

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,)
BOARD OF MEDICINE,)
)
Petitioner,)
)
vs.) Case No. 98-4450
)
TIMOTHY A. ALEXANDER, M.D.,)
)
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 January 21, 1999, by video teleconference.

APPEARANCES

For Petitioner: John E. Terrel, Esquire
Department of Health
Post Office Box 14229
Tallahassee, Florida 32317-4229

For Respondent: Timothy A. Alexander, M.D., pro se
9000 Northeast 2nd Avenue
Miami, Florida 33138

STATEMENT OF THE ISSUES

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

PRELIMINARY STATEMENT

By a one-count Administrative Complaint dated April 28,

1997, Petitioner charged that Respondent, a licensed physician, violated the provisions of Subsection 458.331(1)(x), Florida Statutes, by "violating . . . a lawful order of the board or department previously entered in a disciplinary hearing." As the predicate for such charge, the complaint alleged the following:

3. On or about June 30, 1995, the Board of Medicine filed a Final Order against Respondent in Case Number 92-11508 which required Respondent to pay an administrative fine of \$1,500.00 within sixty (60) days of the filing of the Final Order, required Respondent to complete ten (10) hours of Continuing Medical Education in Risk Management, and required Respondent to complete the course "Quality Medical Records Keeping for Health Care Professionals" sponsored by the Florida Medical Association within one (1) year of the filing of the Final Order. The Board determined that Respondent had failed to practice medicine within the acceptable level of care by performing an adequate medical examination, and for failing to maintain appropriate medical records by failing to document the basis for diagnosing a patient's condition, failing to document the basis for the plan of treatment followed, and for failing to document operative notes.

4. On or about March 27, 1997, the Board of Medicine notified the Agency that Respondent had failed to complete the course sponsored by the Florida Medical Association, and had failed to complete the required ten (10) Continued Medical Education hours.

5. Respondent is guilty of violating an order of the Board in that he failed to comply with the Final Order issued in case number 92-11508 by failing to complete the requirements of the Final Order.

For such violation, Petitioner proposed one or more of the following penalties be imposed:

. . . permanent revocation or suspension of

the Respondent's license, restriction of the Respondent's practice, imposition of an administrative fine, issuance of a reprimand, placement of the Respondent on probation . . . and/or any other relief that the Board deems appropriate.¹

Respondent filed an election of rights which disputed the factual allegations contained in the Administrative Complaint and requested a formal hearing before an administrative law judge appointed by the Division of Administrative Hearings. Consequently, on October 7, 1998, Petitioner referred the matter to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct a formal hearing pursuant to Sections 120.569, 120.57(1), and 120.60(5), Florida Statutes.

At hearing, Petitioner called Dinah Skrimich, Crystal A. Griffin and Melissa Carter, as witnesses, and Petitioner's Exhibits 1-9 were received into evidence. Respondent testified on his own behalf, and Respondent's Exhibits 1-7 were received into evidence.

The hearing transcript was filed February 8, 1999, and the parties were initially accorded until February 18, 1999, to file proposed recommended orders; however, at Petitioner's request, and with Respondent's acquiescence, the time for filing was extended to March 2, 1999. Consequently, the parties waived the requirement that a recommended order be rendered within 30 days after the transcript has been filed. Rule 28-106.216(2), Florida Administrative Code. The parties elected to file such proposals and they have been duly considered.

FINDINGS OF FACT

1. Respondent, Timothy A. Alexander, is now, and was at all times material hereto, licensed as a physician by the State of

Florida, having been issued license number ME 0035285.

2. On June 29, 1995, the Board of Medicine entered a final order which approved and adopted a consent agreement accepted by Respondent in a prior disciplinary action (Case No. 92-11508). Pertinent to this case, the final order imposed an administrative fine in the amount of \$1,500.00, against Respondent, which was to be paid within 60 days following the filing of the final order (June 30, 1995). The final order also required that Respondent attend 10 hours of Category I Continuing Medical Education in risk management within one year of the filing of the order. Finally, the order required that Respondent complete the course "Quality Medical Records Keeping for Health Care Professionals," sponsored by the Florida Medical Association, or a Board-approved equivalent, within one year of the filing of the final order.²

3. Here, there is no dispute or reason to doubt that Respondent timely paid the administrative fine imposed by the final order and that he likewise timely completed the 10 hours of Category I Continuing Medical Education in risk management required by the terms of the final order.³ Consequently, the only viable issue to resolve is whether Respondent timely completed the course "Quality Medical Records Keeping for Health Care Professionals," sponsored by the Florida Medical Association, or a Board-approved equivalent.

