney Leikam sent an email to Petitioner's counsel, transmitting an Answer to the Complaint for filing on Respondent's behalf.[4] Attorney Leikam also sent an email attaching Respondent's response to the Motion for Waiver. The response invoked the doctrine of equitable tolling as a defense to the admitted untimely filing of the Election of Rights.

21. The Motion for Waiver and response were presented to the Board of Nursing on December 5, 2019. As a result of Attorney Leikam's request that the Board defer review of the case pending a hearing on equitable tolling, the matter was referred to DOAH to hear the equitable tolling defense.

22. The equitable tolling defense asserted by Respondent is predicated on the circumstances surrounding Attorney Leikam having entrusted the filing of the Election of Rights to her then-assistant, Tawanna Hackley, who failed to complete the assigned task.

23. Tawanna Hackley was not a lawyer or a paralegal; her position at CLG was a "legal assistant," and she worked under the supervision of Attorney Leikam. Ms. Hackley began working at CLG on November 12, 2018. Just over eight months later, on July 24, 2019, she was fired for inadequate performance.

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[4] As noted above, Attorney Leikam had recorded in the File Notes that as of July 22, 2019, Respondent had not yet paid the requested retainer fee, and that until Respondent paid, she was only going to file the Election of Rights and not the Answer. No evidence was offered to establish when Respondent paid, but based on Attorney Leikam's July 22, 2019, File Notes entry, presumably Respondent did not pay until shortly before Attorney Leikam filed the Answer on December 3, 2019.

24. Attorney Leikam testified candidly that during Ms. Hackley's short tenure at CLG, she had a lot of performance issues, described as follows:

> It was really—it was really everything from not completing tasks, not documenting tasks, or then doing tasks but having multiple repeated errors in the format or the spelling or the language. It was—it was really a constant issue one way or another. But to me, the biggest issue was that when I would confront these things with her, she just denied all responsibility. (Tr. 25-26).

25. Ms. Hackley was primarily trained by another legal assistant, Katherine Kalinowski, who acknowledged that Ms. Hackley did not seem to grasp what she was taught. When asked how long it took Ms. Kalinowski to train Ms. Hackley, of the eight months she was employed, Ms. Kalinowski responded, "Eight months." (Tr. 108). Nonetheless, Ms. Kalinowski testified that after the first month or so, she stopped checking over Ms. Hackley's work, limiting her involvement to answering Ms. Hackley's questions.

26. Attorney Leikam communicated in telephone calls with CLG's director of human resources, Kristin Teague, regarding the consistent performance problems she was having with Ms. Hackley. However, no specific steps to address these problems were documented in Ms. Hackley's personnel file until her last few weeks at CLG. In particular, her personnel file contains one "coaching" document, prepared by Ms. Teague from information given to her by Attorney Leikman to facilitate a performance-related meeting between Attorney Leikam and Ms. Hackley on July 8, 2019; and one formal corrective action in the form of a counseling warning, issued on July 12, 2019.

27. The July 8, 2019, coaching document listed specific performance issues to be addressed in discussion with Ms. Hackley, all of which fell within the broad categories of performance issues to which Attorney Leikam testified at the hearing: not completing tasks assigned to her, not documenting tasks, and committing multiple repeated errors in the work she did complete. The coaching document ended with a list of specific behavior changes needed from

Ms. Hackley, and item two on the list was: "Complete tasks given by attorneys and/or ask a question if she does not understand."

28. The next step in CLG's performance review process if an employee does not meet the expectations communicated in a coaching discussion is formal corrective action in the form of a counseling warning. A corrective action counseling warning was issued to Ms. Hackley on July 12, 2019, only four days after the scheduled performance discussion. The corrective action document was signed by Ms. Teague on July 12, 2019, and by Ms. Hackley and Attorney Leikam on July 15, 2019. The document warned Ms. Hackley that her performance needed to improve because she was making too many mistakes of the type identified by Attorney Leikam in her testimony: not completing assignments given to her by her attorneys, not following the CLG procedures for documenting tasks, not scanning documents into the electronic files, and making a lot of spelling and formatting errors. A confidential version of the corrective action document contained a heading identifying the reason for the action as "Unsatisfactory Work Performance." (Jt. Ex. 1, Pet. Depo. Ex. 2, Bates page 0028).

29. The corrective action defined a time period for improvement of six months from the date it was issued, during which Ms. Hackley was expected to have weekly meetings with Attorney Leikam to discuss her performance. Almost immediately after the corrective action counseling warning was signed by Ms. Hackley, though, Ms. Teague testified that she and Attorney Leikam made the decision that Ms. Hackley needed to be terminated. Together, they informed Ms. Hackley that she was fired on Wednesday, July 24, 2019, but the decision was made either on Monday, July 22, 2019, or Tuesday, July 23, 2019. Ms. Teague explained when and why the decision was made: "Earlier that week I think we had decided that we could no longer risk her continuing to work on our files." (Jt. Ex. 1 at 53). That was because of the errors Ms. Hackley kept making.

30. The precursor to this joint decision appears to have occurred on Friday, July 19, 2019 (the day on which Attorney Leikam received the Complaint by certified mail from Petitioner). Attorney Leikam apparently spent her morning in several rounds of email exchanges with Ms. Hackley. In each of these rounds, Attorney Leikam pointed out errors in Ms. Hackley's work, to which Ms. Hackley responded by blaming someone or something else for the errors. Attorney Leikam then forwarded each round of these email exchanges to Ms. Teague at CLG's Michigan office, and the email strings were placed in Ms. Hackley's personnel file.

