

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF PROFESSIONAL)
REGULATION, BOARD OF MEDICINE,)
)
Petitioner,)
)
vs.) CASE NO. 92-0014
)
PAMELA SUE MORGAN, R.C.P.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on March 31, 1992, in Fort Lauderdale, Florida, before Stuart M. Lerner, a duly designated Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Arthur B. Skafidas, Esquire
Department of Professional Regulation
1940 North Monroe Street, Suite 60
Tallahassee, Florida 32399-0792

For Respondent: Pamela Sue Morgan, pro se
7324 S.W. 25th Court
Fort Lauderdale, Florida 33317-7005

STATEMENT OF THE ISSUES

1. Whether Respondent committed the offenses described in the Amended Administrative Complaint?
2. If so, what disciplinary action should be taken against her?

PRELIMINARY STATEMENT

On October 23, 1991, the Department of Professional Regulation (Department) issued an Administrative Complaint charging that Respondent, a licensed respiratory care practitioner, violated Section 468.365(1)(j) and Section 468.365(1)(a), Florida Statutes. Respondent denied the allegations of wrongdoing made in the Administrative Complaint and requested a formal hearing on the matter. On January 2, 1992, the matter was referred to the Division of Administrative Hearings for the assignment of a Hearing Officer.

On February 6, 1992, the Department filed a motion for leave to file an Amended Administrative Complaint. By order issued February 14, 1992, the motion was granted. The Amended Administrative Complaint alleges that (1) Respondent failed to comply with a rule of the Board, and thereby violated Section 468.365(1)(j), Florida Statutes, "in that Respondent failed to maintain and submit documentation verifying the required forty (40) hours of continuing

education for the period from January 1, 1989, through December 31, 1990, in response to the Board's random audit," and (2) Respondent violated Section 468.365(1)(a), Florida Statutes, by "falsely certifying [on her application for license renewal] that she completed the continuing education requirements for the period January 1, 1989, through December 31, 1990."

Respondent was the only witness to testify at the final hearing held in this cause. In addition to her testimony, there were a total of nine exhibits offered into evidence. The Hearing Officer received all nine exhibits into evidence.

At the conclusion of the evidentiary portion of the hearing, the Hearing Officer advised the parties on the record that post-hearing submittals had to be filed no later than ten days following the Hearing Officer's receipt of the hearing transcript. The Hearing Officer received the hearing transcript on April 9, 1992. On April 14, 1992, the Department filed a proposed recommended order. All of the proposed findings of fact set forth in the Department's proposed recommended order have been accepted and incorporated in substance, although not necessarily repeated verbatim, in this Recommended Order. To date, Respondent has not filed any post-hearing submittal.

FINDINGS OF FACT

Based upon the record evidence, the following Findings of Fact are made:

1. On August 31, 1988, Respondent was authorized by the Board Of Medicine (Board) to provide respiratory care services in this state under license number TU C000050, a license she still holds.

2. Respondent did not take a licensure examination. She was granted her license based upon her pre-October 1, 1987, respiratory therapy work experience pursuant to Section 468.357(3)(a), Florida Statutes, as amended by Chapter 87-553, Laws of Florida.

3. In December, 1990, Respondent sought to renew her license. As part of the renewal process, she submitted to the Board a signed Affirmation of Eligibility for License Renewal, which read as follows:

I HEREBY AFFIRM THAT I HAVE MET ALL OF THE REQUIREMENTS FOR LICENSE RENEWAL SET FORTH BY THE DEPARTMENT OF REGULATION AND/OR THE PROFESSIONAL REGULATORY BOARD INDICATED ON THE REVERSE SIDE OF THIS NOTICE.

