

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
PHARMACY,)
)
Petitioner,)
)
vs.) Case Nos. 07-1436PL
) 07-1437PL
DENIS R. BOUSQUET, R.PH,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On June 20, 2007, a formal administrative hearing in this case was held in Tallahassee, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Patrick L. Butler, Esquire
Billie Jo Owens, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Denis R. Bousquet, pro se
5125 Cedar Springs Drive, Unit 203
Naples, Florida 34110

STATEMENT OF THE ISSUES

The issues in this case are whether the allegations set forth in the Administrative Complaints are correct, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On or about July 3, 2006, the Department of Health, Board of Pharmacy (Petitioner), filed two Administrative Complaints against Denis R. Bousquet (Respondent), alleging that the Respondent had violated the requirements of a Final Order (DOH 05-0782-S-MQA) filed May 3, 2005, which resolved two previous disciplinary actions against the Respondent (Petitioner's Case Nos. 2002-25746 and 2002-27092). The Respondent requested an administrative hearing. The Petitioner forwarded the dispute to the Division of Administrative Hearings, which scheduled the matter for hearing.

The Administrative Complaint filed in DOAH Case No. 07-1436PL incorrectly alleges that the referenced Final Order imposed a penalty of \$12,652.66 (comprised of a fine of \$2,000 and costs of \$10,652.66) to be paid within six months of the filing of the Final Order and that the Respondent failed to pay the fine or costs.

The Administrative Complaint filed in DOAH Case No. 07-1437PL correctly alleges that the referenced Final Order imposed a penalty of \$12,852.66 (comprised of a fine of \$2,000 and costs of \$10,852.66) and further imposed a license suspension followed by reinstatement with a period of probationary restrictions. Such restrictions included the requirement that the Respondent (or his employer) file various

reports on a scheduled basis with the Petitioner's compliance officer. The Administrative Complaint alleges that the Respondent failed to submit the required reports.

At the hearing, the Petitioner presented the testimony of the Respondent and of Cheryl Sellers and had Exhibits 1 through 16 admitted into evidence. The Respondent testified on his own behalf, presented the testimony of Cheryl Sellers, and had Exhibits 1 through 4 admitted into evidence.

A Transcript of the hearing was filed on July 9, 2007. The Petitioner filed a Proposed Recommended Order. The Respondent filed a letter, which has been treated as a Proposed Recommended Order.

FINDINGS OF FACT

1. The Petitioner is the state agency charged, pursuant to Chapter 465, Florida Statutes (2006), with regulation of the practice of pharmacy.

2. At all times material to this case, the Respondent was a licensed pharmacist in the State of Florida, holding license number PS 26142.

3. On May 3, 2005, a Final Order (DOH-05-0782-S-MQA) was filed based on the stipulated resolution of disciplinary proceedings initiated against the Respondent by the Petitioner in DOH Case Nos. 2002-27092 and 2002-25746.

4. The Final Order imposed a suspension of the Respondent's license as follows:

Respondent's license to practice pharmacy shall be suspended until such time as Respondent petitions and appears before the Board and can demonstrate that he is able to practice pharmacy with skill and safety to patients. Proof of his ability to practice safely shall include an evaluation of respondent by the Professional Resources Network (PRN) and a recommendation from PRN to the Board that Respondent can practice pharmacy with reasonable skill and safety to patients.

5. The Final Order imposed a probationary period as follows:

Upon the termination of suspension of Respondent's license, Respondent's license shall be placed on probation concurrent with the PRN contract or three (3) years whichever is longer. If, after completing an evaluation of Respondent, the PRN deems it necessary for Respondent to execute a contract for supervision and/or treatment, the three-year probationary period shall run concurrent with the PRN's contract. During the period or probation Respondent shall be subject to the following terms and conditions:

a. Respondent or his employer shall submit written reports to the Compliance Officer at the Board office. The written reports shall contain Respondent licensee's name, license number, current address and phone number; current name, address and phone number of each pharmacy in which Respondent is engaged in the practice of pharmacy; the names of all pharmacists, pharmacy interns, pharmacy technicians, relief pharmacists, and prescription department managers working with the Respondent. These reports shall be

submitted to the Compliance Officer every three (3) months in a manner as directed by the Compliance Officer.

* * *

e. Respondent shall submit documentation evidencing that his employer, or if employed as a relief pharmacist, his supervision pharmacists(s) and the relief agency, have been provided with a copy of the Final Order describing these probationary terms within ten (10) days of the entry of the Final Order or upon initiation of employment.

f. Respondent shall ensure that his employer or, if employed as a relief pharmacist, the supervising pharmacist at each pharmacy at which the Respondent works, submits written reports to the Compliance Officer for the Board of Pharmacy. These reports shall contain: the name, current address, license number, and telephone number of each pharmacy intern, pharmacy technician, relief pharmacist, and prescription department manager working with the Respondent in the prescription department; a brief description of Respondent's duties and responsibilities; and Respondent's work schedule. These reports shall be submitted by the employer to the Compliance Officer every three (3) months in a manner directed by the Board.

