

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF )  
PHYSICAL THERAPY PRACTICE, )  
 )  
Petitioner, )  
 )  
vs. ) Case No. 00-4728PL  
 )  
TINA MARIE PATE, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, Jeff B. Clark, held a formal hearing in this case on February 12, 2001, in Viera, Florida.

APPEARANCES

For Petitioner: Mary Denise O'Brien, Esquire  
Agency for Health Care Administration  
Post Office Box 14229  
Mail Stop 39  
Tallahassee, Florida 32317-4229

For Respondent: Herbert Allen, Jr., Esquire  
2000 Highway A1A, 2nd Floor  
Indian Harbour Beach, Florida 32937-3525

STATEMENT OF THE ISSUES

Whether Tina Pate violated Subsection 486.125(1)(b), Florida Statutes, by committing deceit in obtaining a license as a physical therapist, and, if so, what penalty should be

imposed; and whether Tina Pate violated Subsection 455.624(1)(w), Florida Statutes, for failing to report to the Board of Physical Therapy her conviction of aggravated child abuse, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On June 28, 2000, the Agency for Health Care Administration (AHCA), Board of Physical Therapy Practice, filed an Administrative Complaint against Respondent, Tina Pate (Pate), alleging that Pate violated Subsections 486.125(1)(b) and 455.624(1)(w), Florida Statutes. The Administrative Complaint was filed with the Division of Administrative Hearings on November 21, 2000. On December 6, 2000, an order setting final hearing for February 2, 2001, was entered. On AHCA's motion, a new hearing date was set for February 12, 2001.

Pate was the only witness and testified for herself and AHCA.

AHCA submitted the following two exhibits into evidence:

1. Application for licensure as a Physical Therapist of Tina Marie Pate.

2. Information dated November 7, 1978, and Order Withholding Adjudication of Guilt and Placing Defendant on Probation, dated August 17, 1979, in the case of State of Florida vs. Tina Pate; in the Circuit Court for the Sixth

Judicial Circuit of Florida, In and For Pasco County, Case  
No. 7800963FAWS.

Pate submitted the following two exhibits into evidence:

1. Exemption Application package (10 pages).
2. Letter dated February 24, 1999, from Joe Baker, Florida Department of Health, Bureau Chief, Health Care Practitioner Regulation, to Tina M. Pate.

No transcript of the hearing was ordered. Both parties submitted Proposed Recommended Orders, which have been considered in rendering this Recommended Order.

#### FINDINGS OF FACT

Based on the testimony of Pate and the evidence submitted, the following findings of fact are made:

1. At all times material, Pate held a license as a Physical Therapist in the State of Florida.
2. The Department of Health, through the Board of Physical Therapy Practice, is the state agency that licenses and has regulatory jurisdiction of physical therapists. As authorized by Florida Statutes, AHCA performs investigative and prosecutorial services for the Department of Health.
3. Pate pled nolo contendere to a charge of aggravated child abuse in 1979. Aggravated child abuse is a felony (AHCA Exhibit 2).

4. Pate applied for a physical therapy license on August 1, 1996.

5. The license application contained, among other things, the following question: "12. Have you ever been convicted or found guilty of a felony, regardless of adjudication? (A plea of nolo contendere shall create a rebuttable presumption of guilt to the underlying criminal charges)." Pate answered "No" to this question.

6. Pate testified that she was advised and that she believed that having successfully completed three years of probation that her record would be expunged. She further testified that because she found Question 12 and another question on the application regarding criminal convictions confusing, she sought legal counsel prior to answering the questions and answered the question as counseled.

7. In this particular factual situation, based on the nature of the felony, the text of the question, the counsel she received, and her mistaken belief that the record of criminal conviction had been expunged, Pate's incorrect answer to Question 12 was not deceitful.

8. Late in 1998, Pate discovered, as a result of an investigation by a prospective employer, that the 1979 nolo contendere plea was still a matter of public record.

