

**BEFORE THE DIRECTOR
DEPARTMENT OF CONSUMER AFFAIRS
BUREAU FOR PRIVATE POSTSECONDARY EDUCATION
STATE OF CALIFORNIA**

In the Matter of the Accusation Against:

DIANOVA INSTITUTE

Institution No.: 51315935

Respondent.

Case No. 1006317

OAH Case No.: 2021120683

DECISION AND ORDER

The attached Proposed Decision of the Administrative Law Judge is hereby accepted and adopted by the Director of the Department of Consumer Affairs as the Decision in the above-entitled matter.

This Decision shall become effective on September 29, 2022

It is so ORDERED August 26, 2022

"Original Signature on File"

RYAN MARCROFT

Deputy Director

Legal Affairs Division

Department of Consumer Affairs

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DEPARTMENT OF CONSUMER AFFAIRS
FOR THE BUREAU FOR
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Institution Code No. 51315935

Respondent.

Agency Case No. 1006317

OAH No. 2021120683

PROPOSED DECISION

Administrative Law Judge Holly M. Baldwin, State of California, Office of Administrative Hearings, heard this matter on July 13, 2022, by videoconference.

Deputy Attorney General Susana Gonzales represented complainant Deborah Cochrane, Chief of the Bureau for Private Postsecondary Education, Department of Consumer Affairs.

Respondent DiaNova Institute was represented by its president, David Floyer.

The record closed and the matter was submitted for decision on July 13, 2022.

FACTUAL FINDINGS

1. On March 11, 2020, the Bureau for Private Postsecondary Education (Bureau) issued an Approval to Operate, Institution Code Number 51315935, to respondent DiaNova Institute. Respondent was approved to offer a non-degree program entitled Community Health and Sexual Trauma Recovery Program. The approval to operate was in full force and effect at all times relevant to the charges in the accusation, and is scheduled to expire on March 11, 2025.

2. On October 1, 2021, complainant Deborah Cochrane issued an accusation in her official capacity as Chief of the Bureau, seeking to impose discipline upon respondent for failure to comply with a citation. Respondent submitted a notice of defense, and this hearing followed.

Basis for Citation

ANNUAL FEE

3. Each institution that is approved to operate by the Bureau is required to pay an annual fee. (Ed. Code, § 94930.5, subd. (d); Cal. Code Regs., tit. 5, § 74006.) The annual fee is due within 30 days after the date on which the institution originally received its approval, and each year thereafter on the anniversary of that date. (Cal. Code Regs., tit. 5, § 74006, subd. (a).) The amount of the annual fee *is* based on a percentage of the institution's annual revenue, with the minimum fee being \$2,500. (Ed. Code, § 94930.5, subds. (d)(1) & (g).) The minimum annual fee of \$2,500 is due even if the institution has no revenue for that year.

4. On April 8, 2020, Bureau staff sent respondent an invoice by mail to respondent's address of record, stating that the 2020 annual fee was due by May 1,

2020. The invoice provided notice that a late fee would be assessed for late payments, and that failure to pay may result in disciplinary action. No payment was received.

5. Bureau staff sent a delinquency notice to respondent on June 16, 2020, by mail to respondent's address of record, which assessed a late fee of 25 percent. This notice stated that the late fee would increase to 35 percent after the annual fee was 90 days past due. The notice also provided a telephone number for Bureau staff member Sean McClary, and stated that respondent should contact McClary with any questions. Respondent did not contact McClary, and did not pay the 2020 annual fee or respond to this notice in any other way.

6. On August 17, 2020, Bureau staff sent a second delinquency notice to respondent by mail to respondent's address of record, which stated that the annual fee was now subject to a late fee of 35 percent, because it was 90 days past due. The notice again provided McClary's telephone number as a contact, and stated that failure to pay may result in disciplinary action. Respondent did not contact McClary, and did not pay the 2020 annual fee or respond to this notice in any other way.

STUDENT TUITION RECOVERY FUND ASSESSMENT REPORTING FORM

7. Under Education Code section 94923, the Student Tuition Recovery Fund (STRF) relieves or mitigates economic loss suffered by enrolled students at qualifying institutions who prepaid their tuition. Institutions must submit STRF Assessment Reporting Forms (STRF Forms) to the Bureau on a quarterly basis, no later than the last day of the month following the end of the quarter (due by July 31 for the second quarter of the year). (Cal. Code Regs., tit. 5, § 76130, subd. (b).) The institution must report items such as the number of enrolled students and total amount of STRF assessments charged to students, and must submit the form to the Bureau together

with the assessments collected from students. (*Id.*, subds. (b) & (c).) Institutions must submit quarterly STRF Forms even if they enroll no students.

8. Respondent did not submit a STRF Form to the Bureau for Quarter 2 of 2020 by July 31, 2020.

ISSUANCE OF CITATION

9. On September 17, 2020, Bureau staff issued Citation Number 2021090 (Citation) to respondent for: (1) failure to submit the STRF Form for Quarter 2 of 2020; and (2) failure to pay the 2020 annual fee. The Citation assessed an administrative fine of \$50, and included an order of abatement requiring respondent to submit the form and pay the annual fee within 30 days. The Citation provided information about how to appeal, and also advised respondent that failure to comply may result in disciplinary action. The Citation was sent to respondent by mail at respondent's address of record.

