

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
MEDICINE,)
)
Petitioner,)
)
vs.) Case No. 05-1982PL
)
JOSE A. GUTIERREZ, M.D.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On February 7, 2006, an administrative hearing in this case was held in Orlando, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Patrick L. Butler, Esquire
Katharine B. Heyward, Esquire
Department of Health
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For Respondent: George F. Indest, III, Esquire
Joanne Kenna, Esquire
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STATEMENT OF THE ISSUES

The issues in the case are whether the allegations of the Administrative Complaint are correct, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated November 15, 2004, the Department of Health (Petitioner) alleged that Jose A. Gutierrez, M.D. (Respondent), was in violation of various statutes and rules related to licensure of his medical practice.

The Respondent disputed the allegations. Attempts to resolve the dispute were unsuccessful, and the Petitioner forwarded the matter to the Division of Administrative Hearings, which received the request on May 31, 2005.

At the hearing, the Petitioner presented the testimony of two witnesses and had Exhibits numbered 1 through 9 and 11 admitted into evidence. The Respondent testified on his own behalf, presented the testimony of one witness, and had Exhibits numbered 1 through 21 admitted into evidence.

The one-volume Transcript of the hearing was filed on March 16, 2006. Both parties filed Proposed Recommended Orders, which were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner is the State of Florida agency responsible for regulating the practice of medicine pursuant to Section 20.43 and Chapters 456 and 458, Florida Statutes (2004).

2. As set forth herein, the Respondent was a physician licensed to practice medicine in the area of critical need (ACN), and holding Florida license number ACN144.

3. A physician holding an ACN license must practice in a facility that meets certain statutory requirements or which is designated by the State Health Officer as an entity providing health care to an indigent population, and must submit documentation establishing employment at an ACN-designated facility for licensing.

4. The secretary of the Florida Department of Health is the state health officer.

5. Prior to the events at issue in this proceeding, the Respondent practiced medicine as medical director at "Mariner's Medical Center" (Mariner's), which closed in October 2002. Mariner's was an approved ACN facility.

6. After the closure of the Mariner's facility, the Respondent accepted a position in Miami at Jackson Memorial Hospital (Jackson) in October 2002; however, prior to commencing his employment, circumstances at Jackson changed and the Respondent's position at Jackson was eliminated. The Respondent's employment contract at Jackson was terminated and, he received payment under the terms of the agreement.

7. The Respondent subsequently returned to central Florida, apparently intent on opening a medical practice.

8. By letter to "Sandy Condo," from the Respondent dated July 17, 2003, the Respondent sought responsibility for Mariner's medical records. The letter did not further identify Sandy Condo, but the address was that of the Petitioner.

9. The letter, which identified the practice as an entity called "Boriquen Healthcare Plus," stated as follows:

This is to certify my desire for the responsibility of the medical records of Mariner's Medical Center, where I was the Medical Director until October 24, 2002. I am willing to be the custodian of these medical records and I would like the computer data base (sic) be transferred to my care. I intend to follow up on the care of all these patients.

10. In August 2003, the Respondent opened a private practice at 931 West Oak Street, Suite 103, Kissimmee, Florida, and began treating patients. The practice was initially named "Boriquen Health Care" (reflecting the historical name for Puerto Rico), but within a few days of opening was renamed "Physician's Health Care Plus."

11. Towards the end of August 2003, the Respondent made efforts to acquire the ACN designation for his practice. Materials seeking the designation were submitted by Glenda E. Gonzalez-Cortes, M.D., the Medical Director for Physician's Healthcare Plus, to the Board of Medicine (Board). Although the materials were received by the Board, the Board was not the agency responsible for ACN facility designations.

12. It is unclear whether the Board forwarded the materials to the appropriate office within the Department of Health for processing. It is likewise unclear whether the Respondent understood the distinction between the "Department of Health" and the "Department of Health, Board of Medicine." In any event, the fact that materials were submitted seeking ACN designation for the practice clearly establishes that the Respondent was aware that the practice was not designated as an ACN facility.

13. A memo dated October 2, 2003, from Melinda K. Gray, Regulatory Supervisor of the Board of Medicine, to Larry McPherson, Jr., Executive Director of the Board of Medicine, stated as follows:

Attached please find a letter dated July 17, 2003, from Dr. Jose A. Gutierrez, expressing his desire to take responsibility for the medical records of Mariner's Medical Center.

Based on my conversation today with Dr. Gutierrez, he again expressed his desire to take responsibility of the medical records and to follow-up on the care of these patients who received medical treatment at Mariner's Medical Center

Please be advised of the following:

1. Mariner's Medical Center is closed.
2. Mariner's Medical Center is owned by a non-health care licensee.
3. The medical records located at Mariner's Medical Center are currently inaccessible and are being maintained by a leasing company.

