

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
MEDICINE,)
)
Petitioner,)
)
vs.) Case No. 06-4767PL
)
ISAAC NOSOVSKY, M.D.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

This case came before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, on a factual record stipulated to by the parties.

APPEARANCES

For Petitioner: April Dawn M. Skilling, Esquire
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For Respondent: J. David Bogenschutz, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, Isaac Nosovsky, M.D., committed a violation of Chapter 458, Florida Statutes (2005), as alleged in the Administrative Complaint filed by Petitioner, the Department of Health, on July 18, 2006,

in DOH Case Number 2006-07801, as amended; and, if so, what disciplinary action should be taken against his license to practice medicine in the State of Florida.

PRELIMINARY STATEMENT

On or about July 18, 2006, the Department of Health filed an Administrative Complaint against Isaac Nosovsky, M.D., an individual licensed to practice medicine in Florida, before the Board of Medicine, in which it alleged that Dr. Nosovsky had committed a violation of Section 458.331(1)(c), Florida Statutes (2005). Dr. Nosovsky executed an Election of Rights form in which he disputed the allegations of fact contained in the Administrative Complaint and requested a formal administrative hearing pursuant to Section 120.569(2)(a), Florida Statutes (2006).

On November 22, 2006, the matter was filed with the Division of Administrative Hearings with a request that an administrative law judge be assigned the case to conduct proceedings pursuant to Section 120.57(1), Florida Statutes (2006). The matter was designated DOAH Case Number 06-4767PL and was assigned to the undersigned.

The final hearing was scheduled by a Notice of Telephonic Final Hearing entered December 4, 2006, for January 24, 2007. Although arrangements had been made to allow the incarcerated Dr. Nosovsky to participate in the final hearing by telephone, a

letter was received from counsel for Dr. Nosovsky indicating that Dr. Nosovsky would not be able to participate in the hearing. In order to resolve this issue, a pre-hearing conference was scheduled by telephone. During the pre-hearing conference, the parties stipulated that no evidentiary hearing was necessary if the following conditions were met: (1) An amended administrative complaint was issued making it clear that Petitioner did not allege that the facts that underlie Respondent's criminal conviction were necessarily true; (2) Petitioner was allowed to admit certified copies of the indictment, verdict, and commitment relating to Respondent's criminal conviction; (3) Petitioner was allowed to admit an affidavit addressing the issue of whether Respondent's criminal conviction relate to his practice of medicine or his ability to practice medicine; and (4) the parties were given an opportunity to file proposed recommended orders.

On January 16, 2007, an Order Establishing Timelines was entered memorializing the conditions agreed to by the parties for cancellation of the final hearing. On January 17, 2007, the final hearing scheduled for January 24, 2007, was cancelled by an Order Canceling Hearing.

Consistent with the agreement reached by the parties and the January 16, 2007, Order Establishing Timelines, Petitioner filed an Amended Administrative Complaint along with the agreed

upon exhibits: Respondent's Indictment in the United States District Court Southern District of Florida, Case No. 06-20178 CR; the Verdict in that case, finding Respondent guilty on all seven counts of the Indictment; the Judgment in a Criminal Case entered by the Honorable Paul C. Huck, United States District Judge; and an Affidavit of John P. Mahoney, M.D. Petitioner also filed the Final Order in Department of Business and Professional Regulation v. Isaac Nosovsky, M.D., DBPR Case No. 92-00411, and the Florida Licensure Certification for Respondent. These seven Exhibits are hereby admitted. Respondent did not file any exhibits.

Also consistent with the agreement reached by the parties, both parties filed proposed orders for consideration in entering this Recommended Order. Those pleadings have been fully considered.

FINDINGS OF FACT

A. The Parties.

1. Petitioner, the Department of Health (hereinafter referred to as the "Department"), is the agency of the State of Florida charged with the responsibility for the investigation and prosecution of complaints involving physicians licensed to practice medicine in Florida. § 20.43 and Chs. 456 and 458, Fla. Stat. (2006).

2. Respondent, Isaac Nosovsky, M.D., is, and was at all times material to this matter, a physician licensed to practice medicine in Florida pursuant to Chapter 458, Florida Statutes, having been issued license number ME 29814.