Respondent's Non-Compliance with Citation

10. Respondent did not appeal the Citation by requesting an informal conference and/or an administrative hearing.

11. Respondent did not submit the STRF Form within 30 days of the Citation. Respondent eventually did submit the STRF Form for Quarter 2 of 2020, reporting that there were no students enrolled and no STRF assessments due. The Bureau received the completed form on November 23, 2020.¹

¹ Respondent has not yet submitted the STRF Forms for Quarters 3 and 4 of 2020; Quarters 1, 3, and 4 of 2021; or Quarter 1 of 2022.

12. Respondent did not pay the 2020 annual fee or the late payment fee in response to the Citation. As of the date of the hearing, respondent still had not paid the 2020 annual fee or the late fee.

13. Respondent did not pay the \$50 administrative fine in response to the Citation. As of the date of the hearing, respondent still had not paid the \$50 fine.

14. On December 22, 2020, Bureau staff mailed a demand for payment to respondent's address of record, informing respondent that full payment and compliance with the Citation's order of abatement must be received by January 24, 2021. The letter warned that failure to comply could result in disciplinary action. The notice also included an email address for Bureau staff member Nicole Mitchell, and stated that respondent could contact Mitchell if respondent believed it did not owe the money or wished to pay in installments. Respondent did not respond to this demand letter in any way.

15. On February 18, 2021, Bureau staff mailed a second demand for payment to respondent's address of record. Again, the demand told respondent to contact Mitchell if respondent believed it did not owe the money or wished to pay in installments. Respondent did not respond to this demand letter in any way.

16. On April 9, 2021, Bureau staff mailed a third and final demand for payment to respondent's address of record, containing the same contact information and notices. Respondent did not respond to this demand letter in any way.

17. On May 19, 2021, Mitchell sent email to respondent's president, David Floyer, attaching copies of the Citation and the three demand letters. Mitchell's email warned that the \$50 fine and the 2020 annual fee, plus the late fee, must be sent to

the Bureau by May 27, 2021, in order to avoid collection and disciplinary action. Respondent did not respond to this email, or pay any of the fees.

18. The total amount now owed by respondent is \$3,425: the \$2,500 minimum annual fee for 2020; the 35 percent late fee (\$875); and the \$50 fine.

Respondent's Evidence and Contentions

19. Floyer testified on behalf of respondent. Floyer testified that respondent has not been able to offer any classes yet due to the COVID-19 pandemic. He hopes to begin offering classes in January 2023, after a lengthy process to develop new classes and re-work the curriculum. (The evidence did not establish whether respondent's revised curriculum would remain within the scope of the program that has been approved by the Bureau.)

20. Floyer stated that he had been working remotely and traveling frequently, and his assistant had also been working remotely. Floyer noted that respondent had been receiving "a lot of mail" and that some letters were looked at, while others remained "in a pile." He was not focused on ensuring that respondent's mail was reviewed. Floyer did not update respondent's mailing address of record with the Bureau, despite the fact that he was rarely at that address to retrieve mail.

21. Floyer maintained that the Bureau should have easily been able to reach him by telephone or email, and criticized Bureau staff for relying on mail. He complained that communicating by mail is inefficient and outdated.

22. When asked at hearing whether he had received Mitchell's email of May 19, 2021, which attached copies of the Citation and the demand letters, Floyer stated

that the email message had been routed into his "junk" folder. Floyer later retrieved Mitchell's email, but he never responded. He did not explain why not.

23. In March 2022, Bureau staff sent a courtesy email to Floyer, regarding the outstanding STRF Form for Quarter 4 of 2021. Floyer responded by email, stating that the STRF Form had been submitted, but was returned by the postal service. Floyer did not indicate that respondent had made any effort to re-submit the form, nor did he attach it in his email response to the Bureau. Floyer simply requested that the Bureau send all required notices by email.

24. At hearing, Floyer offered no plan or corrective steps to ensure that respondent would receive and act upon notices from the Bureau, other than demanding that the Bureau communicate with respondent by email or telephone.

25. Floyer stated that he believed respondent did not have to pay the annual fee for the first year of its approval, based on information he had learned in 2016. He did not offer further evidence in this regard.

26. Floyer also stated he believes that no money is due to the Bureau if respondent is not offering any classes. Floyer did not offer a response to the testimony of Bureau staff that a minimum annual fee is due even if no classes are offered.

27. Floyer stated that he did not become aware that respondent needed to pay the 2020 annual fee until the accusation in this matter was issued. He did not explain why respondent still has not paid the 2020 annual fee or late fee, or the Citation's fine, even after receiving notice of the pending accusation. Floyer said the institution is "happy to pay" what it needs to, but also asked why the institution should pay the 2020 fee if its approval is at risk of being revoked.

