STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MEDICINE,	)	
Petitioner,	)	
vs.	)	Case No. 05-3118PL
JAMES S. PENDERGRAFT, M.D.,	)	
Respondent.	)	

RECOMMENDED ORDER

On October 11, 2005, 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: J. Blake Hunter, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Kenneth J. Metzger, Esquire
Fowler White Boggs Banker P.A.
Post Office Box 11240
Tallahassee, Florida 32302

Kathryn L. Kasprzak, Esquire
Fowler White Boggs Banker, P.A.
37 North Orange Avenue, Suite 500
Orlando, Florida 32801

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 May 31, 2005, the Department of Health (Petitioner) alleged that James S. Pendergraft, M.D. (Respondent), had violated Subsection 458.331(1)(c), Florida Statutes (2004).

The Respondent disputed the allegations and requested a formal administrative hearing. The Petitioner forwarded the request for hearing to the Division of Administrative Hearings, which scheduled and conducted the proceeding.

At the hearing, the Petitioner presented the testimony of one witness and had Exhibits numbered 1 through 5 and 7 admitted into evidence. The Respondent presented the testimony of one witness and had Exhibits numbered 1 through 3 admitted into evidence.

The one-volume Transcript of the hearing was filed on November 3, 2005. Pursuant to the schedule adopted by the parties, both filed Proposed Recommended Orders on December 5, 2005.

FINDINGS OF FACT

1. At all times material to this case, the Respondent was a licensed physician, holding Florida license number ME 59702. The Respondent is board-certified in obstetrics and gynecology.

2. The Respondent has been licensed in Florida since 1991 and has never been the subject of a previous disciplinary action.

3. In the mid-1990s the Respondent owned and operated several women's health clinics in Florida, where he practiced maternal/fetal medicine and performed terminations of pregnancies.

4. In August 1997, the Respondent purchased a building in Ocala, Florida, for the purpose of opening a women's health clinic. His intention to open a clinic in Ocala was apparently controversial, and he was asked by Larry Cretul, the Chairman of the Marion County Commission, to reconsider the decision.

5. The Respondent became associated with Michael Spielvogel, a real estate broker, through Mr. Spielvogel's wife, who worked for the Respondent. The Respondent discussed with Mr. Spielvogel the possibility that the Ocala property could be sold to the Marion County government. Mr. Spielvogel engaged in telephone conversations with Mr. Cretul about the sale of the property to the county.

6. Mr. Cretul allegedly became concerned about the nature of the conversations and contacted law enforcement authorities. An investigation by the Ocala office of the Federal Bureau of Investigation (FBI) commenced, which included the recording of the conversations between Mr. Spielvogel and Mr. Cretul, apparently without Mr. Spielvogel's knowledge.

7. On one specific occasion, a conversation occurred between Mr. Spielvogel and Mr. Cretul, after which Mr. Spielvogel contacted the Tampa office of the FBI and reported that Mr. Cretul had threatened him.

8. Mr. Spielvogel told the FBI that Mr. Cretul had referenced an Alabama women's clinic that had been bombed on the date of the alleged conversation, and suggested that the Ocala clinic would come to an even more spectacular demise.

9. By subsequently prepared affidavit, Mr. Spielvogel reported the substance of the conversation including the allegation that Mr. Cretul had threatened the facility. Also by affidavit, the Respondent reported that he had been present with Mr. Spielvogel during the conversation and although not able to hear Mr. Cretul speak, had observed Mr. Spielvogel react as if Mr. Cretul had threatened the Ocala clinic.

10. The Ocala clinic eventually opened. The Respondent sought to employ off-duty law enforcement officers to provide security for the facility, but the Marion County Sheriff's

Department denied the request. The Respondent sought relief by filing a federal lawsuit against Marion County and other parties.

11. During a conversation with the county's attorney as to why the county had been named in the suit, the Respondent's counsel reported to the county's attorney the threat allegedly made by Mr. Cretul. In addition, the Respondent's counsel produced the affidavits of the Respondent and Spielvogel regarding the alleged conversation.

12. The county attorney allegedly learned from Mr. Cretul that the conversations had been recorded, contacted the FBI, and eventually convened an unsuccessful settlement conference in March 1999 that was videotaped by the FBI.

13. In April 1999, the FBI allegedly advised Mr. Spielvogel that the law enforcement authorities were aware that the allegations against Mr. Cretul were false. Mr. Spielvogel advised the Respondent that the FBI had been investigating the allegation.

