STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF RESPIRATORY CARE,	)	
Petitioner,	)	
vs.	)	Case No. 00-1246
OSCAR DIAZ, T. T.,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a hearing was held in this case in accordance with Section 120.57(1), Florida Statutes, on November 9, 2000, by video teleconference at sites in Miami and Tallahassee, Florida, before Stuart M. Lerner, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Albert Peacock, Esquire
Linton Eason, Esquire
Agency for Health Care Administration
Post Office Box 14229
Tallahassee, Florida 32317-4229

For Respondent: No appearance

STATEMENT OF THE ISSUES

Whether Respondent is guilty of being in violation of Section 468.365(1)(x), Florida Statutes, as alleged in the

Administrative Complaint, and, if so, what disciplinary action should be taken against him.

PRELIMINARY STATEMENT

On March 17, 1999, Petitioner's predecessor, the Department of Health, Board of Medicine, 1/ filed an Administrative Complaint against Respondent, a Florida-licensed respiratory care practitioner, alleging that Respondent had "violated Section 468.365(1)(x), Florida Statutes, by being unable to deliver respiratory care services with reasonable skill and safety to patients by reason of illness or the use of alcohol, drugs, narcotics, chemicals, or any other type of material or as a result of any mental or physical condition."

Through the submission of a completed Election of Rights form dated March 16, 2000, Respondent "dispute[d] the allegations of fact contained in the Administrative Complaint and request[ed] . . . a formal hearing, pursuant to Section 120.569(2)(a)(1), Florida Statutes, before an Administrative Law Judge appointed by the Division of Administrative Hearings." On March 23, 2000, the matter was referred to the Division of Administrative Hearings (Division) for the assignment of a Division Administrative Law Judge to conduct the "formal hearing" Respondent had requested.

The final hearing was originally scheduled to commence on September 5, 2000, but was continued at Petitioner's request and rescheduled for November 9, 2000, starting at 9:00 a.m.

Petitioner and Respondent were each provided with written notice of the rescheduled hearing in accordance with Section 120.569(2)(b), Florida Statutes. The notice was issued on August 28, 2000. It directed the parties to report to the Court Administrator's Office located in Room 1600 of the Dade County Courthouse at 9:00 a.m. on November 9, 2000, "for room assignment."

On October 31, 2000, Petitioner filed its witness and exhibit lists with the Division, accompanied by a written advisement, in which it stated the following:

> Despite numerous failed attempts to contact Respondent and messages left with his mother at his telephone number on record with the Board of Medicine [sic] and listed on the Election of Rights form dated March 16, 2000, Respondent has not contacted our office. Furthermore, Respondent's mother has notified our office that the number listed as Respondent's is hers and Respondent has not left a forwarding address or telephone number where [she] or anyone else may contact him.

On November 6, 2000, the undersigned issued an Amended Notice of Hearing, in which he announced that the final hearing in this case would be held (on November 9, 2000, starting at 9:00 a. m.), not at a single location in Miami, as previously

scheduled, but by video teleconference at two locations: one in Tallahassee (at the Division's headquarters) and another in Miami (in Room N-106 of the Ruth Bryan Rohde Building at 401 Northwest 2nd Avenue, which is a short walk from the Dade County Courthouse). The Court Administrator's Office was instructed to tell anyone reporting to Room 1600 of the Dade County Courthouse and asking for the "room assignment" for the final hearing in the instant case that the hearing would be held in Room N-106 of the Ruth Bryan Rohde Building at 401 Northwest 2nd Avenue.

As noted above, the final hearing was held on November 9, 2000, by video teleconference, as described in the Amended Notice of Hearing issued on November 6, 2000. Petitioner appeared at the hearing, through its counsel of record, Albert Peacock, Esquire, at the Tallahassee site. The undersigned also participated in the hearing from the Tallahassee site. Respondent did not make an appearance (in person or through counsel or an authorized representative) at either the Miami or the Tallahassee site.

Two witnesses testified on behalf of Petitioner at the hearing: Zulma del Torro, an Investigative Specialist I with the Department of Health, who testified (from the Miami site) that she had waited in Room 1600 of the Dade County Courthouse from 8:50 a.m. to 9:35 a.m. that morning (in accordance with Mr. Peacock's directions) and no one (other than employees of the

Court Administrator's Office) had entered the room during that time; and Raymond Pomm, M. D., the director of Physicians Recovery Network, who gave testimony (from the Tallahassee site) concerning the allegations set forth in the Administrative Complaint. In addition to the testimony of Ms. del Torro and Dr. Pomm, Petitioner offered nine exhibits (Petitioner's Exhibits 1 through 9) into evidence. All nine exhibits were admitted.