31. Attorney Leikam testified that she completed Respondent's Election of Rights on July 22 or 23, 2019, and physically handed it to Ms. Hackley with verbal instructions to scan and email the Election of Rights to Petitioner.[5]

32. Attorney Leikam exercised questionable judgment by entrusting to Ms. Hackley the critical step of transmitting the Election of Rights to Petitioner without verifying for herself that the email was sent and received, when at the same time she and Ms. Teague had jointly concluded that Ms. Hackley had to be fired because they "could no longer risk her continuing to work on our files." But according to Attorney Leikam, it is standard CLG practice for legal assistants to transmit by email these time-critical documents to the opposing party for filing.

33. That this is the standard practice is not so clear in the CLG policies and procedures manual, which seems to assign to attorneys the responsibility for all communications of any kind with opposing parties. Further, as to deadlines, the CLG manual is quite clear that "[w]hile legal assistants should remind attorneys daily of their upcoming deadlines/events, both parties are responsible for ensuring that deadlines and events are not missed."

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[5] Attorney Leikam told Petitioner in the early November 2019 email exchanges that she completed the Election of Rights form on July 21, 2019, and gave it to Ms. Hackley to submit to Petitioner, but that is unlikely, since July 21, 2019, was a Sunday. More likely, Attorney Leikam completed the Election of Rights form on Monday, July 22, 2019, or possibly Tuesday, July 23, 2019, and gave it to Ms. Hackley to scan and email to Petitioner.

34. Attorney Leikam acknowledged that when CLG's legal assistants send emails to opposing parties regarding a case, CLG's standard practice also dictates that the legal assistant must copy the attorney handling the case on the email. Attorney Leikam did not receive a copy of an email sent by Ms. Hackley to Petitioner transmitting the Election of Rights for filing.

35. Despite not getting a copy of an email from Ms. Hackley transmitting the Election of Rights to Petitioner, Attorney Leikam believed Ms. Hackley completed the assigned task by sending the completed Election of Rights form by email to counsel for Petitioner on July 23, 2019. Attorney Leikam believed that the filing was made on July 23, 2019, because an entry dated July 23, 2019, in the File Notes document maintained for Respondent's case stated: "Sent election of right to Dirlie McDonald @ DOH place in G:drive. TH."

36. The File Notes document is a Microsoft Word document. File Notes documents are maintained for each case, with contact information for parties and counsel, and entries reporting on events and communications relevant to the case. The File Notes documents can be accessed by any CLG employee. In theory, and in accordance with CLG procedures, an entry's date should be the date the entry is actually made, but no date or time stamp is automatically generated to ensure accuracy. As such, an entry can be made either before or after the typed date. Likewise, in theory, and in accordance with CLG procedures, the initials at the end of a File Notes entry should identify the person who made the entry, but the initials are not automatically generated to identify who accessed the File Notes to record a particular entry.

37. Attorney Leikam testified that she checked the File Notes for Respondent's case sometime on July 24, 2019, and saw the entry for July 23, 2019, by "TH" stating that the "election of right" was "sent" to "Dirlie McDonald @ DOH." Attorney Leikam later made the following entry in the File Notes: "7/24/19: Client left a message worried about payment and election of rights. I played phone tag and left him a message saying it was covered. Sent f/u [follow-up] email. LAL."

38. According to Attorney Leikam, the sequence of events, as recorded in her File Notes entry, was that, first, Respondent called and left a message expressing concern about whether the election of rights had been filed. Then, after Attorney Leikam received the message, she investigated the status of the Election of Rights assignment by reviewing the File Notes and finding the July 23, 2019, entry by TH. Attorney Leikam drew the inference from the entry and the initials that Ms. Hackley had completed her assigned task of sending the Election of Rights by email to Petitioner on July 23, 2019 (even though the entry does not state how the Election of Rights was sent, and even though Attorney Leikam did not receive a copy of an email from Ms. Hackley to Petitioner). Then, Attorney Leikam "played phone tag" with Respondent, and ultimately left a message saying "it was covered." Attorney Leikam then drafted a "follow-up" email to Respondent and sent it to him.

39. The follow-up email prepared by Attorney Leikam stated: "We submitted the Election of Rights form on 7/23/19. We received it on 7/19/19, so it is timely. This is because we were still counsel of record[, so] the Department should have sent the Administrative Complaint to our office. Thus, the Complaint you received [earlier] is not considered properly served." This email was sent to Respondent at 3:16 p.m., on July 24, 2019. Of necessity, then, all of the preceding steps in the sequence occurred sometime earlier on July 24, 2019, if not before July 24, 2019.

40. Attorney Leikam offered no explanation as to why she did not just ask Ms. Hackley if she completed the assignment so Attorney Leikam could answer Respondent's inquiry. Ms. Hackley was still in the office on July 24, 2019, until nearly the time that the follow-up email was sent at 3:16 p.m.

41. Attorney Leikam's review of the File Notes entry ostensibly made by Ms. Hackley on July 23, 2019, was inadequate to support the inference drawn by Attorney Leikam. Reasonable prudence dictated that she ask Ms. Hackley to confirm that she sent the Election of Rights by email, before assuring the client that "we" submitted the Election of Rights on July 23, 2019, and that

it was timely filed. The File Notes entry itself did not identify how the Election of Rights was "sent," and Attorney Leikam was not copied on an email from Ms. Hackley to Petitioner transmitting the Election of Rights, as was the standard CLG practice.[6]

42. Meanwhile, Attorney Leikam also spent time on July 24, 2019, dealing with Ms. Hackley's termination. Attorney Leikam testified that she spoke with Ms. Teague during the morning of July 24, 2019, to confirm the plan to schedule a meeting with Ms. Hackley at 3:00 p.m., and that Ms. Teague would attend by telephone.

