

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF PROFESSIONAL)
REGULATION, Board of Medical)
Examiners,)
)
Petitioner,)
)
vs.) CASE NO. 82-540
)
JOSE R. SUAREZ,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Sharyn L. Smith, held a formal hearing in this case on June 14, 1982, in Miami, Florida. The following appearances were entered:

APPEARANCES

For Petitioner: Joseph W. Lawrence II, Esquire
Chief Attorney
Department of Professional Regulation
130 North Monroe Street
Tallahassee, Florida 32301

For Respondent: W. K. Chester, Esquire
810 Northeast 80th Street
Miami, Florida 33138

The issue for determination in this case is whether disciplinary action should be taken against the Respondent's license for allegedly aiding another in obtaining a license to practice medicine through fraudulent misrepresentation.

INTRODUCTION

By Four Count Administrative Complaint dated January 22, 1982, the Respondent Suarez was charged with violating Chapter 458, Florida Statutes. Specifically, it was charged in Count One that on or about January 29, 1975, the Respondent Suarez swore and affirmed that to his personal knowledge, Olga Lourdes Romani, an applicant for Medical licensure, was a graduate of the School of Medicine of Havana, Cuba and that she lawfully practiced medicine in Cuba from 1954 through 1961. It was further alleged that since the Respondent Suarez had no personal knowledge of the truth and veracity of his statement concerning Ms. Romani when he executed the sworn affidavit, he violated Section 458.1201(1)(b), Florida Statutes (1973), modified and carried forward as Section 458.331(1)(a), Florida Statutes (1981), by making misleading, deceptive, untrue or fraudulent representations in the practice of medicine and practicing fraud or deceit in obtaining a license to practice medicine. Count Two charged a violation of Section 458.1201(1)(j), Florida Statutes (1973), modified and

carried forward as Section 45.331(1)(g), Florida Statutes (1981), by knowingly aiding, assisting, procuring or advising any unlicensed person to practice medicine contrary to Chapter 458, Florida Statutes. Count Three accused the Respondent of violating Section 458.1201(1)(m), Florida Statutes (1974), by engaging in immoral or unprofessional conduct. Additionally, since the Respondent was placed on probation by Order of the Board of Medical Examiners on March 17, 1981, Count Four alleged that the Respondent's actions violated Section 458.331(1)(h), Florida Statutes, by his failure to perform a statutory or legal obligation placed upon a licensed physician.

In support of the allegations of the Administrative Complaint, the Petitioner presented the testimony of Brooks Harle and John McDougald and two affidavits of the Respondent Suarez. Petitioner Exhibits 1-6 were offered and received into evidence. The Respondent Suarez testified on his own behalf and Respondent's Exhibit 1 was admitted into evidence.

A Proposed Recommended Order has been submitted by the Petitioner. To the extent that the proposed findings submitted by Petitioner are not reflected in this Order, they are rejected as being either not supported by admissible evidence or as being irrelevant to the issues determined here.

FINDINGS OF FACT

1. At all times pertinent to this proceeding, the Respondent Jose Raul Suarez, held a Medical license to practice medicine from the State of Florida, Board of Medical Examiners.

2. The Respondent Suarez was born in Tampa, Florida, in 1928 and attended the University of Florida from 1945 through February 1950, receiving a Bachelor of Science degree on February 5, 1950. Respondent Suarez then attended the University of Havana, Cuba, from September 13, 1950 until February 15, 1956. From April 5, 1956 through October 23, 1958, the Respondent attended the Madrid Medical School, Spain, and then completed an internship' in Miami Beach, Florida, from January, 1959 through January, 1960.

3. According to her application for Medical licensure filed with the Florida Board of Medical Examiners, Olga Lourdes Romani attended the Havana University from September, 1947 to September, 1954, and worked at the Hospital-Caliato Garcia-Havana from 1953 through 1954. Romani stated in her application that following a three year absence from the practice of medicine, she resumed practice in several hospitals and clinics from 1957 through 1961. Romani subsequently applied for Medical licensure with the Florida Board of Medical Examiners, attaching to her application an affidavit of Respondent Suarez dated February 5, 1975, which states as follows:

STATE OF FLORIDA
DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL REGULATION
BOARD OF MEDICAL EXAMINERS
305 South Andrews Avenue, Suite 801
Fort Lauderdale, Florida 33301

AFFIDAVIT

APPLICANT: ROMANI, OLGA LOURDES

I, JOSE RAUL SUAREZ, . . . do hereby swear
and affirm by my personal knowledge, that

OLGA LOURDES ROMANI, attended and graduated from SCHOOL OF MEDICINE - HAVANA - CUBA and did lawfully practice the profession of medicine in Havana Cuba during the years 1954-1961.