14. In June 2000, both the Respondent and Mr. Spielvogel were indicted by a grand jury and charged with conspiracy to commit extortion, mail fraud, and perjury. Mr. Spielvogel was additionally charged with filing a false affidavit and making false statements to the FBI.

15. The trial commenced in January 2001. The men were tried as co-defendants although represented by separate counsel. A break in the trial occurred from January 12 through January 19, due to a scheduling conflict.

16. When the break commenced, the Respondent's defense lawyers received detailed transcriptions of recorded telephone conversations between Mr. Spielvogel and Mr. Cretul, at which time it became obvious to the defense team that Mr. Spielvogel had been untruthful about his conversations with Mr. Cretul, and that the alleged threat by Mr. Cretul had not occurred. When confronted with the information by counsel, Mr. Spielvogel admitted the dishonesty and apologized. The Respondent was not present at the time the lawyers confronted Mr. Spielvogel, but entered the room shortly thereafter and observed Mr. Spielvogel's apology.

17. The defense lawyers decided that when the trial resumed, Mr. Spielvogel would make the disclosure of his dishonesty during his testimony, which was scheduled to begin when the trial resumed. The Respondent was scheduled to testify after Mr. Spielvogel. When the trial resumed, Mr. Spielvogel and the Respondent testified as planned.

18. On February 1, 2001, the jury convicted both Mr. Spielvogel and the Respondent on all counts charged. In May, the Respondent was sentenced to serve 46 months in prison,

placed on two years of supervised release, and fined $25,000. Mr. Spielvogel was sentenced to 41 months in prison and three years of supervised release.

19. The Respondent entered prison and began serving his sentence in July 2001.

20. The convictions were appealed to the United States Court of Appeals for the Eleventh Circuit. Oral arguments occurred on February 27, 2001. The Respondent was ordered released from prison on February 28, 2001.

21. By written decision issued on July 16, 2001, the Respondent's conviction was vacated, and the case was remanded for retrial on the sole issue of whether the Respondent's affidavit regarding his observations during the Spielvogel/Cretul threat conversation was false and constituted conspiracy to commit perjury.

22. The court found that the Respondent's threat to file litigation against Marion County, "even if made in bad faith and supported by false affidavits" failed to violate the statute (the "Hobbs Act") under which the Respondent had been charged as to the indictment for conspiracy to commit extortion or attempted extortion.

23. The court further found that the "mailing of litigation documents, even perjurious ones, did not violate the

mail fraud statute" under which the Respondent and Mr. Spielvogel had been charged.

24. As to the actual affidavits, the government had charged that the Respondent and Spielvogel had agreed to supply perjured affidavits as evidence in the legal action against Marion County. The court, reviewing the evidence as required in the light most favorable to the government's position, stated that the government offered circumstantial evidence upon which a jury could infer such an agreement. The court specifically stated as follows:

> During the Government's case, it introduced the affidavits of Spielvogel and Pendergraft. These statements indicated that Cretul threatened Spielvogel on January 29 and that Pendergraft observed Spielvogel receiving these threats. The Government offered evidence that Cretul did not, in fact, make the threats on January 29. Cretul testified that he never made the threat asserted by Spielvogel, and, on the FBI tapes of Cretul's conversations with Spielvogel, Cretul never made the threats that Spielvogel asserted in his affidavit. This demonstrated that Spielvogel's statements were false. Furthermore, Spielvogel was at home when he spoke with Cretul on January 29. The Government and Pendergraft stipulated that Pendergraft was not at Spielvogel's home during Spielvogel's conversation with Cretul on January 29. This was evidence that Pendergraft did not observe what he said he observed. From this circumstantial evidence, the jury could infer that Pendergraft and Spielvogel agreed to fabricate the threats and Pendergraft's observation of the threats.

25. Because the original perjury conviction was included within the convictions for extortion and mail fraud (both of which were vacated), the court remanded the case and directed that the perjury charge should be retried against the Respondent. In October 2002, the U.S. Attorney initiated re-prosecution of the perjury case.

26. In March 2004, after additional litigation including another appeal to the United States Court of Appeal for the Eleventh Circuit, the trial judge directed the parties to resolve the case. Discussions between all parties eventually resulted in the Respondent's entry on June 28, 2004, of a guilty plea to one count of "Accessory After the Fact," and he was adjudicated guilty by the trial court.