43. Sometime between 12:00 p.m. and 1:00 p.m., Attorney Leikam used Microsoft Outlook to schedule the 3:00 p.m. meeting, sending "invitations" to Ms. Hackley and Ms. Teague.[7]

44. Ms. Hackley's receipt of an "invitation" to a meeting with Attorney Leikam and Ms. Teague was not well received, coming on the heels of the corrective action counseling warning Ms. Hackley had signed nine days earlier, and the multiple rounds of criticizing emails from Attorney Leikam five days earlier. According to Attorney Leikam, rather than accepting the invitation, Ms. Hackley "stormed" into her office and started yelling that they

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[6] Attorney Leikam attempted to justify the reasonableness of her inference by explaining Ms. Hackley did not always follow procedure by copying her on emails. Even if true, that would not support the reasonableness of inferring Ms. Hackley completed the email filing assignment from an entry that did not say the Election of Rights was sent by email. Moreover, Attorney Leikam's explanation as to why she was unconcerned by the fact that she did not receive a copy of an email was impeached by Respondent's own evidence. According to an audit of Ms. Hackley's emails, not done until November 2019, all outgoing emails from July 10, 2019, through July 24, 2019, from Ms. Hackley to Petitioner or another party outside of CLG were copied to Attorney Leikam and/or Ms. Bazzigaluppi. If this was a performance issue for Ms. Hackley previously, it apparently was not a problem in July 2019.

[7] Ms. Teague had a somewhat different, but much less clear, recollection of the timing. She repeatedly said she was not sure of the various times to which she hesitantly testified. Ms. Leikam, in contrast, did not express the same hesitancy in her testimony. To the extent their testimony differed as to when certain steps occurred, Ms. Leikam's more certain recollection is generally credited. It would stand to reason that she would have a clearer recollection of the timing of events that occurred in her physical presence than Ms. Teague's admittedly uncertain recollection of the timing of events in which she participated remotely by telephone from Michigan.

were going to fire her and she was not going to sit around and wait for a meeting. Ms. Hackley then left Attorney Leikam's office, and Attorney Leikam said she heard "a lot of slamming for a little while." (Tr. 57). Then Ms. Hackley returned and said she was going to wait for Ms. Teague.

45. Attorney Leikam said after this exchange, she called Ms. Teague immediately, who made herself available for a meeting "within about an hour's time." (Tr. 57). Given Attorney Leikam's description of the events that started at between noon and 1:00 p.m., the meeting must have begun no earlier than 1:30 p.m. and possibly as late as 2:30 p.m.

46. The termination meeting was relatively uneventful, as Ms. Hackley was already expecting to hear that she was fired, and she was. No reasons for dismissal were discussed. Ms. Teague asked Ms. Hackley to give her key to Attorney Leikam, and she did. Ms. Teague than asked Ms. Hackley to delete her CLG email account from her phone while Attorney Leikam observed her doing so, and she did.

47. Inexplicably, Ms. Hackley was not instructed to leave, nor was she instructed to pack up her personal things while a witness observed her doing so. Attorney Leikam testified that she does not know whether Ms. Hackley left the building right away, but believes that she heard Ms. Hackley at her desk for almost an hour after she was fired. Ms. Hackley's desk was just outside of Attorney Leikam's office, but not within her line of sight.

48. Ms. Kalinowski testified that her work station was approximately six feet away from Ms. Hackley's station. Ms. Kalinowski was out to lunch when the termination meeting started in Attorney Leikam's office, but returned before it ended. Ms. Kalinowski testified that when Ms. Hackley left the meeting, she was a little teary-eyed and gave Ms. Kalinowski a hug, telling her she had been fired. Ms. Kalinowski told her she was sorry.

49. Ms. Kalinowski testified that Ms. Hackley went to her work station and was "doing something on the computer," though Ms. Kalinowski could not say if it was work or something else, as she could not see what was on the

screen. Ms. Kalinowski said she gave Ms. Hackley "a few minutes," then asked what she was doing, and Ms. Hackley said she was "cleaning things up." (Tr. 110). Ms. Kalinowski told Ms. Hackley she did not think she needed to worry about that, so Ms. Hackley got her things and went outside to wait for her ride. Ms. Kalinowski testified that it was between 2:30 p.m. and 3:00 p.m. when Ms. Hackley left the building.[8]

50. Attorney Leikam confirmed that Ms. Hackley was terminated because of performance issues. Ms. Teague agreed, stating that the decision was made to fire Ms. Hackley because of all the errors she continued to make. As such, when Ms. Hackley applied for unemployment compensation, CLG did not contest it. To do so, CLG would have had to show that Ms. Hackley had engaged in gross misconduct, and there was no evidence of that.

51. Despite Ms. Hackley's performance inadequacies recounted by Attorney Leikam, there was no immediate undertaking after Ms. Hackley's termination to audit the files on which she had been working to determine whether there were additional instances in which she failed to complete assigned tasks. That was negligent.

52. Attorney Leikam's acceptance at face value of an internal file notation as sufficient proof that Ms. Hackley completed an assignment just given to her on July 22, 2019, was negligent.

53. Even if Attorney Leikam was unwilling or unable to ask Ms. Hackley before she left the building on July 24, 2019, whether she completed the assignment, there was an easy and simple solution. Attorney Leikam could

[8] Among other evidence relied on by Respondent, testimony regarding conversations with Ms. Hackley is hearsay. At the outset of the hearing, the parties were informed that to the extent their evidence constituted or contained hearsay, the hearsay evidence would not be relied on as the sole basis for a finding of fact, whether objected to or not, unless the hearsay would be admissible in a civil action in Florida, i.e., that it would fall within a hearsay exception under the Florida Evidence Code. *See* § 120.57(1)(c), Fla. Stat. (2019); and Fla. Admin. Code R. 28-106.213(3). The parties were instructed to identify on the record any hearsay exceptions they intended to rely on so that argument could be presented by both parties. Neither party raised a hearsay exception on which they were relying. Accordingly, the testimony regarding conversations with Ms. Hackley is recounted not for the truth of what was said, but rather, to portray an approximate timeline of the events on July 24, 2019.

have, and should have, called or emailed counsel for Petitioner to ask whether Respondent's Election of Rights had been submitted. As of July 24, 2019, there were still 16 days remaining—more than two-thirds of the 21-day window—to timely file an Election of Rights. It would have been easy to verify whether the just-fired employee who constantly made errors during her short tenure at CLG had, or had not, made another error on this assignment. Reasonable prudence and due diligence required that Attorney Leikam do so, particularly since she and Ms. Teague, the human resources director, had concluded together earlier that week that the firm could not risk having Ms. Hackley continue to work on their files.