4. The affidavit went on to set forth the fact that Dr. Suarez was licensed to practice medicine in the State of Florida, stating his Medical license number. (See Petitioner's Exhibit No. 3)

5. Based upon the application for Medical licensure with attachments, Olga Lourdes Romani became licensed as a Medical doctor in the State of Florida in 1976.

6. Respondent provided an affidavit on April 17, 1981 to Department of Professional Regulation investigators during the course of the 1981 investigation of the Medical credentials of Olga Lourdes Romani. In the affidavit he stated as follows:

I am supplying this affidavit at the request of J.P. McDougald investigator for the Dept. of Professional Regulation. I have no personal knowledge when or if she graduated from the University of Havana Medical School (she being Olga Lourdes Romani). I signed affidavit 1-29-75 for Olga L. Romani at her request because she told me that she had graduated from the University of Havana Medical School and had practiced medicine previously in Cuba. I think it's possible (at this time) that she may have practiced medicine 1954-1961 but I do not recall for sure that she had her license or graduated from the above University. To my present knowledge the above Affidavit was not notarized in my presence, it was apparently notarized February 5, 1975 which was several days after my affidavit. The above statement I have read and is true to the best of my knowledge at this moment. (See Petitioner's Exhibit No. 5)

7. In response to the Administrative Complaint, Respondent sent another affidavit dated February 5, 1982, to the prosecutor for the Department of Professional Regulation, stating as follows:

This will certify, consistent with my Affidavit of 1975, that to my personal knowledge Dr. Olga L. Romani attended and graduated from the University of Havana School of Medicine and practiced medicine in Havana during 1954 to 1961.

The above statement appeared in my Affidavit of 1975 and is hereby reiterated based on my personal knowledge that Dr. Romani worked at the Havana University Hospital as a

physician during the years, 1954, 1955 and 1956; was addressed as a physician during that time, and was regarded in the University Hospital by everyone, including me, as a doctor.

I wish to make absolutely clear that on making this sworn statement with regard to Dr. Romani, as when I made the 1975 affidavit, the words "to my personal knowledge" refer to that personal knowledge which I had of Dr. Romani's activities in the Medical profession in Havana during the time that I knew her, and under no concept did I intent to imply that I had actually seen her diploma.

In 1956 I left Cuba to continue my studies in Spain which I completed in 1958, returning to Cuba. Since Dr. Romani, to my personal knowledge, was practicing medicine in Havana in 1954, 1955, and 1956 up to the time that I left for Spain, I had no information that her professional status varied, it was certainly logical to assume that she would have continued practicing medicine until the time that she came to this country. Therefore, based on personal knowledge, Dr. Romani practiced medicine until she came to this country.

In 1981, appearing before the Department of Professional Regulation in Miami, as part of a customary investigation into my activities while under suspension (October 1980 to October 1981), a private investigator for the Department, Mr. J.P. McDougald, showed me the Affidavit which I had signed for Dr. Romani in 1975. He then proceeded to question me to determine whether I had ever seen her diploma or graduation from the University of Havana Medical School. To this I replied "No" but that I had personal knowledge that she was practicing medicine as previously stated. Mr. McDougald stated that this did not constitute personal knowledge since I had not seen her diploma and that I would have to clarify the previously written Affidavit (1975). Then Mr. McDougald together with Mr. Harley, an attorney proceeded to dictate a statement which they said would qualify more specifically my aforementioned Affidavit. Despite my repeated requests, Messrs. McDougald and Harley did not allow me to insert into their dictated verbatim statement certain important personal remarks, as contained herein, which

would have clearly demonstrated my nonmalicious intent at the time I signed the 1975 Affidavit, sworn by me in good faith on the basis of the true knowledge available to me at that time.

