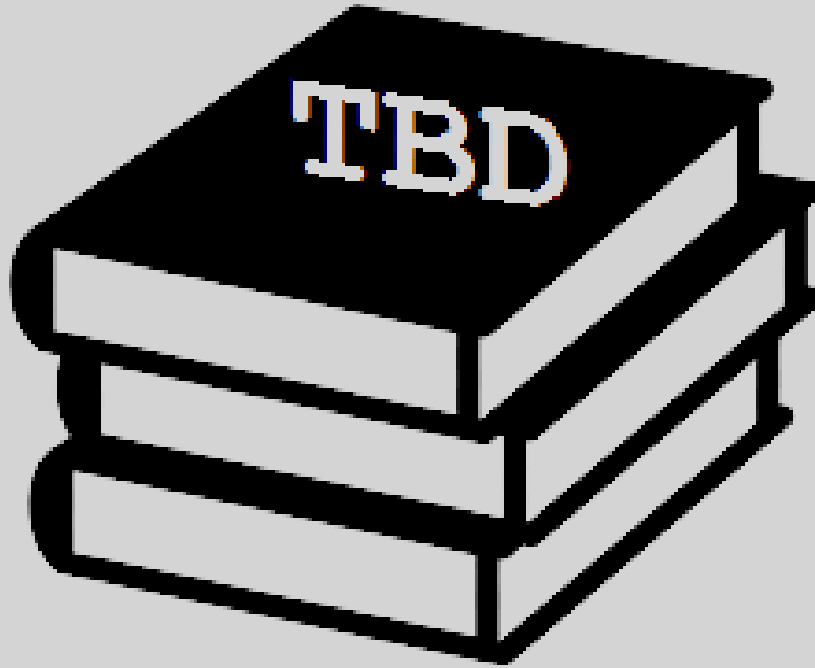


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**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

DEPARTMENT OF HEALTH,

PETITIONER,

v.

**DOAH Case Number 13-0502PL
DOH Case Number 2012-11653**

JINCHUN CUI, LMT,

RESPONDENT.

**PETITIONER'S RESPONSE TO RESPONDENT'S MOTION FOR
RECONSIDERATION OF, OR REHEARING ON, ORDER GRANTING MOTION TO
QUASH SUBPOENA AND FOR PROTECTIVE ORDER; AND TO RESPONDENT'S
OBJECTION TO USE OF THE DEPOSITION OF MELISSA WADE IN LIEU OF LIVE
TESTIMONY**

COMES NOW Petitioner, Department of Health, and files this response to Respondent's Motion for Reconsideration of, or Rehearing on, Order Granting Motion to Quash Subpoena and for Protective Order ("Motion for Reconsideration"); and responds also to Respondent's Objection to Use of the Deposition of Melissa Wade in Lieu of Live Testimony ("Objection to the Use of Deposition"), and states in support thereof:

1. On May 16, 2013, Respondent subpoenaed witness Melissa Wade ("Ms. Wade") to appear live at the final hearing scheduled for June 19, 2013 in Tallahassee, Florida.

2. On May 24, 2013, Ms. Wade filed a Motion to Quash Subpoena and for Protective Order, and in support thereof submitted a signed, notarized affidavit of Ms. Wade, in which she attested to living in Jupiter, Florida, and working in Pompano Beach, Florida, each of which is more than 100 miles away from Tallahassee, Florida.

3. On June 4, 2013, this Honorable Administrative Law Judge entered an order granting Ms. Wade's Motion to Quash Subpoena and for Protective Order.

1. **PETITIONER'S RESPONSE TO RESPONDENT'S MOTION FOR RECONSIDERATION OF, OR REHEARING ON, ORDER GRANTING MOTION TO QUASH SUBPOENA AND FOR PROTECTIVE ORDER**

4. In her Motion for Reconsideration, Respondent argues that the admission of Ms. Wade's deposition in lieu of live testimony would deny Respondent her right to confrontation under the Sixth Amendment to the United States Constitution.

5. In paragraph 13 of her Motion to Consideration, Respondent accurately asserts that disciplinary statutes are penal in nature, and in support thereof cites Ocampo v. Dep't of Health, 80 So. 2d 633, 634 (Fla. 1st DCA 2002). However, Ocampo only holds that the penal nature of the statute requires that "the statute be strictly construed, with any ambiguity interpreted in favor of the licensee." Id. at 635. Respondent's assertion that "[f]or procedural purposes, such statutes are treated the same as criminal statutes" is unsupported.