I UNDERSTAND THAT WITHIN THE UPCOMING RENEWAL PERIOD, IF MY LICENSE NUMBER IS SELECTED FOR AUDIT BY THE DEPARTMENT OF PROFESSIONAL REGULATION AND/OR PROFESSIONAL REGULATORY BOARD, I MAY BE REQUIRED TO SUBMIT PROOF THAT I HAVE MET ALL APPLICABLE LICENSE RENEWAL REQUIREMENTS. I UNDERSTAND THAT PROOF MAY BE REQUIRED BY THE DEPARTMENT OF PROFESSIONAL REGULATION AND/OR PROFESSIONAL REGULATORY BOARD AT ANY TIME AND THAT IT IS MY RESPONSIBILITY TO MAINTAIN ALL DOCUMENTATION SUPPORTING MY AFFIRMATION OF ELIGIBILITY FOR LICENSE RENEWAL.

I FURTHER UNDERSTAND THAT FAILURE TO COMPLY WITH SUCH REQUIREMENTS IS IN VIOLATION OF THE RULES AND STATUTES GOVERNING MY PROFESSION AND SUBJECTS ME TO POSSIBLE DISCIPLINARY ACTION AND FURTHER, THAT ANY FALSE

STATEMENT IS IN VIOLATION OF SECTION 455.227, FLORIDA STATUTES, SUBJECTING ME TO DISCIPLINARY ACTION AS WELL AS THOSE PENALTIES PROVIDED BELOW.

I AFFIRM THAT THESE STATEMENTS ARE TRUE AND CORRECT AND RECOGNIZE THAT PROVIDING FALSE INFORMATION MAY RESULT IN DISCIPLINARY ACTION ON MY LICENSE AND/OR CRIMINAL PROSECUTION AS PROVIDED IN SECTION 455.2275, FLORIDA STATUTES.

4. At the time she made the foregoing affirmation, Respondent believed that she had met all of the requirements for the renewal of her license, including those relating to continuing education. She did not intend to deceive or mislead the Board regarding her eligibility for license renewal.

5. Based upon her review of the copies of the statutory and rule provisions with which the Board of Medicine had previously provided her, Respondent was under the impression that she needed to have earned only 24 hours of continuing education credit biennially in order to be eligible for license renewal. She had earned 31 hours of such credit, 15 in 1989 and 16 in 1990, and therefore thought that she had met the continuing education requirement for eligibility for license renewal. She was unaware that Chapter 468, Part V, Florida Statutes (1987), had been amended by Chapter 87-553, Laws of Florida, to require licensed respiratory care practitioners in her situation to complete 20 contact hours of approved continuing education courses each year.

6. Notwithstanding that she had completed less than 20 contact hours of approved continuing education courses in both 1989 and 1990, Respondent's license was renewed based, in part, upon the representations made in her Affirmation of Eligibility for License Renewal.

7. The Board subsequently selected Respondent for audit and asked her to submit documentation establishing her compliance with the continuing education requirements referenced in her Affirmation of Eligibility for License Renewal. Due to illness and other extenuating circumstances, Respondent was initially unable to provide any documentation in response to this request, however, she ultimately provided certificates of completion for each of the continuing education courses she had taken in 1989 and 1990.

CONCLUSIONS OF LAW

8. The Board of Medicine is statutorily empowered to take disciplinary action against licensed respiratory care practitioners based upon any of the grounds enumerated in Section 468.365(1), Florida Statutes. Such disciplinary action may include one or more of the following penalties: license revocation; license suspension; imposition of an administrative fine not to exceed \$1,000 for each count or separate offense; issuance of a reprimand; and placement of the respiratory care practitioner on probation for a period of time and subject to such conditions as the Board may specify, including requiring the respiratory care practitioner to attend continuing education courses. Section 468.365(2), Fla. Stat.

9. In those cases where license revocation or suspension is sought, the licensee's guilt must be established by clear and convincing evidence. See *Ferris v. Turlington*, 510 So.2d 292 (Fla. 1987); *Pascale v. Department of Insurance*, 525 So.2d 922 (Fla. 3d DCA 1988). "The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be

established." *Slomowitz v. Walker*, 429 So.2d 797, 800 (Fla. 4th DCA 1983). Furthermore, the disciplinary action taken may be based only upon the offenses specifically alleged in the administrative complaint. See *Kinney v. Department of State*, 501 So.2d 129, 133 (Fla. 5th DCA 1987); *Hunter v. Department of Professional Regulation*, 458 So.2d 842, 844 (Fla. 2d DCA 1984).

