

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
PHARMACY,)
)
Petitioner,)
)
vs.) Case No. 98-1093
)
PATRICK O. OJO,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Administrative Law Judge, William J. Kendrick, held a formal hearing in the above styled case on July 8, 1998, in Fort Lauderdale, Florida.

APPEARANCES

For Petitioner: Joseph S. Garwood, Esquire
Agency for Health Care Administration
Post Office Box 14229
Tallahassee, Florida 32317-4229

For Respondent: Patrick Ojo, pro se
2750 Pierce Street
Hollywood, Florida 33602

STATEMENT OF THE ISSUES

At issue is whether Respondent committed the offenses set forth in the Administrative Complaint and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By a four-court Administrative Complaint, Petitioner charged

Respondent, a licensed pharmacist, with a violation of various provisions of Chapter 465, Florida Statutes, the "Florida Pharmacy Act." The complaint read in pertinent part, as follows:

5. At all times material hereto, Respondent was employed by A & N Discount Pharmacy at 900 Alton Road, Miami Beach, Florida 33139.

6. Respondent served as the Pharmacy Manager for A & N Discount Pharmacy.

7. On or about June [24], 1997, an inspection of A & N Discount Pharmacy, place of Respondent's employment, was conducted.

8. Investigation revealed that the pharmacy was operating with 2:1 pharmacist/technician ratio without approval from the board.

9. Investigation revealed that the pharmacy technicians were not wearing any form of identification.

10. Investigation revealed that Respondent failed to display a renewal certificate on the wall.

11. Investigation revealed that the Respondent failed to keep the prescription department open a minimum of 40 hours per week. The facility was open only 24 hours per week, and was closed on Thursdays and Fridays.

COUNT I

12. Petitioner realleges and incorporates by reference the allegations contained in the foregoing paragraphs as if fully stated herein.

13. Based on the foregoing, the Respondent's license to practice pharmacy in the State of Florida is subject to discipline pursuant to Section 465.016(1)(n), Florida Statutes, by violating Rule 64B16-27.100, Florida Administrative Code, which states that the wall certificate and license of each pharmacist engaged in the practice of the profession of pharmacy as defined by Section 465.003(12), Florida Statutes, in any pharmacy shall be displayed, together with the current renewal certificate in a

conspicuous place in or near the prescription department, in such a manner that said the license can easily be read by patrons of said establishment.

COUNT II

14. Petitioner realleges and incorporates by reference the allegations contained in paragraphs one (1) through eleven (11) as fully stated herein.

15. Based on the foregoing, the Respondent's license to practice pharmacy in the State of Florida is subject to discipline pursuant to Section 465.016(1)(n), Florida Statutes, by violating Rule 64B16-27.410, Florida Administrative Code, which states that pharmacy technicians may assist a Florida licensed pharmacist in performing professional services within a community pharmacy or institutional pharmacy environment provided that no licensed pharmacist shall supervise more than one pharmacy technician unless otherwise permitted by the Florida Board of Pharmacy.

COUNT III

16. Petitioner realleges and incorporates by reference the allegations contained in paragraphs one (1) through eleven (11) as fully stated herein.

17. Based on the foregoing, the Respondent's license to practice pharmacy in the State of Florida is subject to discipline pursuant to Section 465.016(1)(n), Florida Statutes, by violating Rule 64B16-27.410, Florida Administrative Code, which states the requirement for all pharmacy technicians to identify themselves as pharmacy technicians by wearing a type of identification badge that is clearly visible which specifically identifies the employee by name and by status as a "pharmacy technician".

COUNT IV

18. Petitioner realleges and incorporates by reference the allegations contained in paragraph one (1) through eleven (11) as fully stated herein.

19. Based on the foregoing, the Respondent's license to practice pharmacy in the State of Florida is subject to discipline

pursuant to Section 465.016(1)(n), Florida Statutes, by violating Rule 64B16-28.404, Florida Administrative Code, which states that any person who receives a community pharmacy permit pursuant to Section 465.018, Florida Statutes, and commences to operate such an establishment shall, for the benefit of the public health and welfare, keep the prescription department of the establishment open for a minimum of forty (40) hours per week and a minimum of five (5) days per week.

In its post-hearing submittal Petitioner concedes, consistent with the proof, that the Respondent was recently licensed and, consequently, the license he had on display was current and without need of a renewal certificate. Therefore, Respondent did not violate Section 465.016(1)(n), Florida Statutes, by violating Rule 64B16-27.100, Florida Administrative Code, as alleged in Count I of the Administrative Complaint. Consequently, that count should be dismissed without the need for further discussion.

For the violations remaining, Petitioner proposed that one or more of the following penalties be imposed:

. . . imposition of an administrative fine not to exceed \$1,000 for each offense, issuance of a reprimand, placement of the Respondent on probation, and/or any other relief that the Board deems appropriate.