4. The course "Quality Medical Records Keeping for Health Care Professionals," sponsored by the Florida Medical Association (the "Course"), is a course designed to help physicians improve

their medical record-keeping skills and is divided into two phases. Phase I includes a one-hour credit for preparatory reading and a four-hour credit for on-site instruction in Jacksonville, Florida. The on-site instruction includes one hour of didactic lecture, a two-hour audit practicum, and a one-hour critique of the practitioner's existing records. Phase II is a follow-up critique, designed to be performed at three months following completion of the on-site instruction. At this phase, the practitioner is required to submit another six sets of records for evaluation (the second set), which presumably reflect the benefits of the on-site instruction. The second set of records is evaluated by the same individual who examined the first set and if deemed acceptable the evaluator would immediately notify the Florida Medical Association (FMA), which would issue a certificate reflecting completion of the course. If the practitioner's record-keeping was not acceptable, he would be accorded another three-month period to implement the recommendations, following which he would submit additional records for evaluation. Successful completion of Phase I and Phase II was required for course completion.

5. Here, the proof demonstrates that in or about May 1996, Respondent registered to attend the Course on June 8, 1996, at Jacksonville, Florida, and that on May 9, 1996, the FMA forwarded to him the required preparatory reading material. Respondent attended and completed the June 8, 1996, on-site instruction

(Phase I).

6. By letter of August 12, 1996, two months following the on-site instruction, the FMA reminded Respondent that, at three

months, he needed to complete Phase II. That letter provided, as follows:

The letter is to remind you that it is time for Phase II of the FMA Clinical Excellence Program, "Quality Medical Records Keeping for Health Care Professionals". You completed Phase I on June 8, 1996.

The second phase of the course will consist of a self-audit of approximately 10-20 of your own office records utilizing the same audit criteria which were provided in Phase I. To ensure that the objectives of the course have been accomplished, this audit is performed three months after you have completed Phase I. The three month delay is to allow sufficient time for implementation of the new record-keeping practices in your own medical record keeping system.

The same faculty member who critiqued your office medical records during Phase I will provide the critique of your Phase II self-audit. You need not return to Jacksonville to complete the self-audit. At the end of three months, September 8, 1996, six (6) sets of medical records should be mailed to the Florida Medical Association, attention Suzanne Brunette, CME Projects Manager. Please take appropriate measures to preserve patient confidentiality. Your mentor will evaluate the records and report the findings to you.

Upon successful completion of Phase II, you will receive a certificate indicating that you have completed the course. No certificate of credit can be issued until Phase II (follow-up evaluation) has been successfully completed.

7. In late October or early November, 1996, Respondent submitted the required medical records for evaluation, they were successfully critiqued, and on November 6, 1996, Respondent was certified by the FMA as having successfully completed the course.

8. Given the proof, it cannot be subject to serious debate that Respondent did not complete the Course, and could not have completed the Course (given the date he elected to take Phase I of the Course and the minimum three-month delay required between the completion of Phase I and the completion of Phase II), within one year after the Board's order was filed. He did, however, timely complete the on-site portion of the Course (Phase I) and successfully completed the follow-up critique (Phase II), with nominal delay. That Phase II and, consequently, completion of the Course occurred outside the one-year period prescribed by the final order was not, apart from the untimeliness itself, shown to be significant.

CONCLUSIONS OF LAW

9. 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.

10. Where, as here, the Department 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). "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). Moreover, the disciplinary action taken may be based only upon the offenses specifically alleged in the administrative complaint. Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996) ("Predicating disciplinary action against a licensee on conduct never alleged in the administrative complaint or some comparable pleading violates the Administrative Procedures Act.") See also Kinney v. Department of State, 501 So. 2d 129 (Fla. 5th DCA 1987); Sternberg v. Department of Professional Regulation, Board of Medical Examiners, 465 So. 2d 1324 (Fla. 1st DCA 1985); and Hunter v. Department of Professional Regulation; 458 So. 2d 844 (Fla. 2d DCA 1984). Finally, in determining whether Respondent violated the provisions of Section 458.331(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).

11. Pertinent to this case, Section 458.331(1), Florida Statutes, provides that the Board of Medicine may discipline a licensee, if it has been shown that the licensee is guilty of:

(x) Violating . . . a lawful order of the board . . . previously entered in a disciplinary hearing. . . .

12. Here, Petitioner demonstrated with the requisite degree

of certainty, that Respondent violated the provisions of Subsection 458.331(1)(x), Florida Statutes, by having failed to timely complete the Course, as alleged in the Administrative Complaint. Having reached such conclusion, it remains to resolve the appropriate penalty that should be imposed.

13. Pertinent to the penalty phase, Rule 64B8-30.015, Florida Administrative Code, establishes the penalty guidelines, as well as aggravating and mitigating circumstances, to be considered by the Board of Medicine when it elects to take disciplinary action against a practitioner. For a violation of Subsection 458.331(1)(x), Florida Statutes, Rule 64B8-30.015(2), Florida Administrative Code, provides for a penalty "[f]rom a reprimand to revocation . . . and an administrative fine from \$50.00 to \$1,000.00." Aggravating and mitigating factors to be considered are set forth in subparagraph (3) of the rule, as follows:

- (3) Aggravating and Mitigating Circumstances. Based upon consideration of aggravating and mitigating factors present in an individual case, the Board may deviate from the penalties recommended above. The Board shall consider as aggravating or mitigating factors the following:
- (a) Exposure of patients or public to injury or potential injury, physical or otherwise; none, slight, sever, or death;
 - (b) Legal status at the time of the offense; no restraints, or legal constraints;
 - (c) The number of counts or separate offenses established;
 - (d) The number of times the same offense or offenses have previously been committed by the licensee or applicant;
 - (e) The disciplinary history of the applicant or licensee in any jurisdiction and the length of practice;
 - (f) Pecuniary benefit or self-gain inuring to the applicant or licensee;
 - (g) Any other relevant mitigating factors.