27. The facts upon which the Respondent entered the plea and was convicted were set forth in a document titled "Factual Basis" which provides as follows:

> James Scott Pendergraft is a medical doctor who owns and operates several women's reproductive health facilities in the State of Florida, including one in Ocala. In February 1998, Michael Spielvogel, a business associate of Pendergraft, intentionally made false reports to agents of the Federal Bureau of Investigation (FBI), regarding alleged threats of death and destruction by then Commissioner Larry Cretul. Specifically, Spielvogel falsely reported to the FBI that Commissioner Cretul had threatened that if Dr. Pendergraft opened a medical facility in Ocala, Florida,

a bombing that had recently occurred at a medical facility in Birmingham, Alabama, "would be nothing compared to what would happen in Ocala." At the time Spielvogel made the false reports to the FBI, he (Spielvogel) knew that Cretul had never made this statement.

Spielvogel was subsequently indicted and charged with making a false report to the FBI, in violation of 18 U.S.C. § 1001, and his trial commenced on January 2, 2001, in Ocala, Florida. While the trial was in progress, Spielvogel informed Pendergraft that Cretul had never made the alleged threatening statement, and that Spielvogel had thus made a false report to the FBI. Spielvogel, however, continued to relay to Dr. Pendergraft that he felt threatened by the communications with Cretul, and that Spielvogel staged a telephone call in front of Pendergraft where he repeated the threat into the telephone to convince Pendergraft that Cretul had just made the threat.

Before the commencement of the trial, Pendergraft had procured the professional services of William Caddy, Ph.D., a clinical psychologist, to assist in Spielvogel's defense. Dr. Caddy was prepared to testify, and Pendergraft was aware of the substance of the prospective testimony of Dr. Caddy, by having reviewed Dr. Caddy's report. Pendergraft knew that Dr. Caddy's report did not contain the truthful disclosure referenced above, and, in fact, reported that Spielvogel believed the false statements to be true. Pendergraft took the affirmative step of concealing the crime committed by Spielvogel by continuing to procure and pay for the services of Dr. Caddy, which included providing contemplated testimony at the trial on behalf of Mr. Spielvogel in order to have him exonerated and avoid punishment.

28. Based upon the conviction of Accessory After the Fact, the Respondent was sentenced to time served, and to pay a total of $300 in assessments and fines.

CONCLUSIONS OF LAW

29. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. § 120.57(1), Fla. Stat. (2004).

30. 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).

31. The Administrative Complaint filed in this case alleges that the Respondent violated Subsection 458.331(1)(c), Florida Statutes (2004), which provides as follows:

> (1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):
>
> * * *

> (c) Being convicted or found guilty of, or entering a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the practice of medicine or to the ability to practice medicine.

32. Subsection 458.305(3), Florida Statutes (2004), defines the "practice of medicine" to mean "the diagnosis, treatment, operation, or prescription for any human disease, pain, injury, deformity, or other physical or mental condition."

33. Disciplinary statutes are penal in nature and must be strictly interpreted against the authorization of discipline and in favor of the person sought to be penalized. Munch v. Department of Professional Regulation, 592 So. 2d 1136 (Fla. 1st DCA 1992).

34. The Administrative Complaint in relevant part sets forth the following allegations:

> On or about May 28, 2004, Respondent was charged by a one count superceding information in case number 5:00-or-21(S1)-Oc-32GRJ in the United States District Court, Middle District of Florida, Ocala Division, with one count of knowingly and willfully assisting an offender in order to hinder and prevent the offender's trial and punishment, in violation of Title 18, United States Code, Section 3, in that Respondent knew and failed to report to the Federal Bureau of Investigation (FBI) that the statements made by his business partner Michael Spielvogel to the FBI were false.
>
> The facts underlying the charges filed against the Respondent were that Respondent knew that his business partner had made

> statements to the FBI during an investigation that were false. The statements by Respondent's business partner were made in an attempt to conspire to commit extortion and these statements damaged the reputation of a government official by falsely implying that he contemplated the use of actual or implicit threats of or acts of violence and other criminal means to cause harm to a person and/or property.
>
> On or about June 28, 2004, Respondent entered a plea of guilty in case number 5:00-or-21(S1)-Oc-32GRJ in the United States District Court, Middle District of Florida, Ocala Division, to one count of Accessory After the Fact.

