

CA

12-3-02

STATE OF FLORIDA
BOARD OF MEDICINE

Final Order No. DOH-03-0183-~~Fd~~MQA
FILED DATE - 2/26/03
Department of Health

DEPARTMENT OF HEALTH,

Petitioner,

vs.

CHARLES S. EBY, JR.,

Respondent.

DOH Case No.: 1998-0048
DOAH Case No.: 02-1307PL
License No.: ME0015824

By: Vicki R. Icenso
Deputy Agency Clerk

AP

FILED
FEB 27 PM 12:27
ADMINISTRATIVE
HEARINGS

Dsm - Closed

FINAL ORDER

THIS CAUSE came before the BOARD OF MEDICINE (Board) pursuant to Sections 120.569 and 120.57(1), Florida Statutes, on February 7, 2003, in Orlando, Florida, for the purpose of considering the Administrative Law Judge's Recommended Order, Petitioner's Amended Exceptions and Motion to Increase Penalty, and Respondent's Exceptions to the Recommended Order, (copies of which are attached hereto as Exhibits A, B, and C, respectively) in the above-styled cause. Petitioner was represented by John Terrel, Senior Attorney. Respondent was not present but was represented by H. Roger Lutz, 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 makes the following findings and conclusions.

RULINGS ON EXCEPTIONS

The Board makes the following rulings on the exceptions submitted by the parties:

1. Petitioner's exception to Paragraph 53 of the Recommended Order is accepted. Paragraph 53 should read as follows:

Ms. Dean conferred with representatives for Petitioner and AHCA. Ms. Dean advised Respondent that if the person was licensed in any state, then when he came into Florida, even though he didn't have a Florida license, he would still be bound to practice under the Physicians' Practice Laws. But if he was not licensed, then he could do just about anything in the OR except the job of another licensed person, like an RN.

2. Petitioner's exception to Paragraph 66 of the Recommended Order is accepted. Paragraph 66 should read as follows:

Respondent did not intend to violate Section 458.331(1)(f).

3. Petitioner's exception to Paragraph 82 of the Recommended Order is accepted. Paragraph 82 should read as follows:

Although the statute does not require Respondent to identify Dr. Metcalf in multiple parts of the medical records, Board Rule 64B8-9.003, F.A.C., (formerly 59R-9.003, F.A.C.) requires that the medical record contain reports of consultation and thus requires that Dr. Metcalf be identified.

4. Petitioner's exception to Paragraph 106 of the Recommended Order is accepted. The disciplinary guidelines of the Board of Medicine set forth the following penalty for the

violation addressed in this Final Order: From probation to revocation or denial, and an administrative fine from \$250 to \$5,000. Furthermore, in similar cases, such as those cited in the Department's Amended Exceptions and Motion To Increase Penalty, the Board has imposed significant discipline. The Board incorporates the argument by the Department as the basis for its rejection of the Administrative Law Judge's finding. Paragraph 106 should read as follows:

The evidence supports a finding that a penalty is reasonable in this case.

5. For the reasons set forth in Petitioner's Amended Exceptions, Petitioner's exception to Paragraph 109 of the Recommended Order is accepted. Paragraph 109 should read as follows:

The imposition of a penalty in this case would serve the purposes adopted by the Board of Medicine in Rule 64B8-8.001(1), F.A.C. Rule 64B8-8.001(1) provides: "(1) Purpose. Pursuant to Section 456.079, F.S., the Board provides within this rule disciplinary guidelines which shall be imposed upon applicants or licensees whom it regulates under Chapter 458, F.S. The purpose of this rule is to notify applicants and licensees of the ranges of penalties which will routinely be imposed unless the Board finds it necessary to deviate from the guidelines for the stated reasons given within this rule. The ranges of penalties provided below are based upon a single count violation of each provision listed; multiple counts of the violated provisions or a combination of the violations may result in a higher penalty than that for a single, isolated violation. Each range includes the lowest and highest penalty and all penalties falling between. The purposes of the imposition of discipline are to punish the applicants or licensees for violations and to deter them from future violations; to

offer opportunities for rehabilitation, when appropriate; and to deter other applicants or licensees from violations."

6. Petitioner's exception to Paragraph 110 of the Recommended Order is accepted. The conclusion of the Administrative Law Judge on this point was influenced by his incorrect finding of fact that Ms. Dean spoke to people whom the record demonstrated were qualified by training and experience in regulatory compliance (which finding is rejected by the Board by its granting of Petitioner's exception to the Finding of Fact in Paragraph 53 of the Recommended Order), which was COMPOUNDED by his misunderstanding of Ms. Dean's testimony as to what she advised Dr. Eby. Paragraph 110 should read as follows:

The evidence does justify punishment of the licensee. Respondent did not intentionally violate Section 458.331(1)(f), and had no anticipatory knowledge of noncompliance.

