BEFORE THE BOARD OF HEALING ARTS
OF THE STATE OF KANSAS

FILED
FEB 13 2015
KS State Board of Healing Arts

In The Matter of	)	
ANN K. NEUHAUS, M.D.	)	
	)	**KSBHA Docket No. 10-HA00129**
Kansas License No.: 04-21596	)	
	)	

FINAL ORDER DETERMINING THE AMOUNT OF COSTS TO BE ASSESED

NOW, on this 13th day of February, 2015, this matter comes before the Kansas State Board of Healing Arts ("Board") for determination of the amount of costs to be assessed against Respondent in the above referenced matter. On December 11, 2014 a Conference Hearing was held to issue a Final Order following Remand in the above-captioned matter against Ann K. Neuhaus, M.D. ("Respondent"). The Initial Order by a Presiding Officer at the Office of Administrative Hearings ("OAH") was modified as directed by the District Court of Shawnee County, Kansas, in the Memorandum Opinion and Entry of Judgment and Appendix, issued by The Honorable Franklin R. Theis on March 7, 2014 ("Memorandum Opinion"). On January 9, 2015, the Board issued a Final Order Following Remand which revoked Respondent's license and assessed costs against her for violations of the Kansas Healing Arts Act, K.S.A. 65-2801, *et seq.* ("KSHAA"). The only remaining issue for this hearing is the amount of costs to be assessed against Respondent.

The Conference Hearing was held pursuant to, and in accordance with, the provisions of the Kansas Administrative Procedure Act, K.S.A. 77-501, *et seq.* ("KAPA"). On January 9, 2015 the Board issued a Final Order Following Remand regarding sanctions. The Board's Final Order finds that the revocation of Respondent's license to practice medicine and surgery in the State of Kansas is warranted and assessed costs against Respondent.

The Board discussed the issue of assessing costs at the Conference Hearing and resolved the issue, deciding to assess costs against Respondent. The Board deferred the limited issue of the amount of costs to be assessed until further briefing had been submitted by the parties.

Respondent appears by and through counsel, Robert V. Eye of the law firm of Kauffman & Eye. Reese H. Hays, Litigation Counsel, appears on behalf of the Petitioner Board. Mark A. Ferguson appears as Special Counsel to the Board.

Pursuant to the authority granted to the Board through the KSHAA, and in accordance with the provisions of KAPA, the Board hereby reaffirms the Final Order Following Remand which was entered on January 9, 2015 in the above-captioned matter which ordered revocation and assessed costs. The Board modifies the Final Order to the limited extent that the Final Order is declared to be an Interim Order for purposes of calculating Respondent's appeal deadlines. This Final Order incorporates by reference all findings of fact and conclusions of the January 9, 2015 Final Order, as if included herein.

This Board enters a Final Order on the amount of Costs to be assessed against Respondent. After reviewing the entire agency record, having heard the statements and arguments of the parties, having reviewed the Briefs submitted by the parties, having reviewed the applicable Findings of the Fact and Conclusions set forth in the Final Order of January 9, 2015, having given due regard to the presiding officer's opportunity to observe and determine the credibility of each witness, having reviewed the Memorandum Opinion and Appendix, having deliberated following the Conference Hearing, having reviewed the additional briefing and communication submitted by the parties and having been otherwise duly advised in the premises, the Board makes the following Findings of Fact, Conclusions and Orders related to the

characterization of the Final Order and the assessment of costs against Respondent, Ann Neuhaus:

Findings of Fact

1. The Board issued a Final Order on 1/9/15. The Final Order concluded: "Consistent with the findings of the Court in the Memorandum Opinion, the Board finds that upon full consideration of all relevant facts, arguments, and circumstances in this proceeding, for Respondent's violations of the Healing Arts Act, Respondent's license to practice medicine and surgery in Kansas should be revoked."
2. K.S.A 65-2846 provides that if the Board's decision is adverse to Respondent, costs may be assessed to the parties in a proportion that the Board may determine based on "all relevant circumstances…." In the Final Order of January 9, 2015 the Board already concluded that, upon full consideration of all relevant facts, arguments, and circumstances, the costs should be assessed against Respondent. The Board simply requested that Petitioner submit a revised and updated Statement of Costs.
3. The Board previously concluded that, upon full consideration of all relevant facts, arguments and circumstances Respondent was obligated to remit payment of the costs of the proceedings. This was a Final Order disposing of all issues. The only limited issue remaining was a determination of the exact amount of such costs. The amount was deferred until such time as the parties were heard through further briefing. Based upon the briefing the Board was expected to determine the amount to be paid based upon a proper apportionment.
4. Petitioner timely submitted its Amended Statement of Costs on December 29, 2014.