54. Attorney Leikam did nothing to check on the status of Respondent's case until she received the Motion for Waiver on November 6, 2019. Then, with the clarity of belated hindsight, the forces were marshalled as they should have been in late July 2019. Ms. Hackley's emails were searched and audited in November 2019, something that should have been done in late July 2019. And, as would have been confirmed in late July 2019 had the audit been requested then, the resulting audit report was that no email was sent by Ms. Hackley to counsel for Petitioner transmitting Respondent's Election of Rights.

55. Respondent, through counsel, contends that Ms. Hackley's actions and inaction constituted intentional sabotage and, as such, extraordinary circumstances beyond Respondent's control and beyond Attorney Leikam's control that could not have been discovered in the exercise of due diligence.

56. The credible non-hearsay evidence, with reasonable inferences drawn therefrom, does not support a finding that Ms. Hackley engaged in intentional sabotage. Instead, that evidence only establishes that Ms. Hackley did not complete an assignment verbally conveyed to her shortly before she was fired. At most, the evidence supports a finding that she was negligent, as she apparently had been throughout her tenure at CLG.

57. Respondent, through counsel, argues that the entry dated July 23, 2019, in the CLG internal File Notes document by "TH" must have been intentionally made by Ms. Hackley after she knew she was fired, out of anger for being fired, to sabotage Attorney Leikam. Of course, this same entry was considered by Attorney Leikam on July 24, 2019, to be solid evidence that Ms. Hackley, in fact, completed her assignment by emailing the Election of Rights to Petitioner on July 23, 2019. Just as the latter inference was not reasonable, as previously found, the opposite inference of intentional sabotage is not fair, reasonable, or supported by the credible evidence.

58. To begin with, the evidence is inconclusive regarding the timeline. Although Attorney Leikam was fairly specific in recalling the timeline related to Ms. Hackley's termination, she testified only in generalities as to the sequence of events on July 24, 2019, with regard to her investigation to respond to Respondent's telephone message. If anything, the sequence of events suggests that Attorney Leikam discovered the File Notes entry dated July 23, 2019, before Ms. Hackley became aware between 12:00 p.m. and 1:00 p.m. on July 24, 2019, that she was likely going to be terminated.

59. Even if the timing predicate had been established, Attorney Leikam candidly admitted that the only basis for inferring that Ms. Hackley had intentionally falsified the File Notes entry to sabotage her was the fact, discovered in early November, that the File Notes entry was false.

60. Respondent argues that the only reasonable inference from the false entry is that Ms. Hackley intentionally falsified the records. But another equally reasonable, if not more reasonable, inference from the July 23, 2019, entry is that Ms. Hackley may have been trying to respond to the recent criticism of her failure to document events in File Notes, by making an entry before she actually completed the task. The completed Election of Rights had also been scanned and saved to the G:drive, something else that Ms. Hackley had been criticized for not doing. Ms. Hackley may well have intended to follow through by preparing an email to counsel for Petitioner to transmit the

already-scanned, already-saved Election of Rights form, but may have gotten sidetracked after making the File Notes entry on July 23, 2019. Had Attorney Leikam asked Ms. Hackley on July 24, 2019, when she saw the July 23, 2019, File Notes entry, the matter may have been resolved. Instead, Ms. Hackley was fired and left the building mid-afternoon on July 24, 2019.[9]

61. Respondent, through counsel, also points to the short time that Ms. Hackley was seen at her computer after she was fired, when she was seen doing something for a few minutes before she packed up her things and left. The suggestion is that the only, or most reasonable, inference is that Ms. Hackley must have been making the July 23, 2019, false entry in File Notes out of anger for being fired. Alternatively, the argument is that Ms. Hackley made the false entry between learning of the meeting at which she was pretty sure she was going to be fired and the actual meeting.

62. These arguments are speculative, unsupported by competent substantial evidence, and not proven to be more likely than not. Once again, the suggested inference is not the only possible or reasonable explanation. Another reasonable inference is that Ms. Hackley may have been spending the little time she had at her computer, after learning she would likely be fired, to delete personal emails and/or documents that she did not want to leave behind on her work station. In the absence of supporting evidence, therefore, Respondent's suggested inference is rejected.

63. Before the Board of Nursing, in the response opposing Petitioner's Motion for Waiver filed December 3, 2019, Attorney Leikam represented that the inference that Ms. Hackley had intentionally falsified the July 23, 2019, entry would be supported by evidence showing that in more than 30 other instances at CLG, Ms. Hackley had falsely documented performing work when she had not. (Resp. Ex. 4, ¶ 16). No such evidence was offered at the

[9] Neither Respondent's inference nor the alternative inference suggested here is supported by evidence sufficient for a finding of fact. The point here is that Respondent's suggested inference is not the only possible or reasonable explanation for the false entry. In the absence of supporting evidence in the record, the inference offered by Respondent is rejected.

hearing. Instead, according to Ms. Teague, Attorney Leikam's suspicion that Ms. Hackley intentionally sabotaged CLG's internal file for Respondent's case was the only time in which there was a suspicion of that kind during her tenure at CLG. She confirmed that Attorney Leikam first expressed her suspicion that the File Notes entry was intentionally falsified when she discovered well after Ms. Hackley was fired that no Election of Rights was filed. That is consistent with Attorney Leikam's testimony: the fact that the entry was false was the basis for inferring that it was intentionally falsified. She admitted she has no proof that Ms. Hackley intentionally falsified or sabotaged CLG's internal records for Respondent's case.