10. In determining whether the licensee has violated Section 468.365, Florida Statutes, as charged in the administrative complaint, one "must bear in mind that it is, in effect, a penal statute . . . This being true the statute must be strictly construed and no conduct is to be regarded as included within it that is not reasonably proscribed by it. Furthermore, if there are any ambiguities included such must be construed in favor of the . . . licensee." *Lester v. Department of Professional and Occupational Regulations*, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

11. The Amended Administrative Complaint issued against Respondent in the instant case alleges that Respondent "renewed her certificate by fraudulent misrepresentation, in that Respondent falsely certified that she had completed the continuing education requirements for the period January 1, 1989, through December 31, 1990," and thereby violated Section 468.365(1)(a), Florida Statutes.

12. Section 468.365(1)(a), Florida Statutes, authorizes the Board to discipline a Florida-licensed respiratory care practitioner for "renewing a certificate or registration as provided by this part . . . by fraudulent misrepresentation." To establish that a licensee committed such a violation, the Department must show not only that the licensee provided false or misleading information on her renewal application, but that she knowingly did so with the intent to deceive or mislead the Board. Cf. *First Interstate Development Corp. v. Ablando*, 511 So.2d 536, 539 (Fla. 1987)("intentional misconduct is a necessary element of fraud. Indeed, to prove fraud, a plaintiff must establish that the defendant made a deliberate and knowing misrepresentation designed to cause, and actually causing detrimental reliance by the plaintiff"); *Charter Air Center, Inc. v. Miller*, 348 So.2d 614, 616 (Fla. 2d DCA 1977), cert. denied, 354 So.2d 983 (Fla. 1977)("[t]he elements of fraudulent representation are: a false statement pertaining to a material fact, knowledge that it is false, intent to induce another to act on it, and injury by acting on the statement"); *Gentry v. Department of Professional and Occupational Regulations*, 293 So.2d 95, 97 (Fla. 1st DCA 1974)(statutory provision prohibiting licensed physicians from "[m]aking misleading, deceptive and untrue representations in the practice of medicine" held not to apply to "representations which are honestly made but happen to be untrue;" "[t]o constitute a violation . . . the legislature intended that the misleading, and untrue representations must be made willfully (intentionally)"); *Naekel v. Department of Transportation*, 782 F.2d 975, 978 (Fed. Cir. 1986)("a charge of falsification of a government document [in this case, an employment application] requires proof not only that an answer is wrong, but also that the wrong answer was given with intent to deceive or mislead the agency;" "[a] system of real people pragmatic in their expectations would not easily tolerate a rule under which the slightest deviation from the truth [on an employment application] would sever one's tenuous link to employment"); *Nyren v. HRS*, 5 FCSR para. 126 (Fla. PERC 1990)("a mere mistaken entry on a travel voucher does not necessarily reflect that an employee has committed fraud or has intended to deceive the agency;" a showing that the employee intended to defraud or deceive the agency "is essential to sustain a charge of falsification of records").

13. To the extent that she represented in her Affirmation of Eligibility for License Renewal that she had complied with the continuing education requirement for eligibility for license renewal prescribed by Section 468.357, Florida Statutes, as amended by Chapter 87-553, Laws of Florida, she provided the Board with false information.

14. As amended by Chapter 87-553, Laws of Florida, which took effect on December 22, 1987, subsection (3)(a) of Section 468.357, Florida Statutes, provides that "[a]ny person issued a certificate pursuant to this paragraph shall complete at least 20 contact hours of continuing education each year."

15. Respondent, whose license had been issued pursuant to subsection (3)(a) of Section 468.357, Florida Statutes, as amended by Chapter 87-553, Laws of Florida, completed only 15 contact hours of continuing education in 1989 and 16 contact hours of continuing education in 1990. While these were fewer contact hours than she needed to be eligible for license renewal, Respondent mistakenly believed otherwise at the time she sought to renew her license.