9. On February 15, 1999, Pate applied to AHCA for an exemption hearing. Subsection 400.215(4)(b), Florida Statutes, states:

(b) As provided in s. 435.07 the appropriate regulatory board within the Department of Health, or that department itself when there is no board, may grant an exemption from disqualification to an employee or prospective employee who is subject to this section and who has received a professional license or certification from the Department of Health or a regulatory board within that department.

10. Subsection 435.07(1), Florida Statutes, states:

(1) The appropriate licensing agency may grant to any employee otherwise disqualified from employment an exemption from disqualification for:

(a) Felonies committed more than 3 years prior to the date of disqualification;

11. In response to Pate's request for exemption hearing, Mr. Joe Baker, Acting Bureau Chief, Health Care Practitioner Regulation, by letter dated February 24, 1999, granted her request stating, "an exemption from disqualification for the above disqualifying offense(s) is granted."

12. Subsection 456.072(1)(w), Florida Statutes, states:

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

\* \* \*

(w) Failing to report to the board, or the department if there is no board, in writing within 30 days after the licensee

has been convicted or found guilty of, or entered a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction. Convictions, findings, adjudications, and pleas entered into prior to the enactment of this paragraph must be reported in writing to the board, or department if there is no board, on or before October 1, 1999.

13. While she was preparing her request for exemption hearing, Pate had telephone conversations at the Board of Health with an individual she identified as Kay Howerton, who Pate believed had reviewed her request for exemption hearing.

14. Pate's request for exemption hearing contains specific reference to her plea of nolo contendere to the November 3, 1978, Pasco County, Florida, charge of aggravated child abuse.

15. It is not unreasonable for a lay person, having made an application to AHCA for an exemption from licensure disqualification for having pled nolo contendere to aggravated child abuse, and having received a letter from the Board of Health granting her the exemption, to believe that she had reported her plea of nolo contendere to the Board in writing as required by Subsection 456.072(1)(w), Florida Statutes.

#### CONCLUSIONS OF LAW

16. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter. Section 120.57(1), Florida Statutes.

17. AHCA has the burden of proving by clear and convincing evidence that Pate violated Subsections 486.125(1)(b) and 455.624(1)(w), Florida Statutes, as alleged in the Administrative Complaint dated June 28, 2000. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1st DCA 1987).

18. AHCA alleges that Pate violated Subsection 486.125(1)(b), Florida Statutes, by "Having committed . . . deceit in obtaining a license as a physical therapist . . . ." Pate's testimony regarding her motive for answering "No" to the question of criminal conviction does not reflect "deceit." AHCA has failed to prove by clear and convincing evidence that Pate violated Subsection 486.125(1)(b), Florida Statutes.

19. By providing ACHA and the Board of Health written information regarding her plea of nolo contendere to the charge of aggravated child abuse, which resulted in an exemption from licensure disqualification, Pate effectively complied with Subsection 455.624(1)(w), Florida Statutes.

#### RECOMMENDATION

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

RECOMMENDED that the Department of Health, Board of Physical Therapy Practice, find Tina Pate not guilty of having violated Subsections 486.12(1)(b) and 455.624(1)(w), Florida

Statutes, and dismiss the Administrative Complaint filed against her.

DONE AND ENTERED this 9th day of March, 2001, in Tallahassee, Leon County, Florida.

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JEFF B. CLARK  
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 9th day of March, 2001.

COPIES FURNISHED:

Herbert Allen, Jr., Esquire  
2000 Highway A1A, 2nd Floor  
Indian Harbour Beach, Florida 32937-3525

Mary Denise O'Brien, Esquire  
Agency for Health Care Administration  
Post Office Box 14229  
Mail Stop 39  
Tallahassee, Florida 32317-4229

Dr. Kaye Howerton, Executive Director  
Board of Physical Therapy Practice  
Department of Health  
4052 Bald Cypress Way, Bin  
Tallahassee, Florida 32399-1701

Theodore M. Henderson, Agency Clerk  
Department of Health  
4052 Bald Cypress Way, Bin A02  
Tallahassee, Florida 32399-1701

William W. Large, General Counsel  
Department of Health  
4052 Bald Cypress Way, Bin A02  
Tallahassee, Florida 32399-1701

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.