64. As a final argument to bolster the missing evidence of nefarious intent, Respondent, through counsel, asserted that an inference of intentional falsification is supported by other evidence from Ms. Hackley's prior job at the Department of Health. However, to make the desired argument, Respondent mischaracterized the evidence. A fair review of the evidence undermines Respondent's argument.

65. Respondent's argument is based on an excerpt of Ms. Hackley's personnel file from the Department of Health in evidence (subject to the hearsay caveat given at the outset of the hearing). The excerpt includes personnel forms indicating that Ms. Hackley was dismissed on July 29, 2016, from a "regulatory specialist II" career service position.

66. Respondent's PRO asserts that the personnel file excerpt shows that "Ms. Hackley had been previously fired from her employment with the Department for what appears to be falsification of internal documents; specifically timesheets[.]" (Resp. PRO ¶ 49). Respondent's PRO refers to documentation within the personnel file claimed to support "the contention that Ms. Hackley was falsifying her timesheets." (Resp. PRO ¶ 51).

67. Contrary to these characterizations, the personnel file excerpt contains no evidence establishing the reason why Ms. Hackley was dismissed from employment as of July 29, 2016. The documents referred to in Respondent's

PRO were what appears to be a single written reprimand memorandum, *dated July 14, 2008*, plus a few pages containing handwritten notes that appear to relate to timesheets *in August 2008*. The memorandum indicates that Ms. Hackley was issued a written reprimand on July 14, 2008, for two reasons: attendance, including excessive tardiness; and "errors on your timesheet." (Resp. Ex. 15, Bates page 424). The written reprimand does not state that Ms. Hackley intentionally falsified timesheets; it states that as of July 14, 2008, she was making errors on her timesheets. The last few pages of the personnel file excerpt cannot be characterized at all without a witness to explain what the handwritten notes represent. All that can be gleaned is that information was written down by someone apparently in reference to Ms. Hackley's timesheets during one week in August 2008. Whatever this information represents, it apparently did not result in any formal action such as a written reprimand, which presumably would have been included in the exhibit. Without a witness to explain these documents, they are plainly hearsay with no predicate to support a hearsay exception, and as such, cannot be the sole basis for a finding of fact.[10]

68. Importantly, Respondent's PRO fails to point out the eight-year gap in time between the timesheet errors for which Ms. Hackley was apparently reprimanded in July 2008, and her dismissal for unstated reasons in July 2016. The only fair inference is that any attendance and timesheet error problems Ms. Hackley had in 2008 were considered minor and were corrected. Presumably falsification of timesheets, had that occurred in 2008, would have been met with serious disciplinary action such that Ms. Hackley would not have rebounded and continued with no adverse personnel records for an eight-year employment span between 2008 and 2016.

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[10] The handwritten notes appear to only indicate that Ms. Hackley may have made more errors on her timesheets in August 2008. In an attempt to suggest something worse than mere errors, Respondent's PRO contains a glaring misquote, asserting that one note stated "8-11-08 Now the week 8-1/8-7 has codes but 0 hours! This was ***faked*** again today 8-11." (Resp. PRO at 14, ¶ 51) (emphasis added). The quoted note actually ends as follows: "This was ***faxed*** again today 8-11." (Resp. Ex. 15, Bates page 00427) (emphasis added).

69. In sum, Respondent mischaracterized a minor disciplinary action in 2008, and compounded that misfire by ignoring the huge time gap between the action and Ms. Hackley's dismissal, to advance an unsupportable claim that the timesheet issue in 2008 was somehow the reason for dismissal in 2016. That effort failed. Ms. Hackley's Department of Health personnel file adds nothing to Respondent's attempt to infer nefarious intent or bolster the claim that Ms. Hackley intentionally falsified CLG's internal records.

70. Regardless of the nature, timing, or intent of Ms. Hackley's File Notes entry, the evidence clearly establishes that there was ample time and opportunity, with the exercise of even a modicum of due diligence, for Attorney Leikem to have discovered before the expiration of the filing period that the Election of Rights had not been filed. The circumstances did not prevent her from timely filing the Election of Rights.

CONCLUSIONS OF LAW

71. DOAH has jurisdiction over the parties and subject matter of this proceeding, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2019).[11]

72. Petitioner's two-count Complaint seeks to take disciplinary action against Respondent's license, based on facts alleged and violations charged therein. Among the range of potential penalties sought are license revocation and suspension. Pursuant to section 120.60(5), Florida Statutes, "No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the entry of a final order, the agency has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action and unless the licensee has been given an adequate opportunity to request a proceeding pursuant to ss. 120.569 and 120.57."

[11] Citations herein to Florida Statutes are to the 2019 versions.

73. The Complaint was properly served on Respondent's counsel of record by certified mail, received July 19, 2019. The Complaint included a Notice of Rights providing Respondent with an adequate opportunity to request an administrative hearing pursuant to sections 120.569 and 120.57.

74. The Notice of Rights complied with the notice requirements in the statutes and in Florida Administrative Code Rule 28-106.111 (specifying the requirements for a "point of entry" to administrative proceedings after notice of an agency's intended action). Respondent does not contend otherwise.

