STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ARIANA ORTEGA DOMINGEZ, E.M.T.,

Petitioner,

vs. Case No. 21-2270F

DEPARTMENT OF HEALTH, BUREAU OF EMERGENCY MEDICAL SERVICES,

Respondent.
_____/

FINAL ORDER

A final hearing in this matter was held on August 25, 2021, via Zoom video conference before Robert S. Cohen, a duly designated Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH").

APPEARANCES

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For Respondent: Kimberly Lauren Marshall, Esquire
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STATEMENT OF THE ISSUE

The issue for determination is whether Petitioner, Ariana Ortega Domingez ("Petitioner"), is entitled to recover attorney's fees and costs pursuant to section 57.111, Florida Statutes (2019), incurred in defending the Administrative Complaint ("AC") filed by Respondent, Department of Health

("Department" or "Respondent"), seeking to impose discipline on Petitioner's emergency medical technician ("EMT") certificate.

PRELIMINARY STATEMENT

On May 19, 2020, the Department filed a one-count AC against Petitioner in DOH Case No. 2020-12066. The AC alleged that Petitioner violated section 401.411(1)(g), Florida Statutes (2017), by engaging in unprofessional conduct, including, but not limited to, a departure from or failure to conform to the minimal prevailing standards of acceptable practice in her care of Patient I.K.

On June 2, 2020, Petitioner sent the Department a completed Election of Rights form requesting an administrative hearing involving disputed issues of material fact. On December 7, 2020, the Department forwarded the case to DOAH for assignment of an ALJ. On December 8, 2020, the undersigned issued his Initial Order in DOAH Case No. 20-5321PL.

After the parties engaged in discovery, on February 18, 2021, the Department filed an unopposed Motion to Relinquish Jurisdiction, which was granted. On May 28, 2021, the Department brought the case back to the Probable Cause Panel for the Bureau of Emergency Medical Oversight ("PCP") for further review. In light of new information obtained in the discovery process, the PCP reconsidered its previous finding of probable cause and dismissed the case.

On June 17, 2021, Petitioner filed her Verified Motion for Award of Attorney[']s Fees and Costs Pursuant to Chapter 57.111, Fla. Stat[.] ("Motion for Attorney's Fees") at DOAH, seeking an award of her attorney's fees and costs incurred in defending DOAH Case No. 20-5321PL. The fees case was assigned DOAH Case No. 21-2270F, and a hearing was scheduled for

August 25, 2021. Prior to the hearing, at the parties' request, the issue of entitlement to fees was bifurcated from the issue of amount of fees.

On August 18, 2021, the parties filed a Pre-hearing Joint Stipulation, which contained a statement of facts to which the parties agreed. The parties agreed that Petitioner was a prevailing small business party under section 57.111. The only issue remaining to be determined at the hearing was whether the Department was substantially justified in filing the AC against Petitioner.

The hearing was convened and completed on August 25, 2021. At the hearing, neither party presented witness testimony. Joint Exhibits 1 through 4 were admitted without objection. Petitioner's Exhibits 1 and 2 were admitted over Respondent's objections to both. At the conclusion of the hearing, the parties agreed that their proposed final orders would be filed within ten days of the filing of the Transcript at DOAH.

The one-volume Transcript of the hearing was filed on September 9, 2021. The parties each timely filed a Proposed Final Order, both of which have been considered in preparation of this Final Order.

FINDINGS OF FACT

Stipulated Facts

1. On May 19, 2020, the Department presented its case against Petitioner to the PCP. The PCP found probable cause and authorized the filing of a one-count AC, alleging a violation of section 401.411(1)(g). Based upon the information presented, the PCP found probable cause and authorized the filing of the AC.

2. On May 19, 2020, the Department filed its AC against Petitioner, alleging a violation of section 401.411(1)(g).

3. On or about June 23, 2020, Petitioner timely filed an Election of Rights form which indicated that she disputed the material allegations of fact in the AC and requested a formal hearing.