16. Respondent was unaware of the 20 contact hour per year continuing education requirement prescribed by Section 468.357(3)(a), Florida Statutes, as amended by Chapter 87-553, Laws of Florida.

17. It was her understanding that the provisions of Chapter 468, Part V, Florida Statutes (1987), a copy of which she had previously received from the Board, specifically Section 468.362(1), Florida Statutes (1987), were applicable and that therefore, "during the 2 years prior to [her] application for renewal, she [needed to have] participated in no fewer than 24 hours of continuing respiratory care education in courses approved by the [B]oard" in order to be eligible for license renewal.

18. Because she had completed 31 contact hours of continuing education during the two year period ending December 31, 1990, she thought that she had a sufficient number of continuing education contact hours to be eligible to renew her license and therefore she so indicated in her Affirmation of Eligibility for License Renewal. While this was a "misrepresentation,"¹ it was not a "fraudulent misrepresentation," within the meaning of Section 468.365(1)(a), Florida Statutes, inasmuch as Respondent did not make this representation knowing it to be false with the intent to deceive or mislead the Board. Accordingly, insofar as the Amended Administrative Complaint alleges otherwise, it should be dismissed.

19. The Amended Administrative Complaint further alleges that Respondent failed to comply with a rule of the Board and thereby violated Section 468.365(1)(j), Florida Statutes, "in that Respondent failed to maintain and submit documentation verifying the required forty (40) hours of continuing education for the period from January 1, 1989, through December 31, 1990, in response to the Board's random audit."

20. Section 468.365(1)(j), Florida Statutes, authorizes the Board to discipline a Florida-licensed respiratory care practitioner for the "[v]iolation of any rule adopted pursuant to this part or chapter 455."

21. Rule 21M-38.004(1), Florida Administrative Code, is a rule adopted pursuant to Chapter 468, Part V, Florida Statutes, and was in effect at all times material to the instant case. It provides that licensed respiratory care practitioners "must retain such receipts, vouchers, certificates, or other papers as may necessary to document completion of the appropriate continuing

education offerings" and, if selected for random audit following the renewal of their license, must submit such documentation "to assure that the[ir] continuing education requirements [have been] met."

22. Respondent was selected for random audit following the renewal of her license. Having taken only 15 and 16 hours of approved continuing education course offerings in 1989 and 1990, respectively, she was unable to provide documentation verifying that, for those two years, she had met the 20 contact hour per year continuing education requirement prescribed by Section 468.357(3)(a), Florida Statutes, as amended by Chapter 87-553, Laws of Florida. Her failure to have furnished such documentation was a violation of Rule 21M-38.004(1), Florida Administrative Code, and hence Section 468.365(1)(j), Florida Statutes, as well.

23. In determining what disciplinary action should be taken against Respondent for her violation of Section 468.365(1)(j), Florida Statutes, it is necessary to consult Rule 21M-37.001, Florida Administrative Code, which contains the disciplinary guidelines that the Board must follow in the instant case. Cf. Williams v. Department of Transportation, 531 So.2d 994, 996 (Fla. 1st DCA 1988)(agency is required to comply with its disciplinary guidelines in taking disciplinary action against its employees).

24. Subsection (2) of Rule 21M-37.001, Florida Administrative Code, provides as follows:
The range of disciplinary penalties which the Board may impose includes denial of an application, revocation, suspension, probation, reprimand, and a fine. In determining the appropriate disciplinary action to be imposed in each case, the Board shall take into consideration the following factors:

- (a) The severity of the offense;
- (b) The danger to the public;
- (c) The number of repetitions of offenses;
- (d) The length of time since the date of the violation;
- (e) The number of previous disciplinary cases filed against the certificate holder or registrant;
- (f) The length of time certificate holder or registrant has practiced;
- (g) The actual damage, physical or otherwise, to the patient;
- (h) The deterrent effect of the penalty imposed;
- (i) The effect of the penalty upon the certificate holder's or registrant's livelihood;
- (j) Any efforts for rehabilitation;
- (k) Any other mitigating or aggravating circumstances.

