

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION, BOARD OF)
VETERINARY MEDICINE)
)
Petitioner,)
)
vs.) CASE NO. 95-0908
)
JONATHAN S. ALLEN,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was held in this case on July 21, 1995, in Boca Raton, Florida, before Patricia Hart Malono, a duly designated Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Susan E. Lingard, Esquire
Department of Business and
Professional Responsibility
1940 North Monroe Street, Suite 60
Northwood Centre
Tallahassee, Florida 32399-0792

For Respondent: William M. Furlow, Esquire
Christopher B. Lunny, Esquire
Katz, Kutter, Haigler, Alderman,
Marks, Bryant & Yon, P. A.
Post Office Box 1877
Tallahassee, Florida 32302-1877

STATEMENT OF THE ISSUES

Whether the respondent committed the violations alleged in the Administrative Complaint, and, if so, the penalty which should be imposed.

PRELIMINARY STATEMENT

In an Administrative Complaint dated January 30, 1995, and filed with the Board of Veterinary Medicine ("Board"), the Department of Business and Professional Regulation ("Department") alleged:

1. Petitioner is the state agency charged with regulating the practice of Veterinary Medicine pursuant to FLA. STAT. sections 20.165, 455, and 474 (1993).[footnote omitted]

2. Respondent is, and has been at all times material hereto, a licensed veterinarian in the State of Florida, having been issued license number VM 0003475;

3. The Respondent's last known address is 871 N.W. Buttonwood Drive, Boca Raton, FL 33432.

4. On or about June 9, 1994, the Respondent entered a consent order with the Division of Pari-Mutuel Wagering of the Department of Business and Professional Regulation in order to settle the charges brought by the Division against the Respondent's pari-mutuel wagering occupational license as a Veterinarian/Practicing Veterinarian.

5. Pursuant to FLA. STAT. section 550(1993) the Division of Pari-Mutuel Wagering within the Department of Business and Professional Regulation is the licensing authority of the pari-mutuel industry.

COUNT I6. Based on the foregoing, the Respondent is in violation of FLA. STAT. section 474.214(1)(b)(1993) in that his authority to practice veterinary medicine has been acted against by a licensing authority.

Count II7. Petitioner realleges and incorporates by reference the allegations in paragraphs one through nine.8. Based upon the foregoing, the Respondent is in violation of FLA. STAT. section 474.214(1)(d)(1993) which prohibits making or filing a report or record which the licensee knows to be false and which the licensee signs in the capacity of a licensed veterinarian.

The Department requested that the Board take disciplinary action against Dr. Allen, including revocation or suspension of his license to practice veterinary medicine or imposition of an administrative fine. Dr. Allen timely filed a Request for Formal Hearing, and the case was forwarded to the Division of Administrative Hearings for formal proceedings. By Notice of Hearing, this case was set for final hearing on July 21, 1995.

The Department called three witnesses: Royal H. Logan, Jr., Chief of the Bureau of Operations of the Department's Division of Pari-Mutuel Wagering; Christie J. Dietert, Investigation Manager for Regions 10 and 11 of the Department's Bureau of Investigative Consumer Services; and Walter Blum, State Steward at Tropical Park at Calder Race Course. The Department's Exhibits 1, 2, and 5 were offered and admitted into evidence. The Department's Exhibit 3 was marked for identification but was not offered into evidence. The Department's Exhibit 4, an audio tape, was offered into evidence but withdrawn, and Exhibit 4a, an edited version of the tape, was substituted; this exhibit was authenticated and offered into evidence but was ultimately rejected. At the Department's request, official recognition was taken of chapters 474 and 550,

Florida Statutes (1993) and of rule chapters 61G18 and 61D-1, Florida Administrative Code. Dr. Allen presented no evidence.

Prior to the final hearing, Dr. Allen filed a Motion to Dismiss, in which he argued that the instant action was barred by the doctrines of res judicata and collateral estoppel; the Department timely filed a response in opposition to the motion. Based upon the arguments contained in the motion and response, the Motion to Dismiss was denied at the final hearing.