4. On December 7, 2020, the Department filed a copy of the AC and Petitioner's Election of Rights form with DOAH. On that same day, counsel for the Department sent a letter to the DOAH Chief Judge requesting that the matter be assigned to an ALJ.

5. On December 8, 2020, the undersigned was assigned the case and issued an Initial Order in DOAH Case No. 20-5321PL.

6. On January 29, 2021, counsel for Petitioner took the deposition of Ryan Pagliarulo, EMT ("Pagliarulo"), Petitioner's EMT partner on the date of the incident. Pagliarulo's testimony at the deposition directly contravened his prior statements to the Department.

7. On February 18, 2021, the Department filed a Motion to Relinquish Jurisdiction, which the undersigned granted the following day.

8. On May 27, 2021, the PCP reconsidered the matter in light of the newly obtained testimony from Pagliarulo and closed the case.

9. Petitioner qualifies as a prevailing small business party under section 57.111.

Additional Findings of Fact

10. A proceeding is "substantially justified" if "it had a reasonable basis in law and fact at the time it was initiated by a state agency." § 57.111(3)(e), Fla. Stat. (2019).

11. The PCP reviewed the following materials: a draft of the proposed AC; the report, supplemental opinion, and curriculum vitae of the Department's expert; an 18-page Supplemental Investigative Report dated October 21, 2019; a ten-page Supplemental Investigative Report dated May 24, 2019; and a 1,017-page Final Investigative Report dated November 5, 2018.

12. The AC charged Petitioner with violating section 401.411(1)(g), by failing to conform to the minimum standards of acceptable practice in her care of Patient I.K. ("I.K.").

13. The AC concerned an incident involving an ambulance crew, comprising Petitioner and Pagliarulo, dropping a patient and fatally injuring him.

14. At all times material to the AC, Respondent was employed as an EMT with American Medical Rescue ("AMR").

15. On May 23, 2018, Petitioner and her partner, Pagliarulo, transported I.K., an elderly man, from a long-term care facility to his home.

16. The patient was dropped while strapped to a gurney while being removed from the emergency vehicle, and struck his head. He subsequently died from a combination of his injuries and his end-of-life conditions.

17. At the time of the incident, Petitioner was a recent EMT licensee and was 20 years old.

18. The charges against the two EMTs involved in the incident, Petitioner and Pagliarulo, were brought two years after the incident occurred. The charges were brought to the Department's attention after a complaint was filed by I.K.'s son.

19. The Department initiated investigations against both EMTs in response to the complaint.

20. The case against Pagliarulo was considered separately by the Department, resulting in a settlement agreement between the two parties, executed on or about June 29, 2020.

21. Pagliarulo, during an interview with the Department's investigator, clearly and unequivocally stated that both he and Petitioner were handling the stretcher, with I.K. strapped to it, when it overturned. Pagliarulo further described where he and Petitioner were standing in relation to the stretcher while removing it from the ambulance and in picking it up after it fell.

22. The Department investigator also requested to interview Petitioner; however, she declined an interview and instead provided a written statement to the Department.

23. Petitioner's brief written statement, dated October 29, 2018, included a general denial that she deviated from the standard of care; however, Petitioner did not directly address any of the allegations in the complaint, including who was handling the stretcher at the time I.K. was dropped. Specifically, all she stated regarding the incident was the following:

> As it pertains to the allegations I may have violated my Practice Act as an EMT, I deny these allegations. As part of my employment with AMR I underwent extensive training as to loading and unloading of patients on a stretcher which included viewing training videos from the stretcher manufacturer and participating in field training on several occasions with a superior specifically related to the loading and unloading of patients while on a stretcher. As such, prior to the transport of the patient I received extensive training in preparation of attending to patients such as I.K. In conclusion, I believe that my care provided to Patient I.K. on May 19, 2018, met the prevailing standard of care for my Practice Act.