28. Floyer contends that the current matter should have been resolved by way of informal conference, as a previous citation was. The Bureau issued a citation (No. 1819212) to respondent on June 4, 2019, for operating without approval. The citation ordered respondent to cease operating without approval, and assessed an administrative fine of \$100,000. Respondent appealed the June 2019 citation; an informal conference was held with a Bureau representative; and the administrative fine was subsequently reduced to \$1,000. Respondent did not, however, provide any evidence that it made any efforts to engage to appeal the September 2020 Citation by way of informal conference or administrative hearing.

29. Floyer also pointed to the prior resolution of a 2019 Statement of Issues, which had denied respondent's 2017 application for approval to operate. Complainant ultimately withdrew the Statement of Issues when the Bureau determined respondent had resolved the deficiencies in its application.

Costs

30. The Bureau has incurred \$16,643.75 in prosecution costs by staff of the Attorney General's Office. These costs are supported by a certification that complies with California Code of Regulations, title 1, section 1042. In the absence of any evidence or argument to the contrary, these costs are found to be reasonable.

LEGAL CONCLUSIONS

1. The Bureau is responsible for regulating private postsecondary educational institutions. Protection of the public is its highest priority. (Ed. Code, § 94875.)

2. The Bureau may issue a citation for violations of the California Private Postsecondary Education Act of 2009. (Ed. Code, § 94936, subd. (a); Bus. & Prof. Code, § 125.9; Cal. Code Regs., tit. 5, § 75020.) The citation may include an order of abatement and/or an administrative fine. (Ed. Code, § 94936, subds. (a) & (b).) An institution's failure to abate the violation or to pay the fine within the time allowed (unless the citation is being appealed) is grounds for discipline of approval to operate. (Cal. Code Regs., tit. 5, § 75050, subd. (b).)

As set forth in Factual Findings 3 through 9, the Bureau issued the Citation to respondent for its failure to pay the required annual fee for 2020 and failure to timely submit the STRF Form for Quarter 2 of 2020, in violation of Education Code section 94930.5 and California Code of Regulations, title 5, sections 74006 and 76130. As set forth in Factual Findings 10 through 18, respondent failed to comply with the Citation's order of abatement by paying the 2020 annual fee (and late fee) and timely submitting the STRF Form, and failed to pay the administrative fine assessed by the Citation. Cause exists for discipline against respondent's approval to operate.

3. The Bureau has issued disciplinary guidelines pursuant to California Code of Regulations, title 5, section 75500. The guidelines set forth factors for determining the appropriate discipline, including as relevant here: nature of the offense; actual or potential harm to consumers, students, or the public; prior discipline record or notice of violations; mitigation or rehabilitation evidence; recency of the offense; cooperation with the Bureau; and recognition by respondent of its wrongdoing and demonstration of corrective action to prevent recurrence. These factors have been considered.

4. The Bureau's regulatory scheme is designed to protect students and the public. Respondent has only recently been approved to operate, after a lengthy process of remediating the deficiencies in its application for approval, and after

issuance of a prior citation for operating without approval. Despite this history, respondent has demonstrated an inability or unwillingness to comply with the Bureau's requirements. Respondent offered no evidence of rehabilitation or a plan to ensure future compliance. Respondent's cavalier attitude, refusal to accept responsibility, and insistence upon dictating the terms upon which the regulating agency communicates with the institution it regulates, demonstrate that placing respondent on probation would be an exercise in futility. Public protection requires revocation of respondent's approval to operate.

Costs

5. Education Code section 94937, subdivision (c), provides that the Bureau may seek reimbursement pursuant to Section 125.3 of the Business and Professions Code. Section 125.3 provides that a licensee found to have committed a violation of the licensing act may be ordered to pay a sum not to exceed the reasonable costs of the investigation and enforcement of the case. Respondent violated the statutes and regulations governing its approval to operate, as set forth in Legal Conclusion 2. As set forth in Factual Finding 30, the Board incurred \$16,643.75 in reasonable costs for the enforcement of this matter.

6. In *Zuckerman v. State Board of Chiropractic Examiners* (2002) 29 Cal.4th 32, 45, the California Supreme Court set forth standards for determining whether costs should be assessed in the particular circumstances of each case, to ensure that licensees with potentially meritorious claims are not deterred from exercising their right to an administrative hearing. Those standards include whether the licensee has been successful at hearing in getting the charges dismissed or reduced, the licensee's good faith belief in the merits of his or her position, whether the licensee has raised a colorable challenge to the proposed discipline, the financial ability of the licensee to

pay, and whether the scope of the investigation was appropriate to the alleged misconduct. These considerations do not support a reduction in cost recovery here.

ORDER

1. The Approval to Operate, Institution Code Number 51315935, issued to respondent DiaNova Institute, is revoked.

2. Respondent DiaNova Institute shall pay the amount of \$16,643.75 in enforcement costs to the Bureau within 30 days of the effective date of this decision.

DATE: 08/10/2022

“Original Signature on File”

HOLLY M. BALDWIN

Administrative Law Judge

Office of Administrative Hearings