The transcript was filed, and the parties timely submitted proposed recommended orders. At the time it filed its Proposed Recommended Order, the Department filed a Motion for Reconsideration of Evidentiary Ruling, in which it requested that the Department's Exhibit 4a be admitted into evidence. In response, Dr. Allen filed a Motion to Strike the Department's motion and Proposed Recommended Order. Upon further reflection, after considering the arguments raised in the post-hearing motions, the entire record of this proceeding, and relevant judicial decisions, reconsideration of the ruling excluding Exhibit 4a is appropriate.

An administrative complaint seeking the revocation of a license "must state with specificity the acts complained of, to allow the licensee a fair chance to prepare a defense." *Hunter v. Department of Professional Regulation*, 458 So. 2d 842, 844 (Fla. 2d DCA 1984) (citing *Davis v. Department of Professional Regulation*, 422 So. 2d 938 (Fla. 5th DCA 1982)). The tape was offered to prove that Dr. Allen violated section 474.214(1)(d), Florida Statutes (1993), which prohibits, among other things, the filing of a report known to be false, which is signed in the capacity of a licensed veterinarian. Even though the Administrative Complaint at issue in this case contains no allegations of fact to support the Department's charge that Dr. Allen violated section 474.214(1)(d), there are ample indications in the record that Dr. Allen was aware of the specific facts at issue and had a fair chance to prepare a defense. See *Hickey v. Wells*, 91 So. 2d 206, 209 (Fla. 1956).

The Motion for Reconsideration of Evidentiary Ruling is, nonetheless, denied; the findings of fact and conclusions of law herein would not be affected were the excluded exhibit admitted into evidence.

A ruling on the parties' proposed findings of fact is contained in the Appendix to this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and the entire record of this proceeding, the following findings of fact are made:

1. Dr. Allen is, and has been at all times relevant to this proceeding, a licensed veterinarian in the State of Florida, having been issued license number VM 0003475 by the Department of Business and Professional Regulation. The Department is the licensing authority for persons who seek to practice veterinary medicine in Florida.

2. The Division of Pari-Mutuel Wagering ("Division") is a subdivision of the Department of Business and Professional Regulation. It is the licensing authority for the pari-mutuel wagering industry, with the responsibility for issuing occupational licenses to persons connected with racetracks, including

veterinarians. The Division does not have jurisdiction to issue or discipline licenses to practice veterinary medicine in Florida.

3. Three stewards are assigned to a racetrack to ensure that the rules of racing are followed; one is employed by the state and two by the racing association at the particular pari-mutuel facility. The stewards have the authority to impose discipline upon persons who have pari-mutuel wagering occupational licenses if they find that the rules have been violated.

4. On December 21, 1993, Dr. Allen was working at Calder Race Course as a veterinarian, and he was fined \$500.00 in a ruling of the stewards at the Tropical Park at Calder Race Course for violation of Calder Racing Association Rule 1.21(4). The fine was imposed for Dr. Allen's failure "to conduct his business in a proper manner as an equine veterinarian in regard to the keeping of his records and the filing of bills."

5. The charge which was the subject of the stewards' ruling derived from testimony Dr. Allen gave during a stewards' hearing regarding a positive drug test on a race horse named Ski Robbery. The charges at issue in the hearing were not brought against Dr. Allen but against the trainer of Ski Robbery. However, during the course of his testimony at the hearing, Dr. Allen admitted that he had added money to a bill submitted to the trainer for services rendered to Ski Robbery.

6. On January 31, 1994, the Division filed an Administrative Complaint against Dr. Allen's pari-mutuel wagering occupational license, alleging violation of several of the Division's rules.

7. In its Administrative Complaint, the Division alleged, among other things, that Dr. Allen had admitted to padding his bill to an owner/trainer by administering only one of the several drugs listed on the bill and that Dr. Allen had included an entry on a Veterinary Report of Medication filed with the state which was, by his own admission, false.

8. On June 7, 1994, Dr. Allen entered into a Consent Order with the Division to settle the case and avoid further litigation. The Division of Pari-Mutuel Wagering agreed to accept a fine of \$1,000 from Dr. Allen in full resolution of the matters contained in the Administrative Complaint.