75. Pursuant to rule 28-106.111(2), "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."

76. Since 1998, section 120.569(2)(c), as amended by chapter 98-200, section 4, Laws of Florida, has provided:

> A petition shall be dismissed if … it has been untimely filed. … This paragraph does not eliminate the availability of equitable tolling as a defense to the untimely filing of a petition.

Accord rule 28-106.111(4) ("any person who received written notice of an agency decision and 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.").

77. Respondent has invoked the defense of equitable tolling to excuse the untimely filing of his Election of Rights seeking a disputed-fact administrative hearing on the Complaint. Respondent acknowledges that he has the burden of proof, by a preponderance of the evidence, with regard to the claimed defense. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005); § 120.57(1)(j), Fla. Stat.

78. The doctrine of equitable tolling has been applied in Florida administrative proceedings under certain circumstances to permit the late

filing of a request for an administrative hearing that otherwise would be barred. *Machules v. Dep't of Admin.*, 523 So. 2d 1132, 1134 (Fla. 1988).

79. Equitable tolling applies to excuse an untimely filing "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." *Machules*, 523 So. 2d at 1134.

80. The doctrine is applied sparingly. When the party asserting equitable tolling has been represented by counsel, the party is generally bound by the actions and inaction of his lawyer. Unfortunately, that includes being bound by mistakes made by the lawyer and/or the lawyer's staff. "Garden variety negligence" or "excusable neglect" by the lawyer and/or the lawyer's staff is not considered an extraordinary circumstance warranting equitable tolling. *See, e.g., Aleong v. Dep't of Bus. & Prof'l Reg.*, 963 So. 2d 799, 801 (Fla. 4th DCA 2007) (agreeing with "[t]hree of Florida's district courts [which] have held that the untimely filing of a request for hearing by counsel is not an 'extraordinary' circumstance which warrants the application of the doctrine of equitable tolling."); *Williams v. Albertson's Inc.,* 879 So. 2d 657 (Fla. 5th DCA 2004); *Cann v. Dep't of Child. & Fam. Servs.,* 813 So. 2d 237 (Fla. 2d DCA 2002); *Envtl. Resource Assoc. v. Dep't of Gen. Servs.*, 624 So. 2d 330, 331 (Fla. 1st DCA 1993) ("There is nothing extraordinary in the failure to timely file in this case. Quite to the contrary, the problem in this case is the too ordinary occurrence of a party's attorney failing to meet a filing deadline.").

81. Before the 1998 amendment to section 120.569(2)(c), there were a few cases that accepted a showing of excusable neglect as a defense to excuse untimely requests for an administrative hearing. However, that defense was eliminated by the 1998 amendment, which pointedly retained only equitable tolling as a viable defense to an untimely administrative hearing request.

82. *Rothblatt v. Department of Health and Rehabilitative Services*, 520 So. 2d 644 (Fla. 4th DCA 1988), is one of a few pre-1998 cases in which excusable neglect was accepted as a defense to excuse an untimely administrative

hearing request. The facts are strikingly similar to those found here. In *Rothblatt*, an administrative complaint was served by certified mail on appellant, alleging violations of the Florida Drug and Cosmetic Act and seeking to impose a $10,000 fine as discipline. Appellant was notified of the right to request a formal administrative hearing, which had to be received by the Department of Health and Rehabilitative Services (HRS) within 30 days after receipt of the complaint. The deadline was May 13, 1987, but the attorney for appellant did not send the request until May 18, 1987, by express mail, received by HRS on May 19, 1987. HRS proceeded to issue its final order, denying the request for hearing as untimely filed.

83. The attorney filed a motion to set aside the final order, with a supporting affidavit. The attorney's affidavit stated that she gave the request for a formal hearing to the firm's receptionist on May 11, 1987, with instructions to send it by Federal Express the next day. The attorney did not know that, instead of sending the request when instructed, the receptionist did not send it until six days later. The attorney did not learn of this until she received a copy of the final order on June 10, 1987. The affidavit added that the receptionist was fired for ineptitude on June 1, 1987 (before the attorney learned of this particular error). The Fourth District was persuaded on appeal that the motion to set aside the final order should be granted, because "the facts reflect excusable neglect." *Rothblatt*, 520 So. 2d at 645.

84. The dimensions of "excusable neglect" are well fleshed out in Florida case law, because it is a standard for setting aside defaults and reopening judgments under Florida Rules of Civil Procedure 1.500 and 1.540. An oft-quoted description of excusable neglect circumstances is as follows:

> [W]here inaction results from clerical or secretarial errors, reasonable misunderstanding, a system gone awry or any other of the foibles to which human nature is heir[.]

Somero v. Hendry Gen. Hosp., 467 So. 2d 1103, 1106 (Fla. 4th DCA 1985). The circumstances found here may meet the standard for excusable neglect, but they do not reach the higher bar required for equitable tolling.

85. The Second District Court of Appeal's decision in *Cann,* 813 So. 2d 237, put to rest any notion that excusable neglect could still excuse an untimely request for an administrative hearing following the 1998 statutory amendment. In that case, the Canns were seeking to renew their license as a medical foster home for children with serious medical conditions. The Department of Children and Family Services gave notice of its intent to deny license renewal. The Canns retained counsel to request an administrative hearing to contest the denial. Counsel properly marked November 29, 2000, on his calendar as the due date, then prepared and mailed the request on November 28, 2000. The problem was that he sent the request by regular mail, and rather than arriving in one day, it arrived two days later, on November 30, 2000. The Department issued a final order denying license renewal and rejecting the untimely hearing request.

86. On appeal, the Canns argued that the late request should be accepted consistent with *Rothblatt*, because the one-day delay was the result of excusable neglect. However, the court pointed out that *Rothblatt* predated the 1998 amendment to section 120.569(2)(c): "We conclude that this amendment overruled … *Rothblatt* to the extent [that case] held that an untimely administrative appeal could proceed if the delay was the result of excusable neglect." *Cann*, 813 So. 2d at 239. Since the facts did not demonstrate "extraordinary circumstances," equitable tolling was not applicable, and dismissal of the untimely hearing request was required.