3. Dr. Nosovsky's address of record is 1865 North Corporate Lakes Blvd., Suite 2, Weston, Florida 33326.

B. The Indictment and Conviction.

4. On or about March 23, 2006, Respondent was indicted in the United States District Court, Southern District of Florida, Case No. 06-20178 CR, United States of America v. Isaac Nosovsky and Faustina Adela Gonzalez, on seven counts (hereinafter referred to as the "Indictment"):

a. In Count 1, Dr. Nosovsky is charged with Conspiracy to Defraud the United States and to Commit Health Care Fraud. In particular, it is alleged that Dr. Nosovsky committed conspiracy against the United States Department of Health and Human Services in its administration and oversight of Medicare and against Medicare in connection with the delivery of any payment for health care benefits, items, and services, in violation of Title 18, U.S.C. Section 371.

b. In Counts 2 through 7, Dr. Nosovsky is charged with Health Care Fraud. In particular, it is alleged that he committed Health Care Fraud against a health care benefit program affecting commerce, that is, Medicare, in violation of

Title 18 U.S.C. Sections 1347 and 2, in connection with the delivery and payment for health care benefits, cost of therapies, treatments, and related items and services allegedly performed by the Nosovsky Clinic.

5. Generally, the Indictment was predicated upon the allegation that, in or around August 2004, Dr. Nosovsky and his co-conspirator formed a clinic, the Nosovsky Clinic, which it then used to unlawfully enrichment themselves by "(a) submitting and causing the submission of false and fraudulent claims to Medicare; (b) paying kickbacks and bribes to Medicare beneficiaries so that they would serve as patients at the Nosovsky clinic, thereby furthering the billing fraud scheme; and concealing the submission of false and fraudulent claims to Medicare, the receipt and transfer of fraud proceeds, and the payment of kickbacks and bribes."

6. The Indictment alleges the following facts regarding the Nosovsky Clinic:

1. The medical clinic of **ISAAC NOSOVSKY** (hereinafter the "Nosovsky clinic") was located at 2250 Southwest 3rd Avenue, Suite 150, in Miami, Florida, and was in business from in or around November 2004 through in or around April 2005, when it closed.

2. The Nosovsky clinic claimed to specialize in the treatment of patients diagnosed with Human Immunodeficiency Virus ("HIV"). HIV is a viral infection that attacks the patient's immune system. The Nosovsky clinic purposed to provide

intravenous infusion treatments, i.e., the insertion of a needle into a patient's vein, in order to administer certain specialized medications. The Nosovsky clinic also purposed to provide injections, i.e., the insertion of a syringe into the patient's arm, in order to administer certain specialized medications.

3. **ISAAC NOSOVSKY** was a medical doctor licensed to practice medicine in the State of Florida pursuant to license number ME29814. **NOSOVSKY** was employed by the Nosovsky clinic and purported to treat patients there from in or around November 2004 through in or around April 2005.

4. **FAUSTINA ADELA GONZALEZ** was employed as a medical assistant licensed to in the State of Florida pursuant to license number CNA121032. **GONZALEZ** WAS EMPLOYED BY THE Nosovsky clinic as a medical assistant and purported to treat patients there from in or around November 2004 through in or around April 2005.

7. The Indictment alleges the following facts concerning the Medicare Program:

5. The Medicare Program (Medicare") was a federal program that provided free or below-cost health care benefits to certain individuals, primarily the elderly, blind and disabled. The benefits available under Medicare are prescribed by statute and by federal regulations under auspices of the United States Department of Health and Human Services, through its agency, the Centers for Medicare and Medicaid Services ("CMS"). Individuals who receive benefits are referred to as beneficiaries.

6. Medicare was a "health care benefit program," as defined by Title 18, United States Code, Section 24(b).

7. Medicare Part B paid for a portion of the cost of certain necessary medical services and medications that were provided and ordered by physicians, clinics, and other qualified health care providers. Medicare Part B was administered in Florida by First Coast Service Options ("FCSO"), a company that contracted with CMS to receive, adjudicate, process, and pay certain Part B claims.