14. With regard to the aggravating and mitigating factors, it is observed that there was (a) no exposure of patients or

public to injury or potential injury, (b) there was no apparent restraint on Respondent's practice at the time, (c) only a nominal violation of the charges was shown (failure to complete Phase II of the Course within one year of the final order), although Respondent timely completed all other requirements placed upon him by the final order, (d) Respondent was not shown to have ever committed a similar offense, (e) apart from the disciplinary action which precipitated the final order at issue in this case, no other disciplinary history was shown, and (f) no pecuniary benefit or self-gain was shown to inure to Respondent.

15. Considering the Board's penalty guidelines, as well as its aggravating and mitigating circumstances, it must be concluded that, at most, Respondent's nominal failure to comply with the Board's final order warrants a reprimand and the imposition of an administrative fine in the amount of Fifty Dollars (\$50.00).⁴

RECOMMENDATION

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

RECOMMENDED that a final order be entered which finds Respondent guilty of violating Section 458.331(1)(x), Florida Statutes, by having failed to timely complete the course "Quality Medical Records Keeping for Health Care Professionals," sponsored by the Florida Medical Association, as alleged in the Administrative Complaint, and that for such violation, Respondent

receive a reprimand and an administrative fine in the amount of Fifty Dollars (\$50.00).

It is further RECOMMENDED that in all other respects, Respondent was not shown to have committed any offense alleged in the Administrative Complaint and that the Administrative Complaint should otherwise be dismissed.

DONE AND ENTERED this 12th day of March, 1999, 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
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of March, 1999.

ENDNOTES

1/ The complaint also sought an award of costs as provided for by Section 455.227(3), Florida Statutes; however, the Department offered no proof, at hearing, regarding what costs, if any, it incurred. Consequently, there is no record basis on which to address such an award.

2/ In its Proposed Recommended Order, Petitioner has referenced two other provisions of the final order which it suggests Respondent violated and which warrant the assessment of a penalty. First, with regard to the requirement that Respondent attend 10 hours of Category I Continuing Medical Education in risk management, the order further provided:

. . . Respondent shall submit a written plan
to the Chairman of the Probationer's

Committee for approval prior to the completion of said continuing education hours. . .

Second, with regard to the requirement that Respondent complete the course "Quality Medical Records Keeping for Health Care Professionals," sponsored by the Florida Medical Association, or Board-approved equivalent, the order further provided.

. . . In addition, Respondent shall submit documentation in the form of certified copies of the receipts, vouchers, certificates, or other papers, such as physician's recognition awards. . .

It is Respondent's perceived failure to comply with the additional requirements that Petitioner contends warrant further disciplinary action. There is, however, no rational basis to support Petitioner's contention. In so concluding, it is observed that the matters were not shown to be substantive, as opposed to procedural in nature. Indeed, the provisions provide little more than assurance Respondent successfully completed course(s) acceptable to the Board. Here, there is no dispute that Respondent successfully completed the courses and that the courses were acceptable to the Board. Consequently, Respondent's failure to comply with the provisions is of little or no consequence. More fundamentally, Respondent's failure to comply with such requirements was not alleged in the Administrative Complaint as a predicate for disciplinary action and, consequently, cannot support a finding of misconduct. Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996) (Disciplinary action against a licensee may be predicated solely on the violations both pled in the Administrative Complaint and proven at hearing).

3/ Respondent completed a 9-hour course of Category I Continuing Medical Education on November 30, 1995, and a 1-hour course of Category I Continuing Medical Education on December 18, 1995.

4/ In its proposed recommended order, Petitioner proposes, as a penalty, the imposition of an administrative fine in the sum of \$5,000.00. Petitioner did not, however, disclose how it had derived such penalty, and it most likely included a consideration of matters, as discussed in endnote 2, which are not properly at issue. In any event, the penalty proposed by Petitioner bears no rational relationship to the offense committed by Respondent.

COPIES FURNISHED:

John E. Terrel, Esquire
Department of Health
Post Office Box 14229
Tallahassee, Florida 32317-4229

Timothy A. Alexander, M.D.
9000 Northeast 2nd Avenue
Miami, Florida 33138

Tanya Williams, Executive Director
Board of Medicine
Department of Health
1940 North Monroe Street
Tallahassee, Florida 32399-0750

Pete Peterson, General Counsel
Department of Health
Bin A02
2020 Capital Circle Southeast
Tallahassee, Florida 32399-1701

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

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.