

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

A. ALEXANDER JACOBY, M.D.,            )  
  )  
      Petitioner,                            )  
  )  
vs.    )     Case No. 03-4433  
  )  
DEPARTMENT OF HEALTH, BOARD OF     )  
MEDICINE,                                 )  
  )  
      Respondent.                         )  
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  )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on February 19, 2004, at Tallahassee, Florida, before Michael M. Parrish, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner:   Wilson Jerry Foster, Esquire  
                          Law Offices of Wilson Jerry Foster  
                          1342 Timberlane Road, Suite 102-A  
                          Tallahassee, Florida 32312-1775

For Respondent:   Rosanna Catalano, Esquire  
                          Office of the Attorney General  
                          The Capitol, Plaza Level 01  
                          Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUES

The issues in this case are: (1) whether Petitioner's application pursuant to Section 458.315, Florida Statutes, for a temporary certificate to practice in an area of critical need

should be granted or denied; and (2) whether Petitioner is entitled to withdraw his application prior to action by the Board of Medicine on the merits of the application.

PRELIMINARY STATEMENT

This case arises from Petitioner's application for a temporary certificate to practice medicine in communities of Florida where there is a critical need for physicians. Such certificates are authorized by Section 458.315, Florida Statutes.

During the course of a meeting of the Credentials Committee of the Board of Medicine, once it became evident that the Credentials Committee was going to recommend denial of his application, Petitioner requested that he be allowed to withdraw his application prior to any further consideration by the Credentials Committee or by the Board of Medicine. The request was denied. Petitioner promptly made a similar written request addressed to the Board of Medicine. When the Board met to consider Petitioner's application, the Board voted to deny the request to withdraw the application and also voted to deny the application for certification. Petitioner timely filed a request for hearing on both denials. In due course the matter was referred to the Division of Administrative Hearings.

At the final hearing, Petitioner testified on his own behalf and also presented the testimony of Ms. Chandra Prine.

Ms. Prine is a programs operations administrator with the Florida Board of Medicine, Department of Health, who was stipulated by all parties to be an expert in the license application process before the Florida Board of Medicine. Respondent also called Ms. Prine as a witness, but did not call any additional witnesses. The parties offered one joint exhibit, which is a copy of the Board's entire application file in this matter.

At the conclusion of the hearing, the parties requested and were granted, ten days from the filing of the transcript within which to file their proposed recommended orders. The transcript was filed on March 5, 2004. Shortly thereafter, Respondent requested an extension of time, and all parties were allowed until March 29, 2004, to file their proposed recommended orders. On March 29, 2004, all parties filed Proposed Recommended Orders containing proposed findings of fact and conclusions of law. The proposals have been carefully considered during the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Petitioner is a medical doctor, presently licensed to practice medicine in the State of New York.

2. Petitioner signed a Florida Department of Health Board of Medicine Application for Temporary Certificate to Practice in an Area of Critical Need on June 19, 2003. Question number 13

on that application form asked, "Have you ever had any Medical/professional license revoked, suspended, placed on probation, received a citation, or other disciplinary action taken in any state territory or country?" Petitioner answered "yes" to question number 13.

3. The Notice of Intent to Deny issued by the Florida Board of Medicine cited as the only reason for denial "[t]he applicant had action taken against the license by the New York and the Utah Medical Licensing Boards."

4. It has since been confirmed that the Utah Division of Occupational & Professional Licensing did not take any action against Petitioner's medical license in Utah.

5. The New York Department of Health, Monitoring Unit, Office of Professional Medical Conduct, did take action against Petitioner's medical license in New York. The New York Department of Health described its action as follows:

Dr. Jacoby currently holds a valid NYS medical license, and is permitted to practice in this State, however the sanctions imposed by the enclosed Order are still in effect, and have not yet been fully satisfied. The suspension was lifted in January 2003, however the three years probation remains 'tolled' at this time, to be imposed when Dr. Jacoby returns to the practice of medicine in this State.  
[Emphasis added.]

6. The underlying reason for Petitioner's discipline in New York is for failing to repay a student loan guaranteed by

the federal government. Petitioner had secured a health education assistance loan guaranteed by the federal government for approximately \$51,000.00 between 1982 and 1983. The loan came due nine months after Petitioner graduated from medical school in June or July of 1984. Petitioner did not make any payments toward the loan for approximately 18 years. In September of 2002, Petitioner finally settled his long past-due student loan debt.

7. Petitioner requested to withdraw his Application for Temporary Certificate to Practice in an Area of Critical Need after the Credentials Committee voted to recommend denial of his application to the full Board of Medicine. Petitioner promptly made a similar written request addressed to the full Board of Medicine.

8. The full Board of Medicine denied Petitioner's request to withdraw his application.

9. The Board of Medicine then considered the merits of Petitioner's application and voted to deny the application. The Board's action was memorialized in a Notice of Intent to Deny Licensure by Area of Critical Need, which reads as follows in pertinent part:

This matter came before the Credentials Committee of the Florida Board of Medicine at a duly-noticed public meeting on September 13, 2003, in Tampa, Florida and the full Board on October 3-4, 2003, in

Ft. Lauderdale, Florida. The applicant appeared before the Credentials Committee on September 13, 2003, and presented testimony regarding the application file.

The application file shows:

The applicant had action taken against the license by the New York and the Utah Medical Licensing Boards. Additionally, the Board considered applicant's Motion to Withdraw his application during the full Board meeting and voted to deny applicant's motion.