8. Physicians, clinics, and other healthcare providers that provided services to Medicare beneficiaries were able to apply for and obtain a "provider number." A health care provider who had been issued a provider number was able to file claims with Medicare to obtain reimbursement for services provided to beneficiaries. A Medicare claim was required to set forth, among other things, the beneficiary's name and Medicare identification number, the services that had been performed for the beneficiary, the date the services were provided, the cost of the services, and the name and identification number of the physician or other health care provider who had ordered the services.

9. For Medicare billing purposes, medical services and medications provided to beneficiaries were identified by a Current Procedural Terminology ("CPT") code.

10. For services purportedly rendered from in or around November 2004 through in or around May 2005, the Nosovsky clinic billed Medicare under a provider number assigned to **ISAAC NOSOVSKY**, 965420.

8. The indictment alleges that, having formed the Nosovsky Clinic and obtaining a Medicare provider number, Dr. Nosovsky used the Medicare system in his clinic to defraud the United States and commit Health Care Fraud in the following manner:

4. Co-conspirators established the Nosovksy [sic] clinic, with **ISAAC NOSOVSKY** agreeing to serve as its medical director.

5. **ISAAC NOSOVSKY** pre-signed numerous, blank health care-related documents including, but not limited to, "Infusion Therapy" sheets, progress notes, and Medicare superbills.

6. **FAUSTINA ADELA GONZALEZ** failed to provide Medicare beneficiaries with prescribed medications. In some cases, **GONZALEZ** bandaged patients' arms to give the appearance that a treatment or therapy had been administered.

7. **FAUSTINA ADELA GONZALEZ** falsely stated on the pre-signed "Infusion Therapy" sheets that she had provided Medicare beneficiaries with infusion therapy or treatments with specific dosages of medications.

8. **FAUSTINA ADELA GONZALEZ**, among other co-conspirators, fabricated therapy notes and related documents stating that Medicare beneficiaries had received specific treatments, therapies, and dosages of medications, when, in fact, the beneficiaries had actually not received the treatments, therapies, and medications indicated on the therapy notes and documents.

9. To conceal the fact that the Medicare beneficiaries were not receiving the treatments, therapy, and medications that were described in various documents and that were being utilized to bill Medicare, various co-conspirators and **FAUSTINA ADELA GONZALEZ** obtained fraudulent and/or falsified documents, including the pre-signed documents from **ISAAC NOSOVSKY**, and placed them in the patient files of the beneficiaries.

10. To promote and further the billing fraud scheme, co-conspirators paid kickbacks and bribes to Medicare beneficiaries so that they would serve as patients.

11. Co-conspirators submitted and caused the submission of numerous false and fraudulent claims to Medicare on behalf of the Nosovsky clinic, seeking reimbursement for the cost of infusions, injections, medications, and other items and services that were not provided, not provided as claimed, or not medically necessary. As a result of the submission of these claims, Medicare paid in excess of \$1,300,000 into a bank account in the name of **ISAAC NOSOVSKY** and a co-conspirator.

9. The Indictment names six patients that were involved in Dr. Nosovsky's conspiracy to defraud Medicare; E.P., M.P, T.R., J.D., A.C., and J.M. The indictment alleges that Dr. Nosovsky and his co-conspirators used the following means to perpetrate the fraud with regard to Medicare Beneficiary E.P. These alleged facts are, except for dates and the specifics as to medication prescribed, the same for all the other five patients.

3. On or about November 1, 2004, **ISAAC NOSOVSKY** signed a progress note falsely indicating that he had examined Medicare beneficiary E.P. and that the patient required 80 units of the medication acthar gel

4. On or about November 1, 2004, **FAUSTINA ADELA GONZALEZ** prepared an "Infusion Therapy" sheet falsely indicating that **GONZALEZ** had administered 80 units of acthar gel to Medicare beneficiary E.P.

5. On or about November 1, 2004, **ISAAC NOSOVSKY** signed a superbill falsely

indicating that Medicare beneficiary E.P. had received 70 units of acthar gel.