4. Dr. Gutierrez or the patients do not have access to these medical records.
5. Dr. Gutierrez is willing to take custody of these records, which are located on a computer hard drive, and paper records. The hard drive is necessary to be able to link between the patient's name and patient identification numbers.
6. Dr. Gutierrez indicated he intends to follow the care of these patients.
7. Dr. Gutierrez holds a clear active medical license in the area of critical need in the state of Florida and reflects no prior discipline.

Dr. Gutierrez indicated that either the leasing company or the owner of Mariner's Medical Center would not release these records to him until the Board of Medicine reviews his request to take custody of the records and the Board grants his request.

Dr. Gutierrez agrees, accepts and acknowledges the responsibility to maintain the medical records and follow-up patient care of the patients who received medical treatment at Mariner's Medical Center, beginning July 17, 2003.

14. By letter dated October 7, 2003, from the executive director of the Board of Medicine, the custodial request was approved. The letter stated as follows:

It is my pleasure to advise you that, pursuant to your request, the Board of Medicine voted on October 4, 2003, to permanently appoint you as the Custodian of Records for the former Mariner's Medical Center.

This appointment is pursuant to Section 456.057(19), Florida Statutes, which authorizes the Board of Medicine to permanently appoint a person as a custodian of medical records in the event of the death

of a practitioner, the mental or physical incapacitation of the practitioner, or the abandonment of medical records by a practitioner. The custodian appointed shall comply with all provisions of this section, including the release of patient records.

15. The Respondent suggests that the release of the records to his custody constituted approval of his July 17 request to provide treatment; however, the October 7 letter clearly did not address issues regarding provision of patient care. The statutory citation referenced in the letter addresses only custody, maintenance, and use of medical records.

16. There is no credible evidence that the ongoing dialogue between the Respondent and representatives of the Petitioner constituted approval of the Respondent's request to provide medical care to Mariner's patients. Further, there is no evidence that the Respondent's practice at "Boriquen Health Care" or "Physician's Health Care Plus" was limited solely to patients who had received care at Mariner's.

17. By letter dated November 25, 2003, to Kimberly Rivers, Regulatory Supervisor for the Department of Health, Board of Medicine, the Respondent referenced a conversation of November 21, 2003, wherein a discussion allegedly occurred regarding the requirements for ACN designation. The letter clearly establishes that the Respondent was aware that the practice had not yet received the ACN designation.

18. The Respondent's ACN license was due to expire on January 31, 2004. On January 30, 2004, the Respondent submitted his ACN re-licensure application. Because he was not practicing at an ACN facility as of the expiration date, the ACN license was not automatically renewed.

19. By letter dated February 5, 2004, the Petitioner notified the Respondent that his ACN license renewal could not be completed until submission of a letter from "your employer in an area of critical need." The letter referenced an enclosure that allegedly identified the ACN-designated facilities.

20. An email dated February 16, 2004, from Joanne Davis-Trexler to the Respondent references a prior conversation and advises that the Respondent's license can not be renewed without "proof of employment in a facility approved as an Area of Critical Need." The email further advises that the Respondent's license is "delinquent" and that "practice with a delinquent license is a violation of Florida Statutes."

21. An exchange of email between the parties indicates that subsequent to February 16, 2004, additional information, including Medicaid/Medicare billing records, was submitted by the Respondent to the Petitioner to document the patient population being served by the Respondent.

22. On March 8, 2004, the secretary of the Department of Health, acting as the state health officer, approved Physician's

Health Care Plus as an ACN-designated facility based on the staff's recommendation.

23. On March 24, 2004, following the facility's ACN designation, the Respondent's ACN licensure was renewed.

24. Between August 2003 (when the Respondent's practice began operating absent the ACN designation) and March 8, 2004, the Respondent failed to comply with licensure requirements limiting his practice to ACN-designated facilities.

25. Between February 1 and March 24, 2004, the Respondent failed to comply with requirements related to timely renewal of his ACN licensure.

26. The Respondent has moved to Texas, is no longer practicing medicine in Florida, and has placed his Florida license into a "retired" status.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2005).

28. The Petitioner has the burden of establishing the allegations of the Administrative Complaint by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). Clear and convincing evidence is that which is credible, precise, explicit, and

lacking 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 the firm belief of conviction, without hesitancy, as to the truth of the allegations. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). The Petitioner has met the burden relative to the findings of fact set forth herein.

