

2-21-03

STATE OF FLORIDA  
BOARD OF MEDICINE

**FILED**  
DEPARTMENT OF HEALTH  
DEPUTY CLERK  
CLERK *Vicki R. Kenon*  
DATE 4/25/03

DEPARTMENT OF HEALTH,

AP

Petitioner,

vs.

DOH Case No.: 1999-61662  
DOAH Case No.: 2002-0080FL  
License No.: ME0062034

**FILED**  
APR 28 PM 2:54  
DEPARTMENT OF HEALTH  
BOARD OF MEDICINE

ANTHONY GLENN ROGERS, M.D.,

Respondent.

mmp-cws

ORDER

THIS CAUSE came before the BOARD OF MEDICINE (Board) pursuant to Sections 120.569 and 120.57(1), Florida Statutes, on April 4, 2003, in West Palm Beach, Florida, for the purpose of considering the Administrative Law Judge's Recommended Order and Petitioner's Exceptions to Recommended Order (copies of which are attached hereto as Exhibits A and B, respectively) in the above-styled cause. Petitioner was represented by Ephraim Livingston, Senior Attorney. Respondent was not present and but was represented by C. William Berger, Esquire.

Upon review of the Recommended Order, the argument of the parties, and after a review of the complete record in this case, the Board made the following determination:

The Board accepted the Petitioner's exceptions to paragraphs 41 and 42 of the recommended order. Within paragraph 41 and 42 of the recommended order, the Administrative Law Judge adopted an interpretation of Section 458.331(1)(q), Florida Statutes, which

employed "an abuse of professional discretion standard," rather than simple negligence, in order to establish guilt under Section 458.331(1)(q), Florida Statutes. Specifically, the Administrative Law Judge ruled that when the state charges a physician with violating Section 458.331(1)(q), it must show the following:

[T]he Department must prove that the accused doctor was not practicing medicine when he prescribed the drugs in question but instead was engaged in an illicit (probably oftentimes criminal) activity, e.g. selling narcotics to a "patient" who was not really sick but wanted the drugs for recreational purposes.

The Administrative Law Judge's above-quoted holding is not supported by law.

The Board is of the opinion that when prosecuting a physician for violating Section 458.331(1)(q), the Department is not obligated to prove that the physician "was not practicing medicine when he prescribed the drugs" nor is it required to employ "an abuse of professional discretion standard." A more reasonable interpretation of Section 458.331(1)(q) contemplates an ordinary negligence standard, and accordingly, calls for the Department to show that the physician prescribed legend drugs or controlled substances "inappropriately or in excessive or inappropriate quantities" to a patient. Such would be considered "other than in the course of the physician's professional practice." **See, Scheininger v. Department of Professional Regulation, Board of Medical Examiners**, 443 So.2d 387 (Fla. 1<sup>st</sup> DCA 1983) (The First District Court of Appeal upheld the

suspension of a physician for violating Sections 458.331(1)(t) and (q), Florida Statutes, when it was found that the physician dispensed controlled substances to patients under his continuing care without first giving them physical examinations as required by the minimum acceptable prevailing community medical standards.)

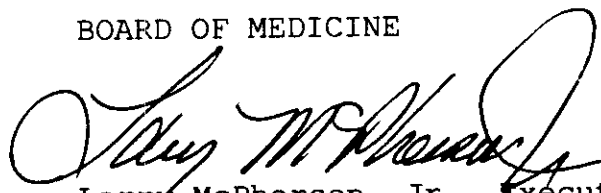
Since the Administrative Law Judge's findings as to whether the Respondent violated Section 458.331(1)(q) were based on an erroneous interpretation of the law, this matter is hereby REMANDED to the Division of Administrative Hearings for findings based on the negligence standard as stated above. **Cohn v.**

**Department of Professional Regulation**, 477 So.2d 1039, 1047 (Fla. 3<sup>rd</sup> DCA 1985)

DONE AND ORDERED this 21 day of APRIL,

2003.

BOARD OF MEDICINE



Larry McPherson, Jr., Executive Director  
for Raghavendra Vijayanagar, M.D., Chair

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been provided by U.S. Mail to: Anthony Glenn Rogers, M.D., 900 North Olive Avenue, West Palm Beach, Florida 33401; C. William Berger, Esquire, 1499 West Palmetto Park Road, Suite 412, Boca Raton, Florida 33486; Michael M. Parrish, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; and by interoffice delivery to Ephraim Livingston, and Pamela Page, Department of Health, 4052 Bald Cypress Way, Bin #C-65, Tallahassee, Florida 32399-3265 this 25<sup>th</sup> day of April, 2003.

Susan K. Hunt