6. On or about November 1, 2004, a co-conspirator paid a cash kickback to Medicare beneficiary E.P.

7. On or about December 8, 2004, a co-conspirator caused the submission of a false claim to Medicare on behalf of the Nosovsky clinic, seeking reimbursement for a dosage of acthar gel that supposedly had been provided to Medicare beneficiary E.P. on or about November 1, 2004.

10. On or about March 30, 2006, Dr. Nosovsky was arraigned in the United States District Court, Southern District of Florida, on the Indictment and entered a plea of not guilty.

11. On or about May 31, 2006, Respondent was found guilty by jury verdict of all seven counts of the Indictment.

12. On August 14, 2006, United States District Judge Paul C. Huck adjudicated Dr. Nosovsky guilty of the criminal offense charged in the Indictment. Judge Huck sentenced Dr. Nosovsky to 60 months' incarceration on Count 1, 65 months' incarceration on Counts 2-7, to run concurrently; participation in a drug/alcohol treatment program while incarcerated; three years' supervised probation; 200 hours of community service; and, restitution in the amount of \$1,305.066.

C. The Relationship of Dr. Nosovsky's Convictions to the Practice of Medicine.

13. In light of the jury conviction on all counts of the Indictment, it is concluded that Dr. Nosovsky engaged in the activities alleged in the Indictment for purposes of this proceeding. All of those activities related to the practice of medicine.

14. But for Dr. Nosovsky's license to practice medicine in Florida, Dr. Nosovsky would not have been able to commit the crimes for which he was committed. It was his license to practice medicine that facilitated his ability to open the Nosovsky Clinic, to obtain a Medicare provider number, and to fully participate in the Medicare program. All of the activities he engaged in, such as signing necessary Medicare documents and medical backup, were carried out in his capacity as a licensed Florida physician.

15. Based upon the Affidavit of John P. Mahoney, M.D., which is found credible, the crimes for which Dr. Nosovsky was committed evidenced a lack of honesty, integrity, trustworthiness, good judgment, and sound morale character, all attributes expected of physicians licensed in Florida. The scope and severity of Dr. Nosovsky's conduct evidences a lack of these qualities.

D. Prior Disciplinary Action.

16. Dr. Nosovsky was previously disciplined by the Board of Medicine in Department of Business and Professional Regulation v. Isaac Nosovsky, M.D., DBPR Case No. 92-00411. In particular, Dr. Nosovsky was found to have violated Section 458.311(1)(m), Florida Statutes (failure to maintain medical records justifying a course of treatment), and Section 458.311(1)(t), Florida Statutes (the standard of care expected of physicians).

CONCLUSIONS OF LAW

A. Jurisdiction.

17. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569, 120.57(1), and 456.073(5), Florida Statutes (2006).

B. The Charges of the Administrative Complaint.

18. Section 458.331(1), Florida Statutes (2005), authorizes the Board of Medicine (hereinafter referred to as the "Board"), to impose penalties ranging from the issuance of a letter of concern to revocation of a physician's license to practice medicine in Florida if a physician commits one or more acts specified therein.

19. In its Administrative Complaint, as amended, the Department has alleged that Dr. Nosovsky has violated Section 458.331(1)(c), Florida Statutes (2005).

C. The Burden and Standard of Proof.

20. The Department seeks to impose penalties against Dr. Nosovsky through the Administrative Complaint, as amended, that include suspension or revocation of his license and/or the imposition of an administrative fine. Therefore, the Department has the burden of proving the specific allegations of fact that support its charge that Dr. Nosovsky violated Section 458.331(1)(c), Florida Statutes (2005), by clear and convincing evidence. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998); and Section 120.57(1)(j), Florida Statutes (2006)("Findings of fact shall be based on a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute.").

21. What constitutes "clear and convincing" evidence was described by the court in Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), as follows:

. . . [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in 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 or conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

See also In re Graziano, 696 So. 2d 744 (Fla. 1997); In re Davey, 645 So. 2d 398 (Fla. 1994); and Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652 (Fla. 5th DCA 1998)(Sharp, J., dissenting).

D. Section 458.331(1)(c), Florida Statutes (2005).

22. Section 458.331(1)(c), Florida Statutes (2005), defines the following disciplinable offense:

(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.