Respondent filed an election of rights which disputed the factual allegations contained in the Administrative Complaint, and requested a formal hearing pursuant to Sections 120.569 and 120.57(1), Florida Statutes. Consequently, Petitioner referred the matter to the Division of Administrative Hearings for the

assignment of an administrative law judge to conduct the formal hearing Respondent had requested.

At hearing, Petitioner called Harold Gluck and Guillermo Tejada, as witnesses, and Petitioner's Exhibits 1 through 3 were received into evidence. Respondent testified on his own behalf, and Respondent's Exhibits 1 through 4 were received into evidence.

The hearing transcript was filed August 10, 1998, and the parties were accorded 10 days from that date to file proposed recommended orders. Petitioner elected to file such a proposal and it has been duly considered.

FINDINGS OF FACT

Respondent's license and employment

1. Respondent, Patrick O. Ojo, is now, and was at all times material hereto, licensed as a pharmacist by the State of Florida, having been issued license number PS 0032023.

2. At all times pertinent hereto, Respondent was under contract with Healthcare Consultants of Central Florida, Inc., d/b/a Healthcare Consultants Pharmacy Staffing (Healthcare Consultants) , a corporation engaged in "the business of placing licensed pharmacists on a temporary and permanent basis" with businesses in need of their services. Pursuant to the agreement, Healthcare Consultants would "from time to time during the term of . . . [the] agreement offer [the] pharmacist the right to

perform pharmaceutical services at the location of various clients, " which the pharmacist had the option to accept or reject. If accepted, for temporary services provided under the agreement, Healthcare Consultants would pay the pharmacist \$25.50 per hour, except for legal holidays when the rate would be \$41.25 per hour.

3. Pursuant to a referral from Healthcare Consultants, Respondent accepted a position, on a temporary basis, as pharmacy manager for A & N Discount Pharmacy on June 2, 1997. A & N Discount Pharmacy is a community pharmacy licensed by Petitioner pursuant to Section 465.018, Florida Statutes, and located at 900 Alton Road, Miami Beach, Florida.

The pharmacy inspection

4. On June 24, 1997, Harold Gluck, a senior pharmacist employed by the Agency for Health Care Administration (AHCA), entered A & N Discount Pharmacy to conduct a routine community pharmacy inspection. Pertinent to this case, that inspection noted three deficiencies or violations against the pharmacy business, to wit: (1) there was a 2:1 technician to pharmacist ratio, without prior approval of the Board of Pharmacy (a perceived violation of Rule 64B16-27.410, Florida Administrative Code); (2) the two technicians were not wearing identification badges (a perceived violation of Rule 64B16-27.410, Florida Administrative Code); and (3) the prescription department was only open 24 hours per week, as opposed to 40 hours per week (a

perceived violation of Rule 64B16-28.404, Florida Administrative Code). Mr. Gluck's visual observations are supported by compelling proof, and are credited.

CONCLUSIONS OF LAW

5. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. Sections 120.569, 120.57(1), and 120.60(5), Florida Statutes.

6. Where, as here, Petitioner proposes to take punitive action against a licensee, it must establish grounds for disciplinary action by clear and convincing evidence. Section 120.57(1)(h), Florida Statutes, (1997), and Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996). That standard requires that "the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. 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)

7. Regardless of the disciplinary action sought to be taken it may be based only upon the offenses specifically alleged in the administrative complaint. See Kinney v. Department of

State, 501 So. 2d 129 (Fla. 5th DCA 1987); Sternberg v. Department of Professional Regulations, Board of Medical Examiners, 465 So. 2d 1324 (Fla. 1st DCA 1985); and Hunter v. Department of Professional Regulations, 458 So. 2d 844 (Fla. 2d DCA 1984). Finally, in determining whether Respondent violated the provisions of Section 475.25(1), as alleged 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." Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923,925 (Fla. 1st DCA 1977)

8. Pertinent to this case, Section 465.016(1), Florida Statutes, provides that the following act shall constitute grounds for which the Board of Pharmacy may take disciplinary action against a licensee:

(n) Violating a rule of the board or department.

9. For the perceived violation of Subsection 465.016(1)(n), Petitioner contends Respondent failed to comply with Rules 64B16-27.410 (Counts II and III) and 64B16-28.404 (Count IV), Florida Administrative Code.¹

10. Pertinent to Counts II and III, Rule 64B16-27.410, Florida Administrative Code, provides:

Pharmacy technicians may assist a Florida licensed pharmacist in performing

professional services within a community pharmacy or institutional pharmacy environment provided that no licensed pharmacist shall supervise more than one pharmacy technician unless otherwise permitted by the Board of Pharmacy. A pharmacist's supervision of a pharmacy technician in a 1:1 ratio working environment requires that a pharmacy technician be under the direct and immediate personal supervision of a Florida licensed pharmacist. All pharmacy technicians shall identify themselves as pharmacy technicians by wearing a type of identification badge that is clearly visible which specifically identifies the employee by name and by status as a "pharmacy technician", and in the context of telephone or other forms of communication, pharmacy technicians shall state their names and verbally identify themselves (or otherwise communicate their identities) as pharmacy technicians. Pursuant to the direction of the licensed pharmacist, pharmacy technicians may engage in the following functions to assist the licensed pharmacist:

(1) Prepackaging and labeling of unit and multiple dose packages pursuant to appropriate procedures. The pharmacist shall directly supervise and conduct in-process and final checks, and affix his/her initials to the record. Such pharmacy technicians activities would include the maintenance of control records. . . .