6. Indeed, the body of case law establishes that certain Sixth Amendment rights are not attached to administrative proceedings, despite their penal nature. *See* Mullins v. Dep't of Law Enforcement, 942 So. 2d 998, 1000 (Fla. 5th DCA 2006) ("No Sixth Amendment right to counsel exists in the context of administrative proceedings involving the revocation of state-issued licenses"). *Citing* Santacroce v. State, Dept. of Banking and Finance, Div. of Securities and Investor Protection, 608 So. 2d 134, 136 (Fla. 4th DCA 1992). Respondent's claim that a licensee subject to disciplinary

proceeding is entitled to the same rights as she would enjoy in criminal proceedings is both inaccurate and unfounded.

7. Respondent's assertion, in paragraph 16 of her Motion for Reconsideration, that "[w]ithout Ms. Wade's testimony, [Petitioner] cannot prove any of the allegations in the [administrative] complaint" is a bare conclusion of law. Petitioner will present its case as it sees fit. It is incumbent upon this Honorable Administrative Law Judge, and not the Respondent, to determine what Petitioner has or has not proven.

8. In paragraph 16 of her Motion for Reconsideration, Respondent asserts that "[p] ermitting [Petitioner] to present its entire case without the live testimony of Ms. Wade amounts to a trial by deposition in violation of Respondent Cui's confrontation rights." This assertion is predicated on the inaccurate conclusion that Ms. Wade's testimony constitutes the whole of Petitioner's case. On the contrary, Petitioner's case consists of Ms. Wade's testimony, along with the testimony of Anthony Jusevitch, the cross-examination of Respondent, and various exhibits, all of which have been disclosed in the Joint Prehearing Stipulation.

9. Respondent relies upon two federal cases in support of her argument: Maryland v. Craig, 497 U.S. 836 (1990); and U.S. v. Yates, 438 F.3d 1307 (11th Cir. 2006). Respondent's reliance is misplaced. Both of the aforementioned cases involved alleged violation of criminal statutes. As discussed above, Respondent's conflation of "penal" and "criminal" is inaccurate. Respondent does not enjoy the same rights in this administrative proceeding as did the defendants in Craig and Yates.

10. Further, it should be noted that Respondent has known of Petitioner's intention to submit Ms. Wade's deposition in lieu of live testimony for some time. In a deposition of Ms. Wade on June 4, 2013, Respondent's counsel had the opportunity to raise objections to Petitioner's examination of Ms. Wade, cross-examine Ms. Wade, and confront Ms. Wade with exhibits. Respondent herself was entitled to be present at the deposition and declined to do so. Respondent has had ample opportunity to confront Ms. Wade.

II. **PETITIONER'S RESPONSE TO RESPONDENT'S OBJECTION TO USE OF THE DEPOSITION OF MELISSA WADE'S DEPOSITION IN LIEU OF LIVE TESTIMONY**

11. Petitioner reasserts paragraphs 4-10 of this Response.

12. Florida Rule of Civil Procedure 1.330 governs the use of deposition transcripts in proceedings and reads, in pertinent part:

The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(A) that the witness is dead;

(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition;

(C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment;

(D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena;

(E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting

the testimony of witnesses orally in open court, to allow the deposition to be used; or

(F) the witness is an expert or skilled witness.

Rule 1.330(a)(3), Florida Rules of Civil Procedure.

13. Ms. Wade has executed an affidavit certifying that she both lives and works more than 100 miles away from Tallahassee, Florida. Therefore, Petitioner may use Ms. Wade's deposition for any purpose, including introduction in lieu of live testimony, pursuant to Florida Rule of Procedure 1.330(a)(3)(B).

14. Respondent alleges that, by requesting Tallahassee as the location for the administrative hearing, Petitioner has procured the unavailability of Ms. Wade.

15. The Petitioner requested the hearing location pursuant to the Uniform Rules of Procedure. Rule 28-106.207 governs venue and reads, in pertinent part:

(1) Whenever practicable and permitted by statute or rule, hearings shall be held in the area of residence of the non-governmental parties affected by agency action, or at the place most convenient to all parties as determined by the presiding officer.

Uniform Rule of Procedure 28-106.207.

16. This case involves alleged fraudulent submittal of a licensure application, which was received by the Board of Massage Therapy in Tallahassee, Florida. Respondent resides in New Jersey. Accordingly, this Honorable Administrative Law Judge determined that Tallahassee, Florida was the location most convenient to all parties. Petitioner cannot have procured the absence of Ms. Wade by simply making a request which comported with the Uniform Rules of Procedure.