29. There are two counts in the Administrative Complaint filed in this case; however, the counts are essentially inseparable and have been treated as a single offense for purposes of the recommended penalty.

30. Subsection 458.331(1)(nn), Florida Statutes (2003, 2004), provides in part that violation of Chapters 456 or 458, Florida Statutes, or any rules adopted pursuant thereto constitute grounds for denial of a license or disciplinary action as specified at Subsection 456.072(2), Florida Statutes.

31. Count One of the Administrative Complaint alleges that the Respondent violated Florida Administrative Code Rule 64B8-3.003(1) by failing to "timely renew his ACN license prior to seeing, treating and/or examining patients at the Physician's Health Care Plus, located at 931 West Oak Street, Suite 103, Kissimmee, Florida." The referenced rule states "[l]icenses shall be renewed biennially in accordance with the rules of the Department."

32. Count Two of the Administrative Complaint alleges that the Respondent "operated his private practice as a Facility for Area of Critical Need without approval by the "State Health Officer" in violation of Section 458.315(1), Florida Statutes (2003)." The referenced statute provides as follows:

458.315 Temporary certificate for practice in areas of critical need.--Any physician who is licensed to practice in any other state, whose license is currently valid, and who pays an application fee of \$300 may be issued a temporary certificate to practice in communities of Florida where there is a critical need for physicians. A certificate may be issued to a physician who will be employed by a county health department, correctional facility, community health center funded by s. 329, s. 330, or s. 340 of the United States Public Health Services Act, or other entity that provides health care to indigents and that is approved by the State Health Officer. The Board of Medicine may issue this temporary certificate with the following restrictions:

(1) The board shall determine the areas of critical need, and the physician so certified may practice in any of those areas for a time to be determined by the board. Such areas shall include, but not be limited to, health professional shortage areas designated by the United States Department of Health and Human Services.

(a) A recipient of a temporary certificate for practice in areas of critical need may use the license to work for any approved employer in any area of critical need approved by the board.

(b) The recipient of a temporary certificate for practice in areas of critical need shall, within 30 days after

accepting employment, notify the board of all approved institutions in which the licensee practices and of all approved institutions where practice privileges have been denied. (emphasis supplied)

33. The statute indicates that a physician holding an ACN license is required to work at a specifically identified or otherwise approved ACN facility.

34. The Respondent asserts that the statute requires that federally designated "health professional shortage areas" must be likewise defined as areas of critical need. The issue in the case is not whether the practice met the requirements for such designation. The essential issue is whether the Respondent met the requirements of practicing at a properly designated facility under the terms of his license. The evidence establishes that he did not.

35. The Respondent suggests that Florida Administrative Code Rule 64B8-4024(1) defines "Areas of Critical Need" so as to negate the requirement that the Respondent's practice receive State Health Officer approval. An administrative rule cannot invalidate a clear statutory requirement regardless of the rule's intent.

36. The evidence presented establishes a violation of licensing requirements. Although the Respondent made efforts to acquire the ACN designation for the facility in August 2003, the facility was not designated as an ACN facility at the time

operations began and did not receive the ACN designation until March 8, 2004.

37. The Respondent's ACN licensure expired on January 31, 2004. Because the Respondent could not meet the requirements for renewal of the ACN license, the license was not renewed upon its expiration. The Respondent's ACN licensure was renewed on March 24, 2004, following the facility's ACN designation.

38. The evidence establishes that between August 2003 and March 8, 2004, the facility at which the Respondent practiced was not an approved ACN facility. The evidence establishes that between August 2003 and March 24, 2004, the Respondent's practice of medicine was not in compliance with licensure requirements.

39. Subsection 456.072(2), Florida Statutes (2003), provides as follows:

When the board, or the department when there is no board, finds any person guilty of the grounds set forth in subsection (1) or of any grounds set forth in the applicable practice act, including conduct constituting a substantial violation of subsection (1) or a violation of the applicable practice act which occurred prior to obtaining a license, it may enter an order imposing one or more of the following penalties:

(a) Refusal to certify, or to certify with restrictions, an application for a license.

(b) Suspension or permanent revocation of a license.

(c) Restriction of practice or license, including, but not limited to, restricting the licensee from practicing in certain settings, restricting the licensee to work only under designated conditions or in certain settings, restricting the licensee from performing or providing designated clinical and administrative services, restricting the licensee from practicing more than a designated number of hours, or any other restriction found to be necessary for the protection of the public health, safety, and welfare.

(d) Imposition of an administrative fine not to exceed \$10,000 for each count or separate offense. If the violation is for fraud or making a false or fraudulent representation, the board, or the department if there is no board, must impose a fine of \$10,000 per count or offense.