9. The Consent Order expressly stated that Dr. Allen did not admit liability or culpability with regard to the charges alleged in the Administrative Complaint.

CONCLUSIONS OF LAW

10. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties hereto pursuant to section 120.57(1), Florida Statutes.

11. In the Administrative Complaint, the Department seeks revocation or suspension of Dr. Allen's license to practice veterinarian medicine. Consequently, the Department has the burden of proving the violations alleged in the complaint by clear and convincing evidence. *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987). Furthermore, statutes authorizing "the revocation or suspension of a license to practice [a profession] are deemed penal in nature and must be strictly construed, with any ambiguity interpreted in favor of the

licensee." *Elmariah v. Department of Professional Regulation, Board of Medicine*, 574 So. 2d 164, 165 (Fla 1st DCA 1990).

12. In Count I of the complaint, the Department has charged Dr. Allen with violating section 474.214(1)(b), Florida Statutes (1993). Section 474.214(1) permits the Department to impose discipline on a veterinarian for

(b) Having a license or the authority to practice veterinary medicine revoked, suspended, or otherwise acted against, including the denial of licensure, by the licensing authority of any jurisdiction, including any agency or subdivision thereof. The licensing authority's acceptance of a veterinarian's relinquishment of a license, stipulation, consent order, or other settlement, offered in response to or in anticipation of the filing of administrative charges against the veterinarian's license or authority to practice, shall be construed as action against the veterinarian's license or authority to practice. 1/

13. Section 550.105(1), Florida Statutes, provides that "[e]ach person connected with a racetrack shall purchase from the division [of Pari-Mutuel Wagering] an annual occupational license for each specified job performed." This requirement applies to veterinarians pursuant to section 550.105(2)(d)2. Section 550.105(3) makes it "unlawful for any person to take part in or officiate in any way or to serve in any capacity at any pari-mutuel facility without first having secured a license and paid the occupational license fee." Section 550.105(4) grants to the Division the power to deny, revoke, or suspend pari-mutuel occupational licenses and to impose civil fines of up to \$1,000 for any violation of the Division's rules.

14. The pari-mutuel wagering occupational license issued to a veterinarian allows him or her to practice veterinary medicine at a pari-mutuel facility. The pari-mutuel wagering occupational license is issued by a subdivision of an agency of the State of Florida. As defined in section 474.214(1)(b), the Consent Order entered into by Dr. Allen and the Division constitutes "action against the veterinarian's . . . authority to practice," even though it is only the veterinarian's authority to practice in a pari-mutuel facility. The Department is, therefore, authorized to take disciplinary action against Dr. Allen pursuant to section 474.214(1)(b).

15. In Count II of the complaint, the Department has charged Dr. Allen with violating section 474.214(1)(d), Florida Statutes (1993). Section 474.214(1) provides that disciplinary action can be taken against a veterinarian for

(d) Making or filing a report or record which the licensee knows to be false, intentionally or negligently failing to file a report or record required by state or federal law, willfully impeding or obstructing such filing, or inducing another person to impede or obstruct such filing. Such reports or records shall include only those which are signed in the capacity of a licensed veterinarian. =

16. The Department has failed to prove by clear and convincing evidence that Dr. Allen violated section 474.214(1)(d). There is evidence that Dr. Allen admitted he added money to a bill while working at a pari-mutuel facility and that he was disciplined by the stewards at Calder Race Course for deficiencies in "the keeping of his records and the filing of bills." There is no evidence, however, that a bill for services is a report or record for purposes of section 474.214(1)(d) or that any reports or records were made or filed which Dr. Allen signed in his capacity as a licensed veterinarian or which he was required to sign in such capacity. 2/

17. Rule 61G18-30.001, Florida Administrative Code, establishes disciplinary guidelines to be followed by the Board of Veterinary Medicine when imposing penalties. Rule 61G18-30.001(2)(b) provides that the "usual action of the Board" for the violation of section 474.214(1)(b) is imposition of "a penalty generally concurrent with that of the other jurisdiction with the addition of appropriate safeguards as determined by the Board." 3/

18. In the Consent Order which forms the basis of the violation of section 474.214(1)(b), the Division of Pari-Mutuel Wagering imposed a \$1,000.00 civil penalty against Dr. Allen in full resolution of the matters contained in the complaint.