11. Here, Petitioner demonstrated with the requisite degree of certainty that Respondent violated the provisions of Rule 64B16-27.410, Florida Administrative Code, by supervising more than one pharmacy technician without the approval of the Board of Pharmacy, and that the pharmacy technicians, on the date of inspection, failed to wear an identification badge which specifically identified the employees by name and by their status

as pharmacy technicians. Consequently, Petitioner demonstrated that Respondent violated the provisions of Rule 64B16-27.410, Florida Administrative Code, and therefore Section 465.016(1)(n), Florida Statutes, as alleged in Counts II and III of the Administrative Complaint.

12. Pertinent to Count IV, Rule 64B16-28.404, Florida Administrative Code, provides:

Any person who receives a community pharmacy permit pursuant to Section 465.018, Florida Statutes, and commences to operate such an establishment shall, for the benefit of the public health and welfare, keep the prescription department of the establishment open for a minimum of forty (40) hours per week and a minimum of five (5) days per week

13. The clear wording of Rule 64B16-28.404, Florida Administrative Code, places the obligation to keep the prescription department of the establishment open for a minimum of 40 hours per week and a minimum of 5 days per week on the "person who receives a community pharmacy permit pursuant to Section 465.018, Florida Statutes". Here, the community pharmacy pertinent holder was A & N Discount Pharmacy (license number 13673) and not the Respondent. Consequently, Petitioner has failed to demonstrate Respondent violated or failed to comply with the provisions of Rule 64B16-28.404, Florida Administrative Code, as alleged in Count IV of the Administrative complaint.²

14. Having reached the foregoing conclusion, it remains to resolve the appropriate penalty that should be imposed.

Pertinent to this issue Rule 64B16-30.001, Florida Administrative code, sets forth the disciplinary guidelines, as well as the mitigating and aggravating circumstances to be considered, in assessing a penalty for a violation of Chapter 465, Florida Statutes. The rule fails, however, to specifically address a violation of Section 465.016(n), Florida Statutes, based on a violation of Rule 64B16-27.410, Florida Administrative Code. See Rule 64B16-30.001(2)(k), Florida Administration Code.³

15. Here, given the lack of severity of the violation shown, an appropriate penalty should not exceed the issuance of a letter of guidance. See e.g., Rules 64B16-30.001(2)(k)1 and 64B16-30.002(1), Florida Administrative Code.

RECOMMENDATION

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

RECOMMENDED that a final order be entered which dismisses Counts I and IV of the Administrative Complaint; finds Respondent guilty of violating Section 465.016(1)(n), Florida Statutes, by failing to comply with Rule 64B16-27.410, Florida Administrative Code, as alleged in Counts II and III of the Administrative Complaint; and, which imposes, as a penalty for such violations, the issuance of a letter of guidance.

DONE AND ENTERED this 15th day of September, 1998, in Tallahassee, Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847

Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of September, 1998.

ENDNOTES

1/ As heretofore noted in the Preliminary Statement, Petitioner acknowledged that the perceived violation of Subsection 465.016(1)(n) , by failing to comply with Rule 64B16-27.100, Florida Administrative Code (Count I) was not shown, and Count I should be dismissed.

2/ A review of Chapter 465, Florida Statutes, and Chapter 64B16, Florida Administrative Code, fails to reveal that any such obligation or responsibility is imposed on the pharmacist or prescription department manager. See, Section 465.01, Florida Statutes, and Rule 64B16-27.104, Florida Administrative Code. This conclusion was apparently shared by Petitioner since its proposed recommended order makes no mention of a violation of such rule by the Respondent.

3/ In its proposed recommended order Petitioner cites Rule 64B16-30.001(2)(n), Florida Administrative Code, as the appropriate guideline. That provision is, however, clearly not applicable.

COPIES FURNISHED:

Joseph S. Garwood, Esquire
Agency for Health Care Administration
Post Office Box 14229
Tallahassee, Florida 32317-4229

Patrick O. Ojo, pro se
2750 Pierce Street, Apt. 19
Hollywood, Florida 33602

Angela T. Hall, Agency Clerk
Department of Health, Bin A02
2020 Capital Circle Southeast
Tallahassee, Florida 32399-1703

John Taylor, Executive Director
Board of Pharmacy
Department of Health
1940 North Monroe Street
Tallahassee, Florida 32399-0792

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.