24. However, Petitioner's handwritten and signed, yet unsworn, statement given on May 17, 2018, the day of the incident, provides almost contemporaneous details of her version of the events, in pertinent part, as follows:

> SUBJECT OF REPORT: Pt [patient] fell with stretcher.
>
> SUMMARY: crew arrived to pt destination. Due to rain we waited a few minutes Pt wanted to go inside. I Ariana proceeded to look for an elevator Because [sic] all we seen [sic] was stairs. As I found an elevator I walked back to the truck to tell my partner there was an elevator[.] [H]e acknowledged & proceeded to take out stretcher. I was about

> 10 feet away when pt fell with the stretcher on pts left side. Me and my partner and another bystander turned patient Back [sic] on the wheels of the stretcher. … I Ariana covered pts [sic] skin tears and lacerations and contacted C8 for further directions. Pt was transferred to West Boca.

The "bystander" referenced in Petitioner's handwritten statement was not identified.

25. Pagliarulo's handwritten, unsigned report acknowledged the inclement weather, but did not include any information regarding Petitioner's having gone in search of an elevator and, therefore, not being present when he loaded I.K. onto the stretcher. He stated that "he and his crew immediately picked up the stretcher," but did not confirm that Petitioner was ten feet away when the stretcher overturned or that he had put I.K. on the stretcher himself. He did not mention a bystander being present at the time the stretcher overturned.

26. Petitioner's report indicates that Pagliarulo alone removed the stretcher and did not state that the decision to do so was made jointly. Pagliarulo's report is silent on the issue of who was handling the stretcher at the time it fell; however, in all other respects, the information contained in his report is consistent with the more detailed statement he later provided to a Department investigator.

27. The Department also attempted to obtain investigative documents from Petitioner's employer, AMR, but AMR twice refused to provide these documents, citing attorney-client privilege.

28. The Department contracted with a licensed EMT expert, Bradley Mayberry ("Mayberry"), to review the case for potential violations of the standard of care. Mayberry holds numerous certifications, most notably, as an EMT, a paramedic, and a firefighter. He is qualified by virtue of his education, training, and experience to give an expert opinion in this matter.

29. Mayberry stated that dropping a patient is always a violation of the standard of care for EMTs, regardless of whether injuries occurred as a result. He further stated that EMTs receive extensive training in the safe operation of stretchers in order to avoid incidents such as the one occurring here.

30. In conducting his review of the case, Mayberry stated that he reviewed all of the Department's investigative materials, including Petitioner's brief response to the allegations. However, in his report dated May 6, 2019, he makes no mention of Petitioner's May 17, 2018, handwritten statement (see paragraph 24 above) in which she states she was returning from having found the elevator to I.K.'s apartment and witnessed the overturning of the gurney when she was still ten feet away from the gurney. This constitutes a significant omission in his report and was either due to his not having seen Petitioner's May 17, 2018, statement or not giving it any weight in his conclusions that the standard of care was violated.

31. According to the exhibits admitted at hearing, the Department's expert received from the Department's counsel, Rose Garrison, additional documents to review, Supplemental Report 1, dated May 24, 2019, and Supplemental Report 2, dated October 21, 2019. Contained in these reports was the statement from Petitioner dated May 17, 2018 (see paragraph 24 above), in which she claimed to have been approaching Pagliarulo from the elevator as she witnessed the gurney overturn. Mayberry stated, in a letter dated February 28, 2020, that this additional information did not change his opinion regarding a deviation from the standard of care. Further, he stated, receipt of Petitioner's May 17, 2018, statement did not cause him to change his opinion because it is not "within my expertise to determine what details are factual."

32. Petitioner was entitled to receive and review a copy of the Department's full investigative file, including the expert's written opinion, and to submit a response for the PCP to consider prior to making its

determination of probable cause, Petitioner did not avail herself of this opportunity. She could have, either on her own or with assistance of counsel, restated the facts she set forth in her May 17, 2018, statement, in the form of a sworn affidavit or deposition, or expanded on them prior to the PCP meeting.