25. Having considered the facts of the instant case in light of the foregoing provisions of Rule 21M-37.001(2), Florida Administrative Code, it is the view of the Hearing Officer that the appropriate penalty in the instant case is the placement of Respondent on probation for a period of one year during which she must, in addition to meeting the 20 contact hour per year continuing education requirement prescribed by Section 468.357(3)(a), Florida Statutes, as amended by Chapter 87-553, Laws of Florida, complete 9 extra contact hours of approved continuing education course offerings and provide the Board with documentation, in the form of receipts, vouchers, certificates or other like papers, verifying her completion of these additional 9 contact hours.

RECOMMENDATION

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

RECOMMENDED that the Board of Medicine enter a final order (1) finding that Respondent did not violate Section 468.365(1)(a), Florida Statutes, as alleged in the Amended Administrative Complaint; (2) dismissing said charge; (3) finding that Respondent violated Section 468.365(1)(j), Florida Statutes, as alleged in the Amended Administrative Complaint; and (4) disciplining Respondent for having violated Section 468.365(1)(j), Florida Statutes, by placing her on probation for a period of one year during which she must, in addition to meeting the 20 contact hour per year continuing education requirement prescribed by Section 468.357(3)(a), Florida Statutes, as amended by Chapter 87-553, Laws of Florida, complete 9 extra contact hours of approved continuing education course offerings and provide the Board with documentation, in the form of receipts, vouchers, certificates or other like papers, verifying her completion of these additional 9 contact hours.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 20th day of April, 1992.

STUART M. LERNER
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative
Hearings this 20th day of April,
1992.

1/ See Chino Electric, Inc. v. United States Fidelity & Guaranty Co., 578 So.2d 320, 323 (Fla. 3d DCA 1991); Nagashima v. Buck, 541 So.2d 783, 784 (Fla. 4th DCA 1989).

2/ That Respondent was not aware of the 20 contact hour per year continuing education requirement prescribed by Section 468.357(3)(a), Florida Statutes, as amended by Chapter 87-553, Laws of Florida, does not excuse her failure to have complied with this requirement. See Moncrief v. State Commissioner of Insurance, 415 So.2d 785, 788 (Fla. 1st DCA 1982)(licensed bail bondsman could be found guilty of employing an unlicensed runner, notwithstanding his belief that "he was not required to have [the runner] licensed;" "the courts universally recognize that ignorance or mistake of law will not excuse an act in violation of the laws so long as the laws clearly and unambiguously proscribe the conduct alleged").

COPIES FURNISHED:

Arthur B. Skafidas, Esquire
Department of Professional Regulation
1940 North Monroe Street, Suite 60
Tallahassee, Florida 32399-0792

Pamela Sue Morgan
7324 S.W. 25th Court
Fort Lauderdale, Florida 33317-7005

Dorothy Faircloth, Executive Director
Board of Medicine
Department of Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 32399-0792

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

ALL PARTIES HAVE THE RIGHT TO SUBMIT WRITTEN EXCEPTIONS TO THIS RECOMMENDED ORDER. ALL AGENCIES ALLOW EACH PARTY AT LEAST 10 DAYS IN WHICH TO SUBMIT WRITTEN EXCEPTIONS. SOME AGENCIES ALLOW A LARGER PERIOD OF TIME WITHIN WHICH TO SUBMIT WRITTEN EXCEPTIONS. YOU SHOULD CONTACT THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE CONCERNING AGENCY RULES ON THE DEADLINE FOR FILING EXCEPTIONS TO THIS RECOMMENDED ORDER. ANY EXCEPTIONS TO THIS RECOMMENDED ORDER SHOULD BE FILED WITH THE AGENCY THAT WILL ISSUE THE FINAL ORDER IN THIS CASE.