5. Respondent submitted its Objections to Petitioners Revised Statement of Costs on January 7, 2015.
6. Further emails were exchanged between the parties and counsel, copies of which were provided to the Board and included in the Agency Record.
7. Respondent submitted a Motion to Amend on January 22, 2015.
8. The Exhibits attached to Petitioner's Amended Statement of Costs include legitimate costs and expenses incurred by the Board in proceedings under KAPA for violations of KSHAA.
9. All Findings of Fact and Conclusions set forth in the Final Order of the Board dated 1/9/15 are included and incorporated herein by reference.
10. The Board is the successful party in the proceedings involving Respondent Ann K. Neuhaus.
11. All of the costs requested are permissible costs as provided under K.S.A 65-2846(b).

Pleadings Considered

The following pleadings and communications submitted and/or exchanged between the parties since the Conference Hearing conducted on December 11, 2014 have been considered by the Board:

- Petitioner's Amended Statement of Costs and Exhibits 1-4, dated 12/29/14;
- Respondent's Objections to Petitioner's Revised Statement of Costs, dated 1/7/15;
- Final Order Following Remand Revoking License and Assessing Costs and Exhibit A, dated 1/9/15;
- Email Correspondence Regarding Final Order from Bob Eye to Mark Ferguson, dated 1/15/15;
- Respondent's Motion to Amend the Board's Order of January 9, 2015;

- Various emails by the parties including email from Mark Ferguson to the parties, dated 1/22/15 (5:15 p.m.);
- Email submission by Reese Hays, dated 1/23/15; and
- Further deliberations and interactions with legal counsel.

Applicable Law

In addition to the Applicable Laws cited in the Final Order dated January 9, 2015, the Board considered the following:

K.S.A. 65-2846 provides for the costs of proceedings and the assessment of costs incurred:

(a) If the board's order is adverse to the licensee or applicant for reinstatement of license, costs incurred by the board in conducting any proceeding under the Kansas administrative procedure act may be assessed against the parties to the proceeding in such proportion as the board may determine upon consideration of all relevant circumstances including the nature of the proceeding and the level of participation by the parties. If the board is the unsuccessful party, the costs shall be paid from the healing arts fee fund.

(b) For purposes of this section costs incurred shall mean the presiding officer fees and expenses, costs of making any transcripts, witness fees and expenses, mileage, travel allowances and subsistence expenses of board employees and fees and expenses of agents of the board who provide services pursuant to K.S.A. 65-2878a and amendments thereto. Costs incurred shall not include presiding officer fees and expenses or costs of making and preparing the record unless the board has designated or retained the services of independent contractors to perform such functions.

(c) The board shall make any assessment of costs incurred as part of the final order rendered in the proceeding. Such order shall include findings and conclusions in support of the assessment of costs.

K.S.A. 65-2863a provides for the assessment of "Administrative fines:"

(a) The state board of healing arts, in addition to any other penalty prescribed under the Kansas healing arts act, may assess a civil fine, after proper notice and an opportunity to be heard, against a licensee for a violation of the Kansas healing arts act in an amount not to exceed $5,000 for the first violation, $10,000 for the second violation and $15,000 for the third violation and for each subsequent violation. All fines assessed and collected under this section shall be remitted to the state treasurer in accordance with the provisions of K.S.A. 75-4215, and amendments thereto. Upon receipt of each such remittance, the state treasurer shall deposit the entire amount in the state treasury to the credit of the state general fund.

(b) This section shall be part of and supplemental to the Kansas healing arts act.