I again wish to emphasize that in giving Dr. Romani my 1975 Affidavit, I acted on my true conviction that she was a physician, based on my personal knowledge that she had worked as a physician in Havana, and at no time was it my intention to misrepresent, deceive or in any way offer false information. (See Respondent's Exhibit No. 1)

8. At the final hearing the Respondent Suarez stated that all the affidavits which he executed were true. (Transcript p. 89)

9. In his opening statement, counsel for Respondent admitted to the erroneous signing of the affidavit as to the graduation from Medical school of Olga Lourdes Romani by Dr. Suarez. (See Transcript p. 12) Dr. Suarez first met Romani in 1954, seeing her on campus of the University Medical School dressed in a white smock and he testified that he saw her several times on campus until 1956. He did not see Ms. Romani again or hear from her until 1975 when he signed the affidavit on her behalf. The Respondent believed Romani to be a doctor since he had seen her at the hospital, believed that she was practicing in a ward at the hospital and recalled that Romani was referred to as "doctor".

10. Mr. Suarez had no personal knowledge of the practice of medicine by Romani from 1956 through 1961 due to his not seeing her during this period of time, she being possibly in Cuba while he was in Spain and the United States. However, he executed the affidavit which stated Romani was practicing medicine during this period in Cuba on his assumption that since Romani was practicing prior to 1956, she must have been practicing subsequent to that date.

11. No evidence was presented by the Petitioner that Romani had not graduated from Medical school and practiced medicine for five years in Cuba.

12. Respondent's license as a physician in the State of Florida is presently on probation for a period of two years following a one year suspension of his license to practice medicine. Said suspension and probation resulted from an Administrative Complaint and formal proceeding wherein it was established that Respondent fraudulently prescribed scheduled controlled substances in return for stolen property and monies.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. See Section 120.57(1), Florida Statutes.

14. In Counts One, Two and Three, the Department has charged the Respondent with violating Sections 458.1201(1)(h), (j) and (m), Florida Statutes (1974), respectively. Additionally in Count Four, the Respondent has been charged with violating Section 458.331(1)(h), Florida Statutes, since he was placed on probation by Order of the Board of Medical Examiners on March 17, 1981. In pertinent part, the statutes in effect as of February 5, 1975, and as

carried forward, which the Administrative Complaint allege the Respondent violated, read as follows:

Section 458.1201 Denial, suspension, revocation of license; disciplinary powers.

(1) The board shall have authority to deny an application for a license or to discipline a physician licensed under this chapter or any antecedent law who, after hearing, has been adjudged unqualified or guilty of any of the following:

* * *

(b) Making misleading, deceptive, untrue, or fraudulent representations in the practice of medicine; employing a trick or scheme in the practice of medicine; practicing fraud or deceit in obtaining a license to practice medicine; or making a false or deceptive annual registration with the board;

* * *

(j) Knowingly maintaining a professional connection or association with any person who is in violation of this chapter or rules or regulations of the board or knowingly aiding, assisting, procuring, or advising any unlicensed person to practice medicine contrary to this chapter or to rules and regulations of the board;

* * *

(m) Being guilty of Immoral or unprofessional conduct, incompetence, negligence, or willful misconduct. Unprofessional conduct shall include any departure from, or the failure to conform to, the standards of acceptable and prevailing Medical practice in his area of expertise as determined by the board, in which proceeding actual injury to a patient need not be established when the same is committed in the course of his practice, whether committed within or without this state;

Section 458.331 Grounds for disciplinary action; action by the board.

(1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:

(a) Attempting to obtain, obtaining, or renewing a license to practice medicine by bribery, by fraudulent misrepresentations, or through an error of the department or the board;

* * *

(g) Aiding, assisting, procuring, or advising any unlicensed person to practice medicine contrary to this chapter or to a rule of the department or the board.

(h) Failing to perform any statutory or legal obligation placed upon a licensed physician.

* * *

(l) Making deceptive, untrue, or fraudulent representations in the practice of medicine or employing a trick or scheme in the practice of medicine when such scheme or trick fails to conform to the generally prevailing standards of treatment in the Medical community;.