87. While the court in *Cann* was sympathetic to the policy argument underlying the excusable neglect standard, "the legislature or the relevant agencies are decision makers to which these policy arguments must be directed. In the context of administrative law, the courts cannot override a filing rule that does not violate due process." *Cann*, 813 So. 2d at 240. In his

concurring opinion, Judge Blue urged the Legislature to consider making the doctrine of excusable neglect available to provide equitable relief "for those citizens of the state who are required to have their personal and property rights decided in the administrative arena." *Cann*, 813 So. 2d at 240.

88. In the 18 years since Judge Blue urged a change, the Legislature has not acted on the invitation to change the standards for untimely hearing requests. The general rule, as held in *Cann*, remains that dismissal of an untimely request for hearing is required. The exception, to be sparingly applied, is limited to the three types of circumstances recognized in *Machules* as appropriate for the defense of equitable tolling.

89. This holding has been uniformly followed in administrative proceedings of all types. In disciplinary actions against professional licenses, untimely hearing requests seeking to contest administrative complaints are not accepted where the facts demonstrate only excusable neglect, and not extraordinary circumstances warranting equitable tolling. *See Aleong*, 963 So. 2d 799 (veterinarian waived his right to contest complaint imposing disciplinary sanctions, where untimely request for an administrative hearing was due to his attorney's mistake in not properly calendaring the due date); *Patz v. Dep't of Health, Fla Bd. of Med.*, 864 So. 2d 79, 80-81 (Fla. 3d DCA 2003) (rejecting doctor's argument that entry of a "default" (i.e., a final order) against him was improper under Florida Rule of Civil Procedure 1.500, where the delay was not protracted, the untimely Election of Rights was filed before a hearing on the Department's motion for "default," and the Department was not prejudiced by the delay; holding that this matter "is not controlled by the rules of civil procedure" but instead, by section 120.569 and rule 28-106.111).

90. Both parties recognized in their PROs that recently, the undersigned found, under unique and extraordinary circumstances, that equitable tolling applied to excuse a late-filed hearing request. *Dep't of Health v. LaRosa*, Case No. 19-1805PL (Order Determining Timeliness, July 5, 2019). It is true, as Respondent notes, that in so ruling, the undersigned determined that there is

no blanket rule established by the Florida cases that a party's own attorney's actions can never be considered "extraordinary circumstances." But the chasm is vast between this case and the rare case in which a party's own attorney's actions are extraordinary circumstances for equitable tolling.

91. As *LaRosa* demonstrated, in compelling circumstances involving an attorney's egregious misconduct, tantamount to abandonment of his client, might the rare case be presented of "extraordinary circumstances" sufficient to warrant equitable tolling to excuse an attorney's failure to timely file a request for hearing. *LaRosa* presented compelling extraordinary circumstances in which a party's former attorney and assistant engaged in concerted, active, egregious misconduct, marked by misrepresentations and deception, to such a degree that the attorney was found to have abandoned the client. In that context, where the former attorney was acting for his own self-interest and not as agent to represent his client's interests, the attorney's inaction in never appearing on the client's behalf or filing the Election of Rights he was hired to file until well after the deadline, could not be imputed to the client as attorney actions and inaction normally are.[12]

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[12] The *LaRosa* Order cataloged a number of federal cases supporting the rare application of equitable tolling in extraordinary circumstances of egregious attorney misconduct and abandonment. The circumstances in these cases bear no resemblance to the facts found above, any more than the *LaRosa* case does. *See, e.g., Holland v. Florida,* 560 U.S. 631, 650-654 (2010) (normally a petitioner bears the risk of attorney error, so garden variety negligence or excusable neglect will never justify equitable tolling, but allegations of egregious attorney misconduct tantamount to abandonment of client could be extraordinary circumstances warranting equitable tolling, entitling petitioner to a hearing on equitable tolling); *Maples v. Thomas*, 565 U.S. 266, 282-83 (2012) (reaffirming the general rule that under principles of agency law, a petitioner bears the risk of negligent conduct on the part of his attorney, and is ordinarily bound by counsel's failure to meet a filing deadline, but attorney abandonment of client severs the agency relationship; attorney abandonment presented extraordinary circumstances beyond the petitioner's control, justifying application of equitable tolling); *Cooper v. Fisher*, 676 Fed. Appx. 355, 357 (5th Cir. 2017) (petitioner was entitled to a hearing on his verified equitable tolling claim that his attorney falsely implied that a filing was timely made *and* actively misled the petitioner). *See also Cadet v. Fla. Dep't of Corr.*, 853 F.3d 1216, 1234-35 (11th Cir. 2017) (rejecting equitable tolling where attorney's negligence in missing a filing deadline did not equate to abandonment as there was no rejection or desertion of attorney's responsibilities, nor did it equate to attorney misconduct); *Robinson v. State Atty. for Fla.*, 808 Fed. Appx. 894 (11th Cir. 2020) (attorney arguably was negligent on several occasions, but his negligence did not rise to the level of abandonment or misconduct necessary to show extraordinary circumstances for equitable tolling).