Discussion and Facts Relied Upon

A. Amended Statement of Costs

The Final Order of license revocation was signed and filed on 1/9/15. At the prior hearing on 12/11/14, the Board directed the Petitioner's attorney to submit an Amended Statement of Costs and allowed the parties to brief the issue of apportionment of costs. Petitioner did submit an Amended Statement of Costs on 12/29/14. The itemization of costs only included the costs through the Administrative Hearing in September of 2011 and did not include costs from the time Presiding Officer Gaschler issued the Initial Order. The Amended Statement of Costs did not include the costs of the Prior Final Order, the appeal to the District Court, the remand to the Board and the hearing on 12/11/14. Through special counsel, the Board requested

information about all costs that could be attributable to Respondent through the date of the decision. Petitioner's counsel advised the Board that it was his opinion that no other costs could be assessed against Respondent because they either were not statutorily authorized or incapable of being computed based upon the billing procedures involved. As a result, the Board limits the costs considered to those included in the Amended Statement of Costs filed on December 29, 2014.

B. <u>Apportionment of Costs</u>

Respondent objects to the Petitioners Amended Statement of Costs, claiming that the revised statement does not attempt to differentiate between the costs incurred for the several claims and advances a methodology without citation to or reliance on legal authorities. The Board disagrees with Respondent's analysis. Petitioner does differentiate between costs and proposes a methodology for the Board to consider.

The Board's Order is adverse to the licensee and the Board is a prevailing party, which entitles the Board to cost shifting. A prevailing party is the party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his or her original contention. The prevailing party is one in whose favor the decision or verdict is rendered and judgment entered. With respect to the specific question of attorney fees, it has been stated a prevailing party is the person who has an affirmative judgment rendered in his or her favor at the conclusion of the entire case. *Curo Enterprises, LLC v. Dunes Residential Services, Inc.*, 2015 WL 47567, ___ P.3rd ____, Case No. 111,191 (January 2, 2015).

The Board was the prevailing party herein. Although not "necessarily to the extent of [it's] original contention," it did prevail on the issue of recordkeeping violations which resulted

in the revocation of Respondent's license. The District Court upheld and sustained many of the factual determinations regarding the recordkeeping violations and the District Court remanded the case for further proceedings on the issue of what, if any, sanction was appropriate. While the Court rejected the standard of care violations, there is no correct way to calculate the degree of success which would support a finding of a specific percentage of success. The apportionment of the costs is not always easily determined. Just because it is difficult to determine or based upon an imprecise method is not sufficient justification for refusing to make a reasonable attempt to apportion the costs. There is no case law available to interpret K.S.A. 65-2846. The Board is doing the best it can to make an apportionment of the costs. The Board is the prevailing party herein and rejects The Respondent's argument that the Petitioner's Amended Statement of Costs is defective. The underlying premise was, in part, that the standard of care allegations were based upon poor recordkeeping. Since recordkeeping was intertwined with standard of care, the two issues are intertwined and difficult to differentiate. However, since the premise was based upon improper and insufficient recordkeeping, the testimony, proceedings, evidence and corresponding costs of the proceeding could be weighted more heavily toward 100% than Petitioner requests. Respondent also acknowledges and accepts that the statute, in theory, would support the assessment of 100% of the costs. Nevertheless, the Board accepts the recommendation and request of Petitioner, as the prevailing party, and adopts the substantial competent evidence submitted by Petitioner in the Amended Statement of Costs. The apportionment is simple yet justified: Respondent is assessed 1/3 of all costs in this matter because 1/3rd is the amount of allegations this Board was directed to resolve by the District Court. This Board has applied a similar apportionment analysis in the prior action of *In the Matter of Robert Rusnak, DC*; Docket No. 09-HA00080 (Final Order Filed on 4/1/10).

One could reasonably argue that many of the costs of the proceedings are the same, or nearly the same, regardless of the extent to which the party prevails. There are certain fixed costs and overhead associated with pursuing the action which make apportionment difficult. Only when the cost or expense is wholly related to an unsuccessful claim, should it be excluded as a expense. There are some costs which contribute to the overall cost of the proceedings and the costs to the prevailing party cannot be excised from the total. When the cost or expense is intertwined with both successful and unsuccessful claims, the cost is difficult to divide and is not easily explained in a strict mathematical formula or percentage calculation. The ultimate desire is to do the best possible to apportion the costs appropriately given the circumstance involved. Even the statute itself recognizes that "the nature of the proceedings" and "the level of participation by the parties" may be considered. *See* K.S.A. 65-2846(a).