(e) Issuance of a reprimand or letter of concern.

(f) Placement of the licensee on probation for a period of time and subject to such conditions as the board, or the department when there is no board, may specify. Those conditions may include, but are not limited to, requiring the licensee to undergo treatment, attend continuing education courses, submit to be reexamined, work under the supervision of another licensee, or satisfy any terms which are reasonably tailored to the violations found.

(g) Corrective action.

(h) Imposition of an administrative fine in accordance with s. 381.0261 for violations regarding patient rights.

(i) Refund of fees billed and collected from the patient or a third party on behalf of the patient.

(j) Requirement that the practitioner undergo remedial education.

In determining what action is appropriate, the board, or department when there is no board, must first consider what sanctions are necessary to protect the public or to compensate the patient. Only after those sanctions have been imposed may the disciplining authority consider and include in the order requirements designed to rehabilitate the practitioner. All costs associated with compliance with orders issued under this subsection are the obligation of the practitioner.

40. The Petitioner's disciplinary guidelines are set forth in Florida Administrative Code Rule 64B8-8.001(2). The rule provides no specific guideline for a violation of Subsection 458.331(1)(nn), Florida Statutes (2003), however the minimum disciplinary action for an otherwise unspecified first offense relating to failure to perform a legal obligation is a letter of concern and an administrative fine of \$1,000. See Fla. Admin. Code R. 64B8-8.001(2)(g).

41. Florida Administrative Code Rule 64B8-8.001(3) sets forth circumstances permitting the Petitioner to deviate from the guidelines and provides as follows:

Aggravating and Mitigating Circumstances.
Based upon consideration of aggravating and mitigating factors present in an individual case, the Board may deviate from the penalties recommended above. The Board shall consider as aggravating or mitigating factors the following:

- (a) Exposure of patient or public to injury or potential injury, physical or otherwise: none, slight, severe, or death;
- (b) Legal status at the time of the offense: no restraints, or legal constraints;
- (c) The number of counts or separate offenses established;
- (d) The number of times the same offense or offenses have previously been committed by the licensee or applicant;
- (e) The disciplinary history of the applicant or licensee in any jurisdiction and the length of practice;
- (f) Pecuniary benefit or self-gain inuring to the applicant or licensee;
- (g) The involvement in any violation of Section 458.331, F.S., of the provision of controlled substances for trade, barter or sale, by a licensee. In such cases, the Board will deviate from the penalties recommended above and impose suspension or revocation of licensure.
- (h) Where a licensee has been charged with violating the standard of care pursuant to Section 458.331(1)(t), F.S., but the licensee, who is also the records owner pursuant to Section 456.057(1), F.S., fails to keep and/or produce the medical records.
- (i) Any other relevant mitigating factors.

42. An aggravating factor in this case is that the Respondent clearly understood from the beginning of operations that his practice had not received the ACN designation. The Respondent's assertion that the October 7, 2003, letter granting custody of the Mariner's records constituted blanket approval of his request to provide medical care to Mariner's patients is not reasonable. Further, even assuming that such approval could be presumed, there is no evidence that the only patients served by

Physician's Health Care Plus were former Mariner's patients. Although his desire was to provide medical care to a population in need, he knowingly failed to comply with licensure requirements.

43. There are also mitigating factors in this case. There is no evidence that the Respondent's practice exposed any patient to injury or potential injury of any kind. The evidence establishes that the Respondent's interest in continuing to operate the facility was primarily to provide medical care to the relevant population, as opposed to pecuniary benefit or self-gain. There is no evidence of prior disciplinary action against the Respondent. There are no issues related to standard of care or to controlled substance provision. There appears to have been confusion related to the responsibilities of various government offices involved in the facility's ACN designation and the Respondent's license.

44. Consideration of the aggravating and mitigating factors indicates that the penalty imposed in this case, if one is imposed at all, should be minimal.

45. At the time of the hearing, the Respondent testified that he was seeking to serve as a volunteer medical missionary in foreign countries on behalf of the Assemblies of God, Church of Chaplain Ministries, Inc., and expressed concern that any adverse finding in this matter would preclude his service. It

should be noted that the allegations in this case raised no issues related to quality of care or whether the Respondent met applicable professional practice standards. There was no evidence presented that the Respondent was not capable of providing appropriate medical care to those in need.

RECOMMENDATION

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

RECOMMENDED that the Department of Health, Board of Medicine, enter a final order issuing a letter of concern to the Respondent related to the licensing violations cited herein.

DONE AND ENTERED this 12th day of May, 2006, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 12th day of May, 2006.

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.