17. In support of her argument that Ms. Wade should be compelled to testify live

at the hearing, Respondent relies upon Florida Rule of Procedure 1.410(e)(2). That rule governs subpoenas issued for the purpose of taking depositions, not subpoenas to appear at trial. Nevertheless, Ms. Wade's occupation involves oversight of a number of Florida campuses. Though it may be said that she occasionally conducts business in Maitland, Florida, it cannot be said that she conducts regular business there. Moreover, Respondent has failed to articulate any reason why Orlando would be an appropriate venue, save for the convenience of Respondent's counsel.

18. In paragraph 27 of Respondent's Objection to the Use of Deposition, Respondent claims that "[o]ne of the other requirements of Rule 1.330 is that the party offering the deposition has been unable to procure the attendance of the witness by subpoena." Respondent misreads the rule. Florida Rule of Civil Procedure 1.330 reads, in pertinent part:

The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(A) that the witness is dead;

(B) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition;

(C) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment;

(D) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena;

(E) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting

the testimony of witnesses orally in open court, to allow the deposition to be used; **or**

(F) the witness is an expert or skilled witness.

Rule 1.330(a)(3), Florida Rules of Civil Procedure (emphasis added).

19. The coordinating conjunction in Rule 1.330(a)(3) is “or.” As such, the rule does not comprise a list of “requirements” as Respondent alleges, but rather sets forth a number of situations in which the use of a deposition in lieu of testimony is permitted. As stated above, Ms. Wade clearly satisfies subparagraph (B) of the rule, and thus her deposition is admissible; Ms. Wade need not satisfy any of the other subparagraphs.

III. **CONCLUSION**

20. In paragraph 20 of her Motion for Reconsideration, Respondent asserts that “Ms. Wade’s convenience should not outweigh Respondent Cui’s Sixth Amendment right.” Respondent misstates Petitioner’s position. Petitioner argues that Respondent is not entitled to identical rights as she would be in a criminal proceeding. Moreover, the Orders setting the hearing in Tallahassee, Florida, and quashing Respondent’s subpoena of Ms. Wade were not so issued for the “convenience” of Ms. Wade. Rather, those orders were issued pursuant to the Florida Statutes, the Florida Administrative Code, the Florida Rules of Civil Procedure, and the Uniform Rules of Procedure.

WHEREFORE, Petitioner requests that this Honorable Administrative Law Judge enter an order:

- a. Denying Respondent’s Motion for Reconsideration of, or Rehearing on, Order Granting Motion to Quash Subpoena and for Protective Order; and

b. Overruling Respondent's Objection to the Use of the Deposition of Melissa Wade
in Lieu of Live Testimony.

Respectfully Submitted,

/s/ R. Shaffer Claridge _____
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CERTIFICATE OF SERVICE

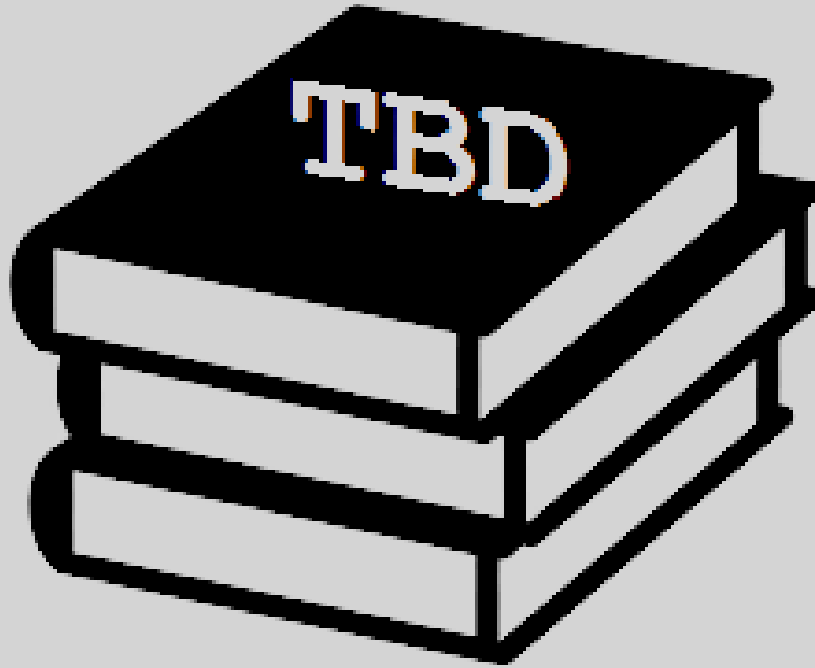
I CERTIFY that a copy hereof has been furnished via Electronic Mail to Lance O. Leider, Esq., at lleider@thehealthlawfirm.com; and George F. Indest, Esq., at gindest@thehealthlawfirm.com, this 17th day of June, 2013.

/s/ R. Shaffer Claridge
R. Shaffer Claridge
Assistant General Counsel

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