There may not be a bright line to follow when making a reasonable attempt to apportion costs. The only obvious expense which could be excluded would be any expert expense when that expert testimony was ***only*** called for the limited purpose of supporting the standard of care allegations, which were later rejected by the District Court. In this specific instance, this expert cost should be excluded. However, most experts provided additional, more general testimony on many facts and subjects, which aided the trier of fact in other areas and the factual information provide was not limited *only* to standard care of testimony.

It is less clear in the case of a cost of a court reporter, administrative law judge, copy costs or other expenses associated with the overall disciplinary action. These expenses are general in nature and not easily applied to a mathematical formula based upon the numerical breakdown of successful and unsuccessful claims. While the cost may reasonably be reduced, the exact amount is an inexact estimation. The law which permits the recovery of costs and the

assessment is broad. The statute dictates that "costs incurred by the Board in conducting <u>any proceedings</u> under the Kansas Administrative Procedure Act may be assessed…." (K.S.A. 65-2846(a)(emphasis added)). Additionally, the Board may determine these costs "upon consideration of all relevant circumstances including the nature of the proceeding and the participation by the parties". (K.S.A. 65-2846(a)). The Board has attempted to apply these principles when reviewing the Amended Statement of Costs.

The Petitioner submits an Amended Statement of Costs suggesting an apportionment of one-third. The initial premise of Petitioner is that "[a]ll of the costs in the matter were incurred through the process of addressing all of the allegations in the Petition and not one single cost that was incurred could be attributed to solely addressing the Respondent's violation of K.S.A. 65-2836(k)." (*See* Petitioner's Amended Statement of Costs at p. 2). Petitioner's rationale to support a percentage application is that ". . . the only reasonable distribution of costs in this matter is to assess 1/3rd of all costs in this matter to Respondent because 1/3rd is the amount of allegations this Board was directed to resolve by the District Court." (Petitioner's Amended Statement of Costs, p. 2). While this is partially true, the Board disagrees that this is "the only reasonable distribution of costs." There are other reasonable methods of distribution and apportionment.

As addressed in the Final Order of the Board at fn. 2, the Board strongly considered the prospect of assessing fines against Respondent, *in addition to* imposing the sanction of revocation and assessing costs (*See* Final Order dated 1/9/15). Assessing an administrative fine would have been justified based upon the facts of the case, the statutes (K.S.A. § 65-2863a) and the Board's Sanctioning Guidelines. However, the Board elected not to go that far, concluding that the assessment of costs would be substantial and the imposition of fines in addition thereto

could be viewed as "*too harsh*" under the circumstances. By taking this position, the Board fully intends to shift as much of the cost of these lengthy proceedings as possible to Respondent. As such, the Board could award a larger percentage of the costs against Respondent than suggested by Petitioner.

The Petitioner did not include all of the costs that could be assessed against Respondent. The Amended Statement of Costs only included costs incurred through the Administrative Hearings conducted in September of 2011 (there were costs dated February 28, 2012, but relate back to the hearings). Petitioner did not include the costs of the proceedings after that time period. There are costs incurred by the Board for extensive proceedings thereafter which could be assessed against Respondent. Since those costs are not included in the Statement of Costs and Petitioner has narrowly interpreted and applied the cost shifting statute, the Board will not now include them. However, the Board considers that the one-third apportionment is actually a smaller fraction of all the costs incurred by the Board and associated with this disciplinary action. While the Board does not challenge the position of Petitioner in this regard, the amount of costs, as a smaller portion of all costs incurred, is a fact which supports the assessment of costs pursuant to K.S.A. 65-2846(c).

Furthermore, while Respondent objects to Petitioners methodology, Respondent offers no alternative analysis. Presumably, Respondent simply requests that "zero" costs be assessed against her and seeks to avoid any cost shifting whatsoever. Since the Board cannot look to Respondent for any alternative evaluation method, the Board looks to the suggestions of Petitioner for guidance. Respondent filed a Brief titled "Respondent's Objection To Petitioner's Revised Statement Of Costs," which objected to the methodology for differentiating between the costs incurred, but provides no direction or argument for an alternative methodology.