19. In its Proposed Recommended Order, the Department has recommended imposition of a \$500.00 administrative fine for the violation of section 474.214(1)(b). The penalty recommended by the Department is appropriate, under the circumstances presented in this case and given the Board's authority to deviate from the disciplinary guidelines. See rule 61G18-30.001(4), F.A.C.

RECOMMENDATION

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

RECOMMENDED that the Board of Veterinary Medicine enter a Final Order finding Jonathan S. Allen guilty of violating section 474.214(1)(b), Florida Statutes (1993), imposing an administrative fine of \$500.00 for this violation, and dismissing Count II of the Administrative Complaint.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 19th day of March 1996.

PATRICIA HART MALONO
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 19th day of March 1996.

ENDNOTES

1/ Prior to its amendment in 1991, section 474.214(1)(b) stated:

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

(b) Having a license to practice veterinary medicine revoked, suspended, or otherwise acted against, including the denial of licensure, by the licensing authority of another state, territory, or country.

2/ The document marked for identification as the Department's Exhibit 3 was identified as Veterinary Report of Medication forms of the Division of Pari-Mutuel Wagering. The document was not otherwise identified or offered into evidence.

3/ The rule has not been changed to correspond with the 1991 amendment to section 474.214(1)(b). See endnote 1/ supra.

APPENDIX

The following rulings are made on the parties' proposed findings of fact:

Petitioner's Proposed Findings of Fact

Paragraphs 1, 2, 4, 5, 6, and 9: Adopted and incorporated in substance but not verbatim in paragraphs 1 through 3, 5, and 8 of the Recommended Order.

Paragraph 3: Rejected as contrary to the facts as found in paragraph 8 of the Recommended Order.

Paragraphs 7, 8, and 11: Rejected as unnecessary.

Paragraph 10: The proposed finding of fact that Dr. Allen testified at a stewards' hearing regarding Ski Robbery is adopted and incorporated in substance but not verbatim in paragraph 5 of the Recommended Order; the proposed finding of fact that the testimony was given under oath is rejected as not supported by the evidence.

Paragraph 12: The proposed finding of fact that Dr. Allen admitted he added charges to the bill for services rendered to Ski Robbery is adopted and incorporated in substance but not verbatim in paragraph 5 of the Recommended Order; the remainder of the paragraph is rejected as not supported by the evidence.

Paragraphs 13 and 14: Rejected as not supported by the evidence.

Respondent's Proposed Findings of Fact

Paragraphs 1 through 4: Adopted and incorporated in substance but not verbatim in paragraphs 1, 2, 6, and 8 of the Recommended Order.

Paragraphs 5 and 6: Rejected as a finding of fact, but addressed in the Preliminary Statement.

Paragraph 7: Noted in the Preliminary Statement that the Department filed a response in opposition to Dr. Allen's Motion to Dismiss; the remaining proposed findings of fact are rejected as merely extracts from legal argument made in response to the Motion to Dismiss.

Paragraph 8: Accepted but not incorporated in the findings of facts in the Recommended Order because subordinate to the facts as found or unnecessary.

COPIES FURNISHED:

Charles F. Tunnicliff
Chief Attorney
Department of Business and
Professional Responsibility
1940 North Monroe Street, Suite 60
Northwood Centre
Tallahassee, Florida 32399-0792

William M. Furlow, Esquire
Christopher B. Lunny, Esquire
Katz, Kutter, Haigler, Alderman,
Marks, Bryant & Yon, P. A.
Post Office Box 1877
Tallahassee, Florida 32302-1877

Lynda L. Goodgame
General Counsel
Department of Business and
Professional Regulation
1940 North Monroe Street
Northwood Centre
Tallahassee, Florida 32399-0792

Susan Foster, Executive Director
Board of Veterinary Medicine
1940 North Monroe Street
Northwood Centre
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 ten days in which to submit written exceptions. Some agencies allow a larger period 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.