6. The Final Order imposed an administrative fine of \$2,000.

7. In the stipulation for settlement of the disciplinary cases, the assessment of costs was addressed as follows:

Respondent agrees to reimburse the Department for any administrative costs incurred in the investigation, prosecution, and preparation of this case, not to exceed eleven thousand dollars (\$11,000). The

total amount of the costs will be assessed at the time the stipulation is presented to the Board. The fine and costs are to be paid by the Respondent . . . within sixty (60) days of the filing of a Final Order accepting and incorporating this Agreement.

8. The copy of the stipulation admitted into evidence at the hearing included a handwritten notation related to the time for payment of the fine and costs and appears to indicate that the 60-day deadline for payment was extended to six months. The source of the handwriting was unclear; but in any event, the Final Order adopted the agreed stipulation and assessed costs of \$10,852.66. The Final Order extended the deadline for payment of the costs to six months from the date of the Final Order, but did not specifically reference the deadline for payment of the administrative fine.

9. The evidence establishes that both the fine and the assessed costs were to be paid within six months of the date of the Final Order, or by November 2, 2005.

10. The evidence establishes that the Respondent paid neither the fine nor the assessed costs by the November 2, 2005, deadline.

11. There is no evidence that the Respondent has made any attempt to pay any portion of the financial penalty, and the \$12,852.66 remained unpaid at the time of the administrative hearing.

12. The Respondent's suspension was lifted pursuant to an Order of Reinstatement filed June 28, 2005, at which time the probationary period began.

13. According to the Respondent's Responses to the Petitioner's First Request for Admissions, the Respondent was placed by "Healthcare Consultants" to work in relief status at the Winn-Dixie #736 pharmacy and at the Winn-Dixie #741 pharmacy for a total of five days during the month of August 2005.

14. According to the terms of the stipulation as adopted by the Final Order, the Respondent's first quarterly report was due three months following the beginning of the probationary period, or approximately September, 28, 2005.

15. Cheryl Sellers, a compliance officer for the Petitioner, was assigned the responsibility of monitoring the Respondent's compliance with his obligations under the May 3, 2005, Final Order.

16. The Respondent had several extended telephone conversations with Ms. Sellers shortly after the Respondent's probationary period began. During the conversations, the specific disciplinary requirements of the stipulation and Final Order were discussed at length.

17. Additionally, in 1997, the Petitioner had incurred a substantially similar penalty, including a suspension, a fine, and compliance with quarterly reporting requirements. It is

reasonable to presume that the Respondent was aware of, and understood, his obligations under the May 3, 2005, Final Order.

18. As was her standard practice, Ms. Sellers sent a package of information to licensees with disciplinary restrictions, including various forms, related to compliance with requirements set forth by Final Orders. The package was mailed by regular mail to the Petitioner on August 4, 2005; but for reasons unknown, the information was not delivered to the Respondent and was returned to the Petitioner by the postal service. The package was not re-mailed to the Respondent until October 12, 2005.

19. The Respondent filed his quarterly reports on October 19, 2005, several weeks after the deadline had passed.

20. Apparently the first Employer's Quarterly Report was completed by an individual identified as Robert Miller, presumably employed by Healthcare Consultants, an otherwise unidentified entity which supposedly placed the Respondent in the Winn-Dixie pharmacies for the August 2005 employment. Mr. Miller was not the pharmacist in charge of the Winn-Dixie units where the Respondent had been employed.

21. By letter dated October 21, 2005, Compliance Officer Cheryl Sellers notified the Respondent that he was "not in compliance" with the May 3, 2005, Final Order and stated as follows:

Guidelines for submitting Employer Quarterly Reports were sent to you on October 12, 2005, the Employer's Quarterly Report from Robert Miller received on October 19, 2005, is not acceptable. Efren Rivera the PDM at the Winn Dixie store #736 is the appropriate person to complete this form. [sic]

22. The Employer's Quarterly Report subsequently submitted by Efren Rivera was dated and notarized on November 1, 2005, and was filed thereafter.

23. The Respondent filed for Chapter 7 bankruptcy in late 2005 and was discharged from debt on January 31, 2006. The Respondent has asserted that his obligation to pay the administrative fine and assessed costs was discharged through the bankruptcy.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2006).

25. The Petitioner has the burden of establishing the allegations of the Administrative Complaints 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.

26. Section 465.016, Florida Statutes (2005), provides in relevant part as follows:

465.016 Disciplinary actions.--

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

* * *

(n) Violating a rule of the board or department or violating an order of the board or department previously entered in a disciplinary hearing.

27. The Respondent clearly failed to comply with the disciplinary requirements of the Final Order filed May 3, 2005. The Respondent failed to pay the fine and assessed costs and failed to timely meet the reporting requirements set forth in the Final Order. It should be noted that the discipline imposed in that case was explicitly set forth in a stipulation that was executed by the parties and upon which the Final Order was based.

28. The Respondent asserts that his obligation to pay the administrative fine and assessed costs identified in the May 3, 2005, Final Order was discharged by the bankruptcy filing. The

Respondent has cited no legal authority in support of the assertion, and it is rejected.

29. Eleven U.S.C. Section 523(a)7, provides that, insofar as is material to this case, a discharge in bankruptcy does not discharge an individual debtor from any