Respondent simply argues for "no costs." This, however, would not be a reasonable approach under the circumstances.

In an attempt to look at this assessment of costs from another perspective, the Board has examined the nature and extent of the costs more closely and also inquired about additional costs that may have been incurred, but not included in the summary provided by Petitioner. The Board also looks to other caselaw to support this decision. In the 1980s, The Kansas Court of Appeals, and later the Kansas Supreme Court, adopted the definition of "prevailing party" from Black's Law Dictionary 1069 (5th ed. 1979) as: "The party to a suit who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not necessarily to the extent of his original contention. The one in whose favor the decision or verdict is rendered and judgment entered. [Citation omitted.] The party ultimately prevailing when the matter is finally set at rest." The Board is the prevailing party in this disciplinary matter. "With respect to the specific question of attorney fees, it has been stated a prevailing party is the person who has an affirmative judgment rendered in his favor at the conclusion of the entire case." *Szoboszlay v. Glessner*, 233 Kan. 475, 482, 664 P.2d 1327 (1983) (quoting *Schuh v. Educational Reading Services of Kansas*, 6 Kan. App. 2d 100, 101, 626 P.2d 1219 [1981]). *See* also Black's Law Dictionary 1298 (10th ed. 2014) (prevailing party is a "party in whose favor a judgment is rendered, regardless of the amount of damages awarded")(*See* also *Curo Enterprises, LLC v. Dunes Residential Services, Inc.*, 2015 WL 47567, __ Kan. App.2d __, ___ P.3rd _____, Case No. 111,191 (January 2, 2015). Although monetary damages are not at stake in this disciplinary proceeding, the same analysis could be applied herein – The District Court found in Petitioner's favor and Petitioner's actions resulted in a successful outcome, given the relief requested. This is an outcome determinative analysis that would justify an award of all of

the costs, or at least a larger percentage of the costs to be assessed. Under a successful outcome approach, the Board would not be limited to an award of costs based only upon the mathematical calculation or division of the amount of successful claims. Under this analysis, the Petition was successful and achieved the ultimate outcome and relief it requested in the Petition.

Respondent argues that that the K.S.A. 77-526(c)(d) and the case of *Water District No. 1 of Johnson County v. Kansas Water Authority*, 19 Kan. App.2d 236, 241 (1994) requires that the statement of costs "must be supported by substantial and competent evidence." The Board agrees that substantial and competent evidence is required, but believes that such has been provided – the substantial and competent evidence consists of the Exhibits and attachments to the Amended Statement of Costs. These attachments provide the Board with the evidence necessary to review and determine that the actual costs are associated with this matter and are related to the cause to which the Petitioner seeks to assess the charges. The methodology advanced by Petitioner is based upon substantial and competent evidence. Furthermore, the Respondent has not produced conflicting evidence provided an alternative methodology, nor argued that the Exhibits supporting the request are invalid or fail to be associated with Respondent's disciplinary case. Thus, the evidence submitted by Petitioner remains undisputed. An attack on the methodology, without more, is simply an insufficient challenge by Respondent. Therefore, the Board rejects Respondent's attempt to eliminate the assessment of costs altogether based upon the arguments presented. Instead, the Board finds that the Amended Statement of Costs is not based upon an arbitrary allocation, but instead is based upon a reasonable apportionment of identifiable invoices and verifiable receipts, which justify the costs sought by Petitioner.

C. Finality of 1/9/15 Order

Respondent files a Motion to Amend arguing that the Final Order of January 9, 2015 is not a final order and instead is an interim order. The basis for the request is that the Board is still considering the cost issue. The legal significance is that if the Order is "final" Respondent must file a Notice of Appeal prior to the hearing on February 13, 2015. The Board finds that the Final Order of 1/9/15 is final in that it does reach a determination of all issues, both revocation and costs. The Board did assess costs against Respondent it was only the amount of costs which was left open for discussion. The Board could determine that the Final Order of January 9, 2015, is truly final because it did intend to resolve all issues, but no legitimate purpose would be served by doing so. The Board stated its clear intent to award costs, it simply wanted to apportion the costs. Nevertheless, the Board does not desire to create issues for litigation. Respondent has filed a Motion to Amend and the Board will acknowledge and comply with this request. Both issues and Orders can be dealt with in unison. The Board's Order of 1/19/15 can be deemed an Interim Order without prejudice to either party. It is the Board's intent to provide finality to this matter and not create appealable issues, where none need be created. The Board does not want to create piecemeal litigation and does not intend to deny Respondent any appeal right by ruling that the Respondent has missed an appeal deadline following entry of the 1/9/15 Order. Therefore, the Board accepts Respondent's request to recharacterize the Final Order of January 9, 2015 as an "Interim Order." This Final Order assessing costs is intended to fully incorporate by reference herein, the entirety of the Final Order issued on 1/9/15. All appeal rights of Respondent shall be triggered by the issuance of this Final Order.