33. The Department's investigative report of Petitioner, signed by Jenna Murphy ("Murphy"), medical malpractice investigator, and accepted into evidence without objection at hearing, bears discussion. In Murphy's interview of Pagliarulo, she documented that, due to the inclement weather (in his words, "tropical storm force" with rain, wind, and lightning), he called dispatch to request a delay in removing I.K. from the ambulance, but was told they "were not allowed to wait any longer." He acknowledged Petitioner had gone to look for an elevator while he stayed in the ambulance with I.K., but stated that he waited to put I.K. on a stretcher until Petitioner returned. Pagliarulo stated that Petitioner was on the side of the stretcher, while he was at the head of the stretcher, when it "very quickly tipped" to the side and "very quickly" was picked back up.

34. Petitioner refused to give any more information to the investigator when called on October 10, 2018, other than confirming her physical address, her email address, and making a request that Murphy send any correspondence to her via email. Murphy noted in her report that Petitioner did not give a recorded statement on that date, and that a computer background check conducted on October 12, 2018, showed that Petitioner had never been charged with a felony or misdemeanor in Florida as an adult.

35. Pagliarulo settled the case brought against him by the Department, DOH Case No. 2020-0187, via a settlement agreement executed by the parties on June 29, 2020, and made part of a Final Order from the Department on July 23, 2020. Pursuant to the agreement, he received a letter of concern against his EMT certification, a $1,500 fine, and agreed to reimburse the Department $2,200 in costs.

36. It was not until January 29, 2021, when Petitioner took Pagliarulo's deposition, that he made statements, under oath, that directly contradicted what he had previously told the Department's investigators. Shortly after this deposition, the Department's unopposed Motion to Relinquish Jurisdiction was granted. The PCP then reconsidered the matter in light of this new information and dismissed the case against Petitioner.

37. The transcript of Pagliarulo's deposition was not filed in the underlying case here, nor was it offered into evidence at the brief hearing conducted in this matter. The undersigned can only speculate whether Pagliarulo testified under oath that he had misstated the facts concerning Petitioner's involvement, or lack thereof, in the placing of I.K. on the gurney or whether she was in transit to the ambulance from having located the elevator when she witnessed the gurney overturn with Pagliarulo attempting to move I.K. by himself. Such speculation is not enough evidence to result in specific factual findings regarding the veracity of the only piece of contemporaneous evidence demonstrating Petitioner's lack of involvement in I.K.'s fall, her handwritten, unsworn statement dated May 17, 2018.

38. Further, the undersigned cannot conclude, as a matter of fact, that the PCP did not have that statement before it when it determined probable cause existed to bring the AC against Petitioner. Had competent evidence been produced to the undersigned that the PCP considered Petitioner's version of what occurred in the transport of I.K., resulting in his fall and injuries, it is possible a conclusion could be reached here that the PCP's finding of probable cause was not substantially justified. Petitioner's failure or refusal to follow up and convince the PCP that she was not directly involved in the tragic incident has made it impossible for the undersigned to conclude that the PCP determination of probable cause was not substantially justified at the time of its decision.

Ultimate Facts

39. Petitioner denied, in a handwritten, unsworn, and nearly contemporaneous statement, any wrongdoing in her role of assisting Pagliarulo with placing I.K. on the stretcher and allowing it to fall, thereby severely injuring him. Pagliarulo unequivocally implicated her in the incident.

40. Based upon the evidence available to the PCP at the time probable cause was found (and not knowing whether the PCP even saw the handwritten statement from Petitioner), it was reasonable for the PCP, at the time of its initial consideration of the case against Petitioner, to believe that both Petitioner and Pagliarulo were responsible for the decision to remove I.K. from the ambulance during inclement weather and that both were handling the stretcher when it fell.