7. Petitioner's exception to Paragraph 112 of the Recommended Order is accepted. The Board rejects the Conclusions that the violation did nor arise from a lack of reasonable care and assertion that Respondent is not likely to commit a similar violation in the future. Paragraph 112 should read as follows:

Discipline is needed to deter Respondent from future violations.

8. Petitioner's exception to Paragraph 113 of the Recommended Order is accepted. While the Administrative Law Judge contends that the law is ambiguous, Respondent did not claim to be confused about the statutes or rules. The many of the

statutes and rules cited by the Administrative Law Judge in order to establish ambiguity were not cited by the Respondent in his Proposed Recommended Order. Paragraph 113 should read as follows:

A finding of guilt is not sufficient to deter other licensees and unlicensed persons from similar violations.

9. The Board reviewed and considered Respondent's Exceptions and denies the exceptions. There is competent substantial evidence in the record to support the findings and conclusions.

FINDINGS OF FACT

1. The findings of fact set forth in the Recommended Order are approved and adopted and incorporated herein by reference with the modifications detailed above.

2. There is competent substantial evidence to support the findings of fact as amended.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter pursuant to Section 120.57(1), Florida Statutes, and Chapter 458, Florida Statutes.

2. The conclusions of law set forth in the Recommended Order are approved and adopted and incorporated herein by reference with the modifications detailed above, and the

following: The Board rejects the assertion in Paragraph 108 of the Recommended Order that aiding and abetting the unlicensed practice of medicine does "not expose any patient or member of the public to physical injury or **potential** injury."

PENALTY

Upon a complete review of the record in this case, the Board determines that the disposition recommended by the Administrative Law Judge be REJECTED. The Board's rejection of the recommended non-penalty is based, in part, on its review of and ruling on Petitioner's Amended Exceptions, particularly its finding that some of the Findings of Fact were not supported by competent substantial evidence and its rejection of the reasoning supporting a recommendation for no penalty. The recommendation of the Administrative Law Judge was based in large part on his misunderstanding of the evidence and testimony relating to Ms. Dean's efforts to obtain information and relating to the advice she gave to Respondent. In addition, the recommendation that no penalty be imposed is based largely on his findings relative to mitigation. However, in addition to the reasons established by the Board's rulings on Petitioner's Amended Exceptions, the Board rejects the opinion that aiding and abetting the unlicensed practice of medicine does "not expose any patient or member of the public to physical injury or **potential** injury." Not only was the person performing surgery unlicensed in Florida, his license

to practice medicine in Louisiana was SUSPENDED when the surgery took place. Another mitigation factor listed is that he had not previously committed the same offense. However, the disciplinary guideline penalty that is applicable is identified as one for a **first offense**. Thus, there is no basis for mitigation on that point. Further, the Board rejects the suggestion that Respondent used all reasonable care in deciding that a person not licensed to practice medicine in Florida could perform surgery on patients in Florida.

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that:

1. Respondent shall pay an administrative fine in the amount of \$5,000 to the Board within 90 days from the date this Final Order is filed.

2. Respondent shall document the completion of the Laws and Rules Course sponsored by the Florida Medical Association within one year from the date this Final Order is filed.

3. Respondent shall document the completion of a medical ethics course within one year year from the date this Final Order is filed. These hours shall be in addition to those hours required for biennial renewal of licensure. Unless otherwise approved by the Board or the Chairperson of the Probationer's Committee, said continuing education courses shall consist of a formal live lecture format.

4. Respondent shall receive a letter of concern from the Board.

(NOTE: SEE ATTACHMENT "A" FOR STANDARD TERMS APPLICABLE TO ALL FINAL ORDERS. UNLESS OTHERWISE SPECIFIED BY FINAL ORDER, THE STANDARD TERMS SET FORTH THE REQUIREMENTS FOR PERFORMANCE OF ALL PENALTIES CONTAINED IN THIS FINAL ORDER.)

COSTS

Pursuant to Section 456.072(4), Florida Statutes, Respondent shall pay the costs associated with this case in the amount of \$10,000. Said costs shall be paid within 90 days from the date this Final Order is filed.

This Final Order shall take effect upon being filed with the Clerk of the Department of Health.

DONE AND ORDERED this 25 day of FEBRUARY, 2003.

BOARD OF MEDICINE



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

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF HEALTH AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by U.S. Mail to CHARLES S. EBY, JR., 2666

Swamp Cabbage Court, Fort Myers, Florida 33901; to H. Roger Lutz, Esquire, Lutz, Webb & Bobo, P.A., One Sarasota Tower, 5th Floor, Two North Tamiami Trail, Sarasota, Florida 34236; to Daniel Manry, 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 26th day of February, 2003.

Susan K. Hunt