Conclusion

K.S.A. 65-2846 provides that if the Board's decision is adverse to Respondent, costs may be assessed to the parties in a proportion that the Board may determine based on "all relevant circumstances...." On January 9, 2015, the Board found that, upon full consideration of all relevant facts, arguments, and circumstances in this proceeding, the costs of this proceeding should be assessed against Respondent. Petitioner submitted an Amended Statement of Costs and Respondent objected. The Board finds that, upon full consideration of all relevant facts, arguments and circumstances in this proceeding, Respondent's obligation to remit payment of the costs of this proceeding in the amount of $30,890.81 for such costs. The Board determines this amount to be a proper apportionment of costs based upon the facts and the law in this matter.

The Board's Order of 1/9/15 is incorporated fully and completely herein by reference. Finally, all appeal rights begin with the issuance of this Order.

ORDER

IT IS THEREFORE ORDERED, BY THE KANSAS STATE BOARD OF HEALING ARTS, that the costs of this proceeding in the amount of $30,890.81 are hereby assessed against Respondent. The costs to be paid by Respondent have been apportioned by the Board based upon a review of all Cost information and documentation submitted to the Kansas State Board of Healing Arts. The parties have fully briefed this issue.

IT IS THEREFORE ORDERED, BY THE KANSAS STATE BOARD OF HEALING ARTS, that the Final Order issued on January 9, 2015 be construed to be an Interim Order for purposes of calculating Respondent's dates of appeal. The prior Final Order issued on January 9, 2015, is hereby modified and amended to the limited extent that the dates for

rehearing or petition for review as provided by law are determined from the date of this Final Order Determining the Amount of Costs to be Assessed.

IT IS SO ORDERED THIS 13th DAY OF FEBRUARY, 2015.

Terry L. Webb, D.C.
Presiding Officer
Kansas State Board of Healing Arts

Prepared and Approved by:

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Special Counsel to the
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NOTICE OF RIGHTS

PLEASE TAKE NOTICE that this is a Final Order. This Final Order addresses all issues, including the Revocation of License and Assessing Costs as specified in the "Final Order" filed on January 9, 2015 and the Final Order Determining the Amount of Costs to be Assessed. A Final Order is effective upon service, and service of a Final Order is complete upon mailing. Pursuant to K.S.A. 77-529, Licensee may petition the Board for Reconsideration of a Final Order within fifteen (15) days following service of the final order. Additionally, a party to an agency proceeding may seek judicial review of a Final Order by filing a petition in the District Court, as authorized by K.S.A. 77-601, *et seq*. Reconsideration of a Final Order is not a prerequisite to judicial review. A petition for judicial review is not timely unless filed within **(30) days** following service of the Final Order. A copy of any petition for judicial review must be served upon Kathleen Selzler Lippert, the Board's Executive Director, at 800 SW Jackson, Lower Level-Suite A, Topeka, KS 66612.

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a true and correct copy of the above and foregoing **FINAL ORDER DETERMING THE AMOUNT OF COSTS TO BE ASSESSED** was served this 13th day of February, 2015 by depositing the same in the United States Mail, first-class, postage prepaid, and addressed to:

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Confidential
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The original was filed with the office of:

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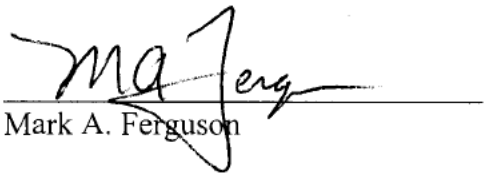

Mark A. Ferguson