41. Based upon the foregoing, and the evidence adduced at hearing regarding what was known to the PCP at the time probable cause was found, there was a reasonable basis in law and fact to believe that Petitioner engaged in unprofessional conduct, including a failure to conform to the minimum prevailing standard of acceptable practice, in her care of I.K.

42. Therefore, the Department's filing of the AC was substantially justified.

CONCLUSIONS OF LAW

43. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 57.111, 120.569, and 120.57(1), Florida Statutes (2019). The undersigned has final order authority pursuant to section 57.111(4)(d).

44. Section 57.111 provides, in relevant part:

> (4)(a) Unless otherwise provided by law, an award of attorney's fees and costs shall be made to a prevailing small business party in any adjudicatory proceeding or administrative proceeding pursuant to chapter 120 initiated by a state agency, unless

> the actions of the agency were substantially justified or special circumstances exist which would make the award unjust.

45. Once the party seeking fees under section 57.111 proves that it is a prevailing small business party, the burden shifts to the government agency to show that its action in initiating the proceeding was "substantially justified." *Helmy v. Dep't of Bus. & Prof'l Reg.*, 707 So. 2d 366, 368 (Fla. 1st DCA 1998). The parties stipulated that Petitioner is a small business prevailing party, thereby shifting the burden to the Department.

46. Substantial justification is defined by section 57.111(3)(e) as "a reasonable basis in law and fact at the time it was initiated by a state agency."

47. The "substantially justified" standard is not so strict as to require the agency to demonstrate that its actions are correct; rather, an agency need only present an argument for its actions that could satisfy a reasonable person. *Ag. for Health Care Admin. v. MVP Health, Inc.*, 74 So. 3d 1141, 1144 (Fla. 1st DCA 2011).

48. For the Department to demonstrate that it had substantial justification for its actions, the PCP must have had a solid, though not necessarily correct, basis in law and fact for finding probable cause and directing the filing of the AC. *See Fish v. Dep't of Health, Bd. of Dentistry*, 825 So. 2d 421, 423 (Fla. 4th DCA 2002). To sustain a determination of probable cause, there must be some evidence considered by the PCP that would "reasonably indicate that the violation occurred." *Id.*

49. A decision to prosecute that turns on a credibility assessment has a reasonable basis in law and fact. *Dep't of Health, Bd. of Med. v. Thomas*, 890 So. 2d 400, 401 (Fla. 1st DCA 2004).

50. When determining whether substantial justification exists to support the filing of an AC, the tribunal must only examine the information before the PCP at the time it found that probable cause existed and directed that an

AC be filed. *Dep't of Health, Bd. of Physical Therapy Practice v. Cralle*, 852 So. 2d 930, 932 (Fla. 1st DCA 2003) (citing *Fish*, 825 So. 2d at 423). "Subsequent discoveries do not vitiate the reasonableness of the actions of the board at the time they made their probable cause determinations." *Cralle*, 852 So. 2d at 933 (citing *Ag. for Health Care Admin. v. Gonzalez*, 657 So. 2d 56 (Fla. 1st DCA 1995)).

51. The reviewing body in a fees case "may not consider any new evidence which arose at a fee hearing, but must focus exclusively upon the information available to the agency at the time that it acted." *MVP Health, Inc.*, 74 So. 3d at 1144.

52. The central focus of Petitioner's argument that she is entitled to fees under the "substantially justified" standard is that she made a brief statement, set forth in paragraph 24 above, that Pagliarulo was solely responsible for attempting to transport I.K. to his home while she was looking for an elevator. She was certain that she was still ten feet away from the gurney when it tipped over under the lack of due care by Pagliarulo. What is unusual here is that, in her subsequent more detailed statement to the Department's investigator, she makes only conclusory remarks that she did not deviate from the standard of care, not mentioning her actions set forth in her previous statement or expounding on it.