At the close of the evidentiary portion of the hearing the undersigned established a deadline (ten days from the date of the filing of the hearing transcript with the Division) for the filing of proposed recommended orders.

A transcript of final hearing (consisting of one volume) was filed with the Division on December 26, 2000. On January 5, 2000, Petitioner filed a Proposed Recommended Order, which has been carefully considered by the undersigned. To date, Respondent has not filed any post-hearing submittal.

FINDINGS OF FACT

Based upon the evidence adduced at the final hearing and the record as a whole, the following findings of fact are made:

1. Respondent is now, and has been since January 5, 1987, a Florida-licensed respiratory therapist. He holds license number CRT 830.

2. Respondent has a lengthy history of drug abuse.

3. In or about June of 1996, when he was employed as a blood gas laboratory technologist by Miami Children's Hospital (MCH) in Miami, Respondent submitted to a drug screen (performed at the request of MCH) and tested positive for cocaine. 2/

4. MCH referred Respondent to South Miami Hospital's (South Miami's) addiction treatment program, to which Respondent was admitted on June 6, 1996.

5. Respondent successfully completed the South Miami program.

6. He was discharged from the program on July 3, 1996.

7. Respondent thereafter voluntarily enrolled in the state-approved program for impaired Florida health care practitioners offered by Physicians Recovery Network (PRN).

8. PRN monitors the care, treatment, and evaluation of the impaired practitioners in its program.

9. On July 11, 1996, Respondent entered into an "Advocacy Contract" with PRN, in which he agreed to, among other things, the following: "participate in a random urine drug and or blood screen program through [the] PRN office within twenty-four hours of notification"; "release by waiver of confidentiality the written results of all such screens to the Physicians Recovery Network to validate [his] continuing progress in recovery"; "abstain completely from the use of any medications, alcohol, and other mood altering substances including over the counter

medication unless ordered by [his] primary physician, and when appropriate, in consultation with the Physicians Recovery Network"; "attend a self help group such as AA or NA"; "participate in continuing care group therapy"; "attend a 12-step program of recovering professionals"; "notify Physicians Recovery Network in the event of use of mood altering substances without a prescription"; and "be appropriately courteous and cooperative in all contacts with the PRN staff and representatives of PRN." The contract further provided that "[r]elapse will result in re-assessment and possible residential treatment."

10. A "monitoring professional" or "facilitator" was appointed by PRN to assist in Respondent's recovery.

11. PRN "facilitators" are responsible for providing therapy in a group setting to those under their charge and reporting to PRN any suspected failure on the part of a member of their group to adhere to the terms of the group member's "Advocacy Contract." (There are 33 "therapy groups" led by PRN "facilitators" throughout the State of Florida.)

12. In March of 1997, Respondent's "facilitator" reported to PRN that Respondent had started using cocaine again (this time intravenously), resulting in his being fired from his position at Miami Children's Hospital.

13. PRN responded to the facilitator's report by voiding Respondent's July 11, 1996, "Advocacy Contract."

14. Respondent was thereafter involuntarily hospitalized pursuant to the Baker Act at the request of his family.

15. Following his discharge from the hospital, Respondent was reported missing.

16. In June of 1997, Respondent resurfaced and, pursuant to a court order, was admitted to Miami-Dade County's Treatment Alternative to Street Crime (TASC) program.

17. In August of 1997, after Respondent completed Phases I and II of the TASC program, he was evaluated, at PRN's request, by Anthony P. Albanese, M.D., the Co-Director of the Addiction Treatment Program at Mount Sinai Medical Center in Miami Beach.

18. Dr. Albanese determined that Respondent was suffering from "cocaine . . . dependence in early remission" and was "medically able to return to work."

19. On September 10, 1997, Respondent entered into a second "Advocacy Contract" with PRN, which was similar to the first contract.

20. In March of 1998, after receiving word that Respondent had again relapsed, as evidenced by the results of a urine screen, which revealed the presence of cocaine metabolites, PRN voided Respondent's second "Advocacy Contract."

21. Subsequent analysis of Respondent's hair confirmed that he had been using cocaine.

22. In July of 1998, Respondent was evaluated by David Myers, M.D., a PRN-approved evaluator and treatment provider. Dr. Myers diagnosed Respondent as having "cocaine dependency, continuous and severe," "marijuana dependency," and "nicotine dependency."

23. On July 7, 1998, Respondent was admitted as a patient in the Tampa-based Healthcare Connection P.I.N. [Professionals in Need] Program (P.I.N. Program).