15. The Petitioner urges that the Respondent Suarez violated Section 458.1201(1)(b), Florida Statutes (1973), by making fraudulent representations to obtain a license to practice medicine. However, this statute in question, Section 453.1201(1)(b), Florida Statutes (1973), specifically addresses the situation where one seeks to obtain a license to practice medicine and proscribes conduct which amounts to fraud or deceit. When Section 458.1201(1)(b) and (j) are read in para materia, it appears that Section 458.1201(1)(b), Florida Statutes, was intended to apply when a physician obtains his own license through fraud or deceit while Section 453.1201(1)(j), Florida Statutes, applies when a physician knowingly assists another to obtain Medical licensure. See *Lester v. Department of Professional Regulation*, 348 So.2d 923, 925 (Fla. 1st DCA 1977).

16. However, assuming arguendo, that Section 458.1201 (1)(b), Florida Statutes, is applicable to the facts alleged in the instant case, the evidence presented by the Petitioner is legally insufficient to demonstrate fraud or deceit on the part of the Respondent' Suarez. Also see *Gentry v. Department of Professional Regulation*, 293 So.2d 95 (Fla. 1st DCA 1974) requiring that untrue, misleading or deceptive statements made by a physician be willful in order to constitute a violation of Section 458.1201(1)(b), Florida Statutes,

17. Similarly, fraud requires proof of a willful intent to deceive; it is an intentional or deliberate act in which scienter must generally be established. This rule is modified when one makes a statement implying knowledge when he has no knowledge that his statement is true or false and his statement proves to be false. In such a situation a recklessness equivalent to fraud has been found to exist. See 37 Am Jur.2d, *Fraud and Deceit* at 199-206.

18. In the instant case, the representation of the Respondent Suarez concerning Romani's practice in Cuba from 1954-1961 was based on his belief that she was in fact a doctor practicing in Havana during this period. The basis for this assertion was the Respondent's assumption that she was a doctor since he saw her at a hospital where she was addressed as doctor, wore a doctor's coat and practiced at the hospital where he saw her. Whether based on this limited information the Respondent's assumption concerning Romani was reasonable is a matter of conjecture. While the Respondent's assumption could be characterized as an overstatement, it does not rise to the level of Intentional fraud or deceit required to be demonstrated pursuant to the statute. This is especially true where, as in this case, the representations are made by a third person having no interest in the transaction to which the representation relates. See 37 Am Jur.2d, *supra*, at 208.

19. Additionally, the Department failed to demonstrate that the Respondent's assumption concerning Romani was in error. No evidence was introduced to prove or infer that Romani had failed to graduate from Medical

school and did not practice medicine in Cuba during the years that the Respondent assumed she was a practicing physician. See 37 Am Jur. 2d, supra, at 283, wherein it is stated that "[I]t is a fundamental principle of law. . . in order to seek relief on a basis of fraud . . . the person seeking redress must have been damaged, injured or harmed as a result of the asserted fraud . . . as is often stated, he must have been misled to his hurt." In sum, what is present in this case is a careless overstatement by the Respondent based on his possibly erroneous assumptions concerning Romani.

20. Similarly, Section 458.1201(1)(j), Florida Statutes (1973), requires proof that a licensed physician knowingly aided an unlicensed person to practice medicine. As stated, supra, the record fails to demonstrate that the Respondent knew that he was aiding an unlicensed person to practice medicine in violation of Chapter 458, Florida Statutes. The Department's proof in this case is essentially limited to the Respondent's allegedly inconsistent affidavits. The affidavit which the Respondent is charged with falsifying is a document prepared by the Department or the Board of Medical Examiners, which amounts to a fill-in-the-blank" form. The Respondent's subsequent affidavits and his testimony at the final hearing establish that while the Respondent's personal knowledge regarding Romani was limited, he signed the first affidavit based on his presumably good faith assumption that she was a practicing physician. If the Department requires specific information from an affidavit concerning the scope of an affiant's personal knowledge, it should consider altering its form to specifically inquire whether an affiant has seen a diploma, been present at a commencement exercise or in the alternative, ask an affiant to explain in detail the factual basis for the matters set forth in the affidavit.