53. On the Department's side, after reviewing the more than 1,000 pages of documents, including both investigative reports and patient records for I.K., the PCP found probable cause to bring an AC against Petitioner. There was no transcript of the PCP provided as evidence at hearing, so the undersigned is left to guess as to whether the PCP was aware of the exculpatory statement given by Petitioner within days of the incident. Petitioner did not testify before the undersigned and subject herself to cross-examination, so the undersigned is left to determine whether the brief statement she wrote on May 17, 2018, is enough to overcome Pagliarulo's insistence of Petitioner's involvement from the date of the incident, through

the PCP's determination of probable cause to proceed made on May 19, 2020, all the way until his deposition was taken on January 29, 2021. At best, the conflicting statements of Petitioner and Pagliarulo represent disputed issues of material fact. Of course, the undersigned learned at hearing, from the representations of counsel for Petitioner and from the Department's action following Pagliarulo's deposition, that Petitioner was being truthful all along. The only issue remaining is, therefore, whether the PCP was "substantially justified" in authorizing the filing of the one-count AC on May 19, 2020. In short, does the existence of the one handwritten, unsworn statement from Petitioner to the Department's investigator, in and of itself, suffice to substantially justify the PCP's finding of probable cause? If the PCP knew in May 2020 what it learned in May 2021, the answer would be self-evident: the finding of probable cause to bring an AC against Petitioner was not substantially justified. However, such was not the case in May 2020.

54. From the affidavit filed by counsel for Petitioner, dated June 17, 2021, it is apparent that Petitioner did not retain legal counsel until on or about July 21, 2020. This was after the PCP found probable cause to authorize the Department to issue the AC against Petitioner. It follows that Petitioner did not have the benefit of counsel prior to that date. Looking at the assistance given to her by counsel, Petitioner chose wisely because, once retained, her counsel took the necessary steps to prove both that she was truthful in her explanation of her role concerning the incident with I.K. on the gurney on May 16, 2018, and that Pagliarulo was untruthful in recounting his version of what transpired on that date to the Department's investigator.

55. The undersigned is reasonably certain that, had counsel for Petitioner been retained prior to the PCP meeting on May 19, 2020, he would have taken the necessary steps to present a stronger case to the Department and the PCP in Petitioner's defense. This could very well have resulted in there having been no probable cause found when the PCP met that day. We will never know for sure because counsel had not been retained to assist

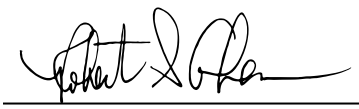
Petitioner prior to the May 19, 2020, meeting of the PCP. Clearly, once counsel intervened on behalf of Petitioner, a professional review of the existing evidence was conducted; discovery was conducted and the true facts of the case were revealed when Pagliarulo changed his earlier version of the events; and the Department, when presented with the newly-revealed evidence, moved to relinquish jurisdiction, which allowed the reconvened PCP to make its determination that no probable cause continued to exist to proceed with this matter. It is evident that Petitioner's wise move in hiring highly competent counsel resulted in her convincing the Department to dismiss the case. Unfortunately, her hiring of counsel came too late for her to establish liability for the Department to pay the attorney's fees and costs already incurred.

56. Based upon the foregoing, the PCP was substantially justified in finding probable cause to authorize the filing of an AC against Petitioner in May 2020, despite being proven otherwise a year later. Therefore, Petitioner is not entitled to attorney's fees under section 57.111.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, it is ORDERED that the Motion for Attorney's Fees filed by Petitioner is hereby denied.

DONE AND ORDERED this 29th day of September, 2021, in Tallahassee, Leon County, Florida.



ROBERT S. COHEN
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Filed with the Clerk of the
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this 29th day of September, 2021.

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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 the original notice of administrative appeal with the agency clerk of the Division of Administrative Hearings within 30 days of rendition of the order to be reviewed, and a copy of the notice, accompanied by any filing fees prescribed by law, with the clerk of the district court of appeal in the appellate district where the agency maintains its headquarters or where a party resides or as otherwise provided by law.