The applicant is guilty of violating Section 458.331(1)(b), Florida Statutes, for having a license acted upon by another jurisdiction. Based on the foregoing, the Board may refuse to certify an applicant for licensure, or restrict the practice of the licensee, or impose a penalty, pursuant to Sections 458.331(2) and 456.072(2), Florida Statutes.

It is therefore ORDERED that the application for licensure by area of critical need by DENIED.

10. If a final order is issued denying Petitioner's license, the denial will be reported to the Federation of State Medical Boards, which is a depository of all disciplinary actions and license application denials by state boards in the United States.

11. In recent years, it has been the consistent practice of the Florida Board of Medicine to deny applications for licenses to practice medicine if the applicant's medical license is on probation in another state. Such practice is not required by either rule or statute. The Board of Medicine does not make any effort to advise applicants or prospective applicants of its

consistent practice of denying applications from physicians who are on probation elsewhere.

12. At the time he filed the subject application, as well as at the time of his appearance before the Credentials Committee, Petitioner was not aware of the Board of Medicine's history of not granting applications submitted by physicians on probation elsewhere. Had Petitioner been aware of the Board's history in that regard, he would not have filed an application.

#### CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and the parties thereto, pursuant to Section 120.57(1), Florida Statutes.

14. Attention is first addressed to the issue of whether Petitioner's requests to withdraw his application should have been granted. Petitioner's arguments on this issue are based primarily on notions of fundamental fairness<sup>1</sup> and on Petitioner's interpretation of Wiregrass Ranch v. Saddlebrook Resorts, Inc., 645 So. 2d 374 (Fla. 1994). Respondent's arguments on this issue are based primarily on notions to the effect that, because of the compelling state interest in protecting the public from unfit and incompetent physicians, there is surely some implied discretionary authority to deny an applicant's request to withdraw an application. Respondent's argument seeks support in

several decisions from other states. Those out-of-state decisions seem to be well reasoned, but they also seem to be inconsistent with Florida appellate court decisions about the powers of Florida administrative bodies. On the basis of decisions such as Department of Professional Regulation, Florida State Board of Medicine v. Marrero, M.D., 536 So. 2d 1094 (Fla. 1st DCA 1988), and Holmes Regional Medical Center, Inc. v. State of Florida, Agency for Health Care Administration, 737 So. 2d 608 (Fla. 1st DCA 1999), the undersigned is of the view that, in the absence of statutory or rule provisions specifically allowing the withdrawal of applications, Florida administrative agencies are without authority to allow the withdrawal of applications. In this regard, attention is especially directed to the last paragraph of Holmes Regional Medical Center, supra. Accordingly, there was no error in the denial of Petitioner's requests to withdraw his application.

15. Addressing attention now to the issue of whether the subject license application should be granted or denied, it should first be noted that, on the facts in this case, the Board of Medicine clearly has the authority and the discretion to deny the application for the specific reasons stated in the Board's notice of intent to deny, to-wit: "The applicant is guilty of violating Section 458.331(1)(b), Florida Statutes, for having a license acted upon by another jurisdiction."<sup>2</sup> But it is equally



clear that there is nothing in the applicable rules or statutes that mandates denial of the application. The Board of Medicine can lawfully resolve this matter either way.

16. In deciding which way to exercise its discretion, the Board's primary focus should be on which decision will best serve the interests of the people of this state; especially the interests of the neediest of the needy, which comprise the patient population Petitioner seeks to serve. There have been no issues raised about Petitioner's medical skills or about his ability to safely practice as a physician. Rather, Petitioner has practiced medicine for almost twenty years, with no disciplinary action related to the quality of the care he has provided. Even though Petitioner's failure to do anything about his student loans for approximately eighteen years is evidence of poor judgment in financial matters, there is nothing in that unfortunate course of conduct to suggest poor judgment in the treatment of patients. And, although long after it should have been done, Petitioner has at long last fulfilled his student loan obligations. All things considered, it appears to the undersigned that the needs of the people of Florida, especially the needs of the neediest of the needy, would be best served by granting Petitioner's application for a temporary certificate to practice medicine in communities of Florida where there is a critical need for physicians.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a Final Order be issued in this case granting Petitioner's application for a temporary certificate to practice medicine in communities of Florida where there is a critical need for physicians.

DONE AND ENTERED this 22nd day of April, 2004, in Tallahassee, Leon County, Florida.



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MICHAEL M. PARRISH  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 22nd day of April, 2004.

ENDNOTES

1/ Part of Petitioner's "fundamental fairness" argument is based on the fact that he was ignorant of the Board of Medicine's long history of denying applications submitted by physicians who were on probation in another state. That argument fails for two reasons. First, the Board's stated reasons for its intended denial do not include Petitioner's probationary status in New York. Second, there is the ancient rule, so well-established as

not to require citation, that "ignorance of the law is no excuse."

2/ In reaching this conclusion Petitioner's arguments based on the administrative "statute of limitations" found at Section 456.073(13), Florida Statutes, have not been overlooked. The limitations language is limited to "administrative complaints," not license application cases. Even if applicable, the limitations period would not pose a bar to an administrative complaint against a Florida physician based on failure to pay student loans because, although the default began approximately eighteen years ago, it was a continuing default and the loans were still in default until they were settled in September of 2002.

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.