24. Respondent was referred, through the P.I.N. Program, for treatment at the Salvation Army Adult Rehabilitation Center.

25. On January 8, 1999, after receiving treatment at Salvation Army Adult Rehabilitation Center and successfully completing the P.I.N. Program, Respondent entered into a third "Advocacy Contract" with PRN, which was similar to the first two contracts.

26. In early February of 1999, Respondent's "facilitator" reported that Respondent was not attending required group meetings and could not be located. Based upon the facilitator's report, PRN voided Respondent's third "Advocacy Contract."

27. At no time subsequent to the voiding of his third "Advocacy Contract" has Respondent made contact with PRN.

28. Because of the "continuous and severe" nature of his cocaine dependency, Respondent is presently unable to deliver respiratory care services with reasonable skill and safety to patients.

CONCLUSIONS OF LAW

29. The Board of Respiratory Care (Board) is statutorily empowered to take disciplinary action against Florida-licensed respiratory therapists 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 on probation for a period of time and subject to such conditions as the Board may specify, including, but not limited to, requiring the licensee to submit to treatment, to attend continuing education courses, or to work under the supervision of another licensee. Section 468.365(2), Florida Statutes.

30. A license that has been suspended or revoked may not be "reinstate[d] . . . until such time as [the Board] is satisfied that [the disciplined licensee] has complied with all the terms and conditions set forth in the final order and that the [licensee] is capable of safely engaging in the delivery of

respiratory care services." Section 468.365(3), Florida Statutes.

31. Section 468.365(1)(x), Florida Statutes, authorizes the Board to take disciplinary action against a licensed respiratory care practitioner or respiratory therapist who is "unable to deliver respiratory care services with reasonable skill and safety to patients by reason of illness or use of alcohol, drugs, narcotics, chemicals, or any other type of material as a result of any mental or physical condition." Section 468.365(1)(x), further provides as follows:

> In enforcing this paragraph, the department shall, upon probable cause, have authority to compel a respiratory care practitioner or respiratory therapist to submit to a mental or physical examination by physicians designated by the department. The cost of examination shall be borne by the licensee being examined. The failure of a respiratory care practitioner or respiratory therapist to submit to such an examination when so directed constitutes an admission of the allegations against her or him, upon which a default and a final order may be entered without the taking of testimony or presentation of evidence, unless the failure was due to circumstances beyond her or his control. A respiratory care practitioner or respiratory therapist affected under this paragraph shall at reasonable intervals be afforded an opportunity to demonstrate that she or he can resume the competent delivery of respiratory care services with reasonable skill and safety to her or his patients. In any proceeding under this paragraph, neither the record of proceedings nor the orders entered by the board shall be used against a

respiratory care practitioner or respiratory therapist in any other proceeding.

32. "No revocation [or] suspension . . . of any [respiratory care practitioner's or respiratory therapist's] license is lawful unless, prior to the entry of a final order, [Petitioner] has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action and unless the licensee has been given an adequate opportunity to request a proceeding pursuant to ss. 120.569 and 120.57." Section 120.60(5), Florida Statutes.

33. The licensee must be afforded an evidentiary hearing if, upon receiving such written notice, the licensee disputes the alleged facts set forth in the administrative complaint. Sections 120.569(1) and 120.57, Florida Statutes.

34. At the hearing, Petitioner bears the burden of proving that the licensee engaged in the conduct, and thereby committed the violations, alleged in the administrative complaint. Proof greater than a mere preponderance of the evidence must be presented. Clear and convincing evidence of the licensee's guilt is required. See Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Company, 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Pou v. Department of

Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998); and Section 120.57(1)(j), Florida Statutes ("Findings of fact shall be based upon a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute . . . .").

35. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). It is an "intermediate standard." Id. For proof to be considered "'clear and convincing' . . . 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." In re Davey, 645 So. 2d 398, 404 (Fla. 1994), quoting, with approval, from Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

36. In determining whether Petitioner has met its burden of proof, it is necessary to evaluate its evidentiary presentation in light of the specific factual allegations made in the administrative complaint. Due process prohibits an

agency from taking disciplinary action against a licensee based upon conduct not specifically alleged in the agency's administrative complaint or other charging instrument. See Hamilton v. Department of Business and Professional Regulation, 764 So. 2d 778 (Fla. 1st DCA 2000); Lusskin v. Agency for Health Care Administration, 731 So. 2d 67, 69 (Fla. 4th DCA 1999); and Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996).