21. Finally, the Respondent Suarez is charged with violating Section 458.1201(1)(n), Florida Statutes (1973), which prohibits, inter alia, Immoral conduct. The acts committed by the Respondent, while unquestionably careless and possibly negligent, could hardly be characterized as immoral. As previously stated, the Petitioner failed to show that the Respondent knew that the Romani affidavit was false when it was executed. The fact that the Respondent's assumptions do not constitute the requisite degree of personal knowledge required by Petitioner, does not necessarily equate with a finding of intentionally fraudulent, deceitful or immoral conduct on the part of the Respondent.

22. The allegations concerning a violation of Section 458.331(1)(h), Florida Statutes, was not briefed by the Department in its Proposed Recommended Order. Since the statute was not In effect when the Respondent executed the Romani affidavit, it can not be applied ex post facto to such act. Linkous v. Department of Professional Regulation, Case No. 81-1343, District Court of Appeals, Fifth District, August 4, 1982; 7 FLW 1665.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED:

That the Petitioner Department of Professional Regulation, Board of Medical Examiners enter a Final Order dismissing the Administrative Complaint against Respondent Suarez.

DONE and ORDERED this 5th day of October, 1982, in Tallahassee, Florida.

SHARYN L. SMITH, Hearing Officer
Division of Administrative Hearings
The Oakland Building
2009 Apalachee Parkway
Tallahassee, Florida 32301
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of October, 1982.

COPIES FURNISHED:

Joseph W. Lawrence II, Esquire
Chief Attorney
Department of Professional Regulation
130 North Monroe Street
Tallahassee, Florida 32301

W. K. Chester, Esquire
810 Northeast 80th Street
Miami, Florida 33138

Dorothy Faircloth, Executive Director
Florida Board of Medical Examiners
130 North Monroe Street
Tallahassee, Florida 32301

Samuel R. Shorstein, Secretary
Department of Professional Regulation
Old Courthouse Square Building
130 North Monroe Street
Tallahassee, Florida 32301

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AGENCY FINAL ORDER

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BEFORE THE BOARD OF MEDICAL EXAMINERS

DEPARTMENT OF PROFESSIONAL
REGULATION, BOARD OF MEDICAL
EXAMINERS,

Petitioner,

vs.

CASE NO. 82-540

JOSE R. SUAREZ, M. D.,

Respondent.

_____ /

FINAL ORDER

This matter came on for final action by the Board of Medical Examiners pursuant to Section 120.57(1)(b)9., F.S., at a public meeting on December 3, 1982, in Kissimmee, Florida, for review of the recommended order of the hearing officer entered herein and the exceptions filed by the Petitioner, Department of Professional Regulation. A transcript of the proceedings is available, if necessary.

FINDINGS OF FACT

Following a review of the complete record, the Board of Medical Examiners adopts and incorporates by reference the Findings of Fact of the Hearing Officer.

CONCLUSIONS OF LAW

1. Following its review of the complete record, the Board of Medical Examiners hereby rejects the Conclusions of Law of hearing officer with regard to the Respondent not having violated Sections 458.1201(1)(b), 458.1201(1)(j) and 458.1201(1)(m), and finds that based upon the findings of fact found by the hearing officer and accepted above that the Respondent did violate Sections 458.1201(1)(b), 458.1201(1)(j), and 458.1201(1)(m), F.S.

2. The Board hereby adopts and incorporates by reference the remaining conclusion of law of the hearing officer.

Accordingly, based upon a review of the complete record by the Board, the Findings of Fact and the Modified Conclusions of Law. the Recommendation of the hearing officer is rejected and, IT IS THEREFORE

ORDERED AND ADJUDGED that the license to practice medicine in the State of Florida of Jose R. Suarez, M.D., be and hereby is suspended for a period of ninety days; reprimanded, and following the period of suspension placed on probation for a period of one year to run concurrent with his current probation

subject to the following terms and conditions: that the Respondent appear before the Board semiannually, and that the Respondent perform one hundred twenty-five (125) hours of community service in the form of providing free Medical services for appropriate individuals, agencies or charitable organizations, and report on same at his semiannual appearances.

This Order shall take effect on the date of filing.

DONE AND ORDERED this 17th day of December, 1982.

BOARD OF MEDICAL EXAMINERS

By: _____
Dorothy J. Faircloth

cc: All Counsel of Record.

Jose R. Suarez, M.D.
4138 Southwest 97th Court
Miami, Florida 33165