92. The circumstances of egregious attorney misconduct and abandonment in *LaRosa* were found by the undersigned to be unique, rare, and extraordinary. Here, the same fact-finder views the facts proven to be in stark contrast to the extraordinary circumstances presented in *LaRosa*. The facts found here are not unique, not rare, not extraordinary, and not grounds for the sparing application of equitable tolling. Attorney Leikam was not shown to have engaged in misconduct, let alone egregious misconduct. Instead, she was negligent in not adequately supervising an assistant whose actions and inaction were shown to be negligent and in keeping with her error-riddled job performance that ultimately caused her termination. Attorney Leikam mistakenly relied on an internal note, which, however characterized, was simply not proof that an external filing with Petitioner had been accomplished. She was negligent in not determining why she did not receive the email copy required by CLG's standard practices. And she was negligent in not seeking simple confirmation from Petitioner as to whether the filing was, in fact, made after the assistant was fired, while there was still plenty of time left in the 21-day window to timely file a hearing request.

93. Perhaps conceding that these circumstances do not rise to the level of "extraordinary," Respondent's PRO, in the conclusions of law, rather than in the findings of fact, recasts the hearing testimony to propose as a conclusion of law that Attorney Leikam was lying to Respondent when she falsely told him that his Election of Rights had been filed on July 23, 2019. (Resp. PRO ¶ 96). The tone of that proposed conclusion stands in marked contrast to the proposed findings of fact, which emphasize that Attorney Leikam reasonably inferred from the File Notes entry by "TH" on July 23, 2019, that the Election of Rights had, in fact, been submitted to Petitioner. There was no evidence presented that would support a finding that Attorney Leikam lied, i.e., knowingly misrepresented the facts to Respondent, and no such finding has been made.

94. As found above, Respondent failed to prove that Ms. Hackley's actions and inaction were anything more than ordinary negligence, a continuation of the performance inadequacies for which she was fired. Respondent did not prove the theory that she intentionally falsified or sabotaged CLG's records.

95. Although Respondent's PRO primarily relies on the second category of equitable tolling cases recognized by *Machules*—that extraordinary circumstances prevented the timely filing—Respondent's PRO also offers an argument under the first category of equitable tolling cases, albeit with a twist to how that category has been applied in cases. Respondent's PRO suggests that the false entry by "TH" in File Notes dated July 23, 2019, misled or lulled *both* Respondent *and* Attorney Leikam into inaction so as to justify application of equitable tolling.

96. First, as for Respondent, for the reasons previously stated, this is not a case in which Respondent's individual actions can be separated from that of his attorney. There is no question that Respondent retained and relied on Attorney Leikam to file whatever was necessary to protect his interests. He had ceded to her the responsibility for filing the Election of Rights, and was not about to act on his own to do so.

97. As for Attorney Leikam, the undersigned concludes that if she were subjectively misled by the July 23, 2019, entry, she should not have been; and in any event, she had no basis for being "lulled" into inaction. It was her responsibility to ensure timely filing of the Election of Rights. While perhaps she could delegate the mechanical task of emailing the Election of Rights form to Petitioner for filing, she could not delegate the responsibility for verifying that task was accomplished. An internal File Notes entry was not verification of an external email transmittal. An internal scanned, saved document was not verification that that document was attached to an external email transmittal. The CLG standard practice was set up to provide Attorney Leikam with that verification, by requiring that she be copied on the external email transmittal. She was not, and knew so.

98. Attorney Leikam had control of the circumstances, the means to easily verify the timely filing of the Election of Rights, and plenty of remaining time to rectify the error that she would have discovered if she had only asked, as due diligence required. Under these circumstances, equitable tolling is not warranted. *See, e.g., Florist Mut. Ins. Co. v. Dep't of Fin. Servs., Div. of Workers' Comp.*, Case No. 13-2940 (Fla. DOAH Sept. 30, 2013) (declining to apply equitable tolling to excuse a late filed petition for administrative hearing due to late mailing by counsel; even though the mail took unusually long to be delivered across town because of a circuitous route, that was not an "extraordinary" circumstance; moreover, the mail delay "in no way prevented Petitioner from asserting his rights," as counsel could have easily called the Department on the deadline day, found out the petition had not come in the mail, and delivered a replacement petition across town for timely filing).

99. Given the absence of circumstances found to justify application of equitable tolling, it is unnecessary to dwell on a consideration that would normally factor into the balance: whether Petitioner demonstrated that it would be prejudiced by accepting the untimely request for an administrative hearing. A determination of no prejudice alone could not justify application of equitable tolling when the circumstances themselves do not warrant it.

100. Petitioner offered no evidence on the issue of prejudice. However, as well-stated by Administrative Law Judge F. Scott Boyd in *Florist Mutual*, in explaining that the circumstances did not warrant equitable tolling:

> While this conclusion may seem contrary to the important goal of ameliorating harsh results where there is no prejudice to the other party, there is an equally important competing value: the filing deadlines of procedural rules must be routinely enforced if they are not to become blurred and unreliable.

Florist Mutual, Case No. 13-2940, FO at 13, ¶ 29. Similarly, where, as here, the circumstances were not shown to be extraordinary, nor were they shown

to have prevented Respondent's counsel from timely filing the Election of Rights had she acted with due diligence, the goal of routinely enforcing the filing deadline in section 120.569(3)(c) and rule 28-106.111 becomes paramount, without counterweight.

101. Stated somewhat similarly in *Lawrence v. United States*, 549 U.S. 327, 336 (2007), the Supreme Court explained why it rejected Lawrence's claim that his attorney's mistake in miscalculating the limitations period entitled him to equitable tolling: "If credited, this argument would essentially equitably toll limitations periods for every person whose attorney missed a deadline." Instead, application of the equitable tolling defense must remain sparing, so the exception does not swallow the rule and the legislative intent to require more than excusable neglect is honored.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Health, Board of Nursing issue a final order dismissing Respondent's Election of Rights request for a disputed-fact administrative hearing as untimely and not excused under the equitable tolling doctrine.

DONE AND ENTERED this 20th day of July, 2020, in Tallahassee, Leon County, Florida.

ELIZABETH W. MCARTHUR
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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.