37. Furthermore, "the conduct proved must legally fall within the statute or rule claimed [in the administrative complaint] to have been violated." Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992). In deciding whether "the statute or rule claimed to have been violated" was in fact violated, as alleged by Petitioner, if there is any reasonable doubt, that doubt must be resolved in favor of the licensee. See Whitaker v. Department of Insurance and Treasurer, 680 So. 2d 528, 531 (Fla. 1st DCA 1996); Elmariah v. Department of Professional Regulation, Board of Medicine, 574 So. 2d 164, 165 (Fla. 1st DCA 1990); and Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

38. The Administrative Complaint issued in the instant case alleges that Respondent "is unable to deliver respiratory care services with reasonable skill and safety to patients by

reason of his ongoing and recurrent cocaine dependency" and therefore is in violation of Section 468.365(1)(x), Florida Statutes.

39. In support of its allegation, Petitioner presented documentary evidence establishing Respondent's "ongoing and recurrent cocaine dependency," and it further offered credible, unrebutted expert testimony (from Dr. Pomm) concerning the impact of Respondent's dependency on his ability to skillfully and safely deliver respiratory care services.

40. Through the presentation of this evidence, Petitioner met its burden of proving by clear and convincing evidence that Respondent is in violation of Section 468.365(1)(x), Florida Statutes, as alleged in the Administrative Complaint, and that therefore the Board is authorized to take disciplinary action against him.

41. In determining what disciplinary action the Board should take, it is necessary to consult the Board's "disciplinary guidelines," which impose restrictions and limitations on the exercise of the Board's disciplinary authority. See Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231, 1233 (Fla. 5th DCA 1999)("An administrative agency is bound by its own rules . . . creat[ing] guidelines for disciplinary penalties."); cf. State v. Jenkins, 469 So. 2d 733, 734 (Fla. 1985)("[A]gency rules and

regulations, duly promulgated under the authority of law, have the effect of law."); Buffa v. Singletary, 652 So. 2d 885, 886 (Fla. 1st DCA 1995)("An agency must comply with its own rules."); Decarion v. Martinez, 537 So. 2d 1083, 1084 (Fla. 1st 1989)("Until amended or abrogated, an agency must honor its rules."); and 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).

42. The Board's "disciplinary guidelines" are found in Rule 64B32-5.001, Florida Administrative Code, which provides, in pertinent part, as follows:

> (1) The Board may impose disciplinary penalties upon a determination that a certificate holder or registrant:
>
> (a) Has violated any provision of Chapter 468, Part V, Florida Statutes, or any rules promulgated thereunder; . . .
>
> (2) 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.

(3) Violations and Range of Penalties. In imposing discipline upon applicants and licensees, in proceedings pursuant to Section 120.57(1) and (2), F.S., the Board shall act in accordance with the following disciplinary guidelines and shall impose a penalty within the range corresponding to the violations set forth below. The verbal identification of offenses are descriptive only; the full language of each statutory provision cited must be consulted in order to determine the conduct included. . . .

VIOLATION: (x) Inability to practice respiratory care with skill and safety. (468.365(1)(x), F.S.)

RECOMMENDED RANGE OF PENALTY: (x) From submission [to] a mental or physical examination directed towards the problem, one year probation with conditions, possible referral to PRN to revocation or denial, and

> an administrative fine from $100.00 to $1,000.00. . . .

43. Having carefully considered the facts of the instant case (including, most significantly, the persistent nature of Respondent's use of cocaine, despite the opportunity he has been given to receive treatment to combat his cocaine dependency) in light of the provisions of Rule 64B32-5.001, Florida Administrative Code, set forth above, the undersigned concludes that, for being in violation of Section 468.365(1)(x), Florida Statutes, Respondent's license should be revoked and he should be fined $500.00.

RECOMMENDATION

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

RECOMMENDED that the Board enter a final order finding Respondent is in violation of Section 468.365(1)(x), Florida Statutes, as alleged in the Administrative Complaint, and disciplining him therefor by revoking his license and fining him $500.00.

DONE AND ENTERED this 10th day of January, 2001, in Tallahassee, Leon County, Florida.

STUART M. LERNER
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 10th day of January, 2001.

ENDNOTES

1/ The Board of Respiratory Care was created by Chapter 99-397, Section 176, Laws of Florida, effective July 1, 1999. Prior to its creation, the Board of Medicine exercised regulatory authority over respiratory care practitioners and respiratory therapists in Florida.

2/ The Florida Legislature, in Section 893.02(2)(a)4, Florida Statutes, has designated cocaine a Schedule II substance, which is described in Section 893.02(2), Florida Statutes, as a substance having "a high potential for abuse and ha[ving] a currently accepted but severely limited restricted medical use in treatment in the United States, and abuse of the substance may lead to severe psychological or physical dependency."

COPIES FURNISHED:

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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.