23. In paragraphs 9 and 10 of the Administrative Complaint, as amended, it is alleged that Dr. Nosovsky's felony convictions relate to his practice of medicine and his ability to practice medicine for the following reasons:

a. Dr. Nosovsky was only able to engage in the actions resulting in this convictions through the use of his medical license.

b. The crimes for which Dr. Nosovsky was convicted are crimes that relate to the ability to practice medicine. "The qualities essential to the practice of medicine include reliability, honesty, and good moral character. The crimes for which Respondent was convicted demonstrate that Respondent lacks these essential qualities."

24. The evidence has clearly and convincingly proven that Dr. Nosovsky has been convicted of crimes that relate to his practice of medicine as alleged in the Administrative Complaint and described in the Findings of Fact. Dr. Nosovsky's convictions for Conspiracy to Defraud the United States and for Health Care Fraud both involved Dr. Nosovsky's manipulation of the Medicare system. His status as a physician allowed him to open the Nosovsky Clinic and apply for and obtain his Medicare provider number, and it was his signature as a licensed physician on the false superbills and false Infusion Therapy sheets that allowed the false claims for Medicare reimbursement to be submitted. These were the facts that were the basis for the jury finding Dr. Nosovsky guilty, and they clearly related to his practice of medicine.

25. As to the Department's second basis for finding that Dr. Nosovsky has violated Section 458.311(1)(c), while it is true that Dr. Nosovsky crimes indicate he lacks honesty, integrity, trustworthiness, good judgment, and sound moral character, all characteristics which a physician should possess, it is concluded that many crimes demonstrate the lack of such character. Lack of those characteristics alone is not, however, sufficient to support a conclusion that the commission of a crime necessarily relates to a person's ability to practice medicine. Had the legislature intended to punish physicians for any crime demonstrating a lack of certain characteristics such as honesty and good judgment, it could have done so without requiring that the crime directly relate to the ability to practice medicine.

E. The Appropriate Penalty.

26. In determining the appropriate punitive action to recommend to the Board in this case, it is necessary to consult the Board's "disciplinary guidelines," which impose restrictions and limitations on the exercise of the Board's disciplinary authority under Section 458.331, Florida Statutes. See Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231 (Fla. 5th DCA 1999).

27. The Board's guidelines are set out in Florida Administrative Code Rule 64B8-8.001, which provides the

following "purpose" and instruction on the application of the penalty ranges provided in the Rule:

(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.

(2) Violations and Range of Penalties. In imposing discipline upon applicants and licensees, in proceedings pursuant to Section 120.57(1) and 120.57(2), F.S., the Board shall act in accordance with the following disciplinary guidelines and shall impose a penalty within the range corresponding to the violations set forth below. The verbal identification of offenses are descriptive only; the full language of each statutory provision cited must be consulted in order to determine the conduct included.

28. Florida Administrative Code Rule 64B8-8.001(2) goes on to provide, in pertinent part, that the penalty guideline for a violation of Section 458.331(1)(c), Florida Statutes, where the crime involves healthcare fraud in dollar amounts in excess of \$5,000, is revocation of the license and an administrative fine of \$10,000.

29. Florida Administrative Code Rule 64B8-8.001(3) provides that, in applying the penalty guidelines, the following aggravating and mitigating circumstances are to be taken into account:

(3) 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.

30. No mitigating circumstances have been presented by Dr. Nosovsky. On the other hand, the Department presented the Final Order in DBPR Case No. 92-00411, which reflects a prior disciplinary action against the Respondent.

31. In Petitioner's Proposed Recommended Order, the Department has suggested that Dr. Nosovsky's license to practice medicine be revoked. This recommendation is well within the guidelines and is appropriate in this case.

RECOMMENDATION

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

RECOMMENDED that the a final order be entered by the Board of Medicine finding that Isaac Nosovsky, M.D., has violated Section 458.331(1)(c), Florida Statutes, as described in this Recommended Order; and revoking his license to practice medicine in the State of Florida.

DONE AND ENTERED this 23rd day of March, 2007, in
Tallahassee, Leon County, Florida.

S

LARRY J. SARTIN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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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 these cases.