35. Contrary to the Administrative Complaint, neither the superceding information nor the factual basis upon which the Respondent was convicted references any failure by the Respondent to report to the FBI knowledge of the falsity of Spielvogel's claim regarding the alleged threat from Mr. Cretul.

36. Disciplinary action may be based only on the offenses specifically alleged in the Administrative Complaint. Trevisani v. Department of Health, 908 So. 2d 1108, (Fla. 1st DCA 2005); Ghani v. Department of Health, 714 So. 2d 1113 (Fla. 1st DCA 1998); Sternberg v. Department of Professional Regulation, Bd. of Medical Examiners, 465 So. 2d 1324, (Fla. 1st DCA 1985).

37. In this case, the factual basis for the guilty plea set forth in the Administrative Complaint is unsupported by evidence. The facts underlying the charge to which the

Respondent ultimately entered a guilty plea established only that once the Respondent became aware that the Spielvogel claim was false, the Respondent failed to inform a clinical psychologist whom the Respondent had obtained to testify on behalf of Mr. Spielvogel.

38. The question of an alleged perjury, which was the subject of the remand, was not ultimately addressed. The Respondent testified that he was unaware that the Spielvogel's reported threat was false prior to the Spielvogel/Cretul conversation transcript information being provided to his defense lawyers during the trial break. The Eleventh Circuit Court decision states that the threat allegedly occurred during a conversation on January 29 between Mr. Spielvogel and Mr. Cretul, that Mr. Spielvogel was at home at the time of the conversation, and that the Respondent had stipulated that he was not at Spielvogel's home during the conversation, hence the issue was remanded for the retrial which did not occur.

39. Assuming that the Administrative Complaint had accurately alleged the facts to which the Respondent had entered the plea, the issue then becomes whether the crime committed is related to the practice of medicine or to the ability to practice medicine, a question of law and fact to be addressed in an evidentiary hearing. Spuza v. Department of Health, 838 So. 2d 676 (Fla. 2d. DCA 2003).

40. As to whether the Respondent entered a guilty plea to a crime directly related to the practice of medicine or to the ability to practice medicine, the Administrative Complaint states as follows:

> The qualities that are essential to the practice of medicine include respect for human life, respect for property and reputations of persons, honesty, integrity, judgment and a willingness to abide by the laws of the State of Florida. Respondent breached the trust and confidence the citizenry and the Legislature of Florida entrusted in him when he knowingly and willfully failed to disclose that his business partner made false statements to the FBI. Respondent's conviction of Accessory After the Fact demonstrates that Respondent lacks these essential qualities as well as a disregard for his role as a physician and for the public's trust in him. Thus the crime for which the Respondent was found guilty and convicted is a crime related to the practice of medicine or to his ability to practice medicine.

41. The allegation clearly references facts that were not established during the hearing. The factual basis underlying the Respondent's conviction does not establish the Respondent "knowingly and willfully failed to disclose that his business partner made false statements to the FBI."

42. In support of the assertion that the Respondent's conviction was of a crime related to the practice of medicine or to his ability to practice medicine, the Petitioner relies on a collection of previous disciplinary proceedings wherein the

Petitioner has broadly interpreted the parameters of medical practice to include a range of personal characteristics.

43. Statutes imposing a penalty must always be construed strictly in favor of the one against whom the penalty is imposed and are never to be extended by construction. Liberal construction to effectuate a public purpose cannot prevail over a principle of law as firmly established as that regarding statutory penalties. Holmberg v. Department of Natural Resources, 503 So. 2d 944 (Fla. 1st DCA 1987).

RECOMMENDATION

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

RECOMMENDED that the Petitioner enter a final order DISMISSING the Administrative Complaint filed against James S. Pendergraft, M.D.

DONE AND ENTERED this 6th day of January, 2006, in Tallahassee, Leon County, Florida.

William F. Quattlebaum

WILLIAM F. QUATTLEBAUM
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 6th day of January, 2006.

COPIES FURNISHED:

J. Blake Hunter, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

Kenneth J. Metzger, Esquire
Fowler White Boggs Banker P.A.
Post Office Box 11240
Tallahassee, Florida 32302

Kathryn L. Kasprzak, Esquire
Fowler White Boggs Banker, P.A.
37 North Orange Avenue, Suite 500
Orlando, Florida 32801

R. S. Power, Agency Clerk
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1701

Larry McPherson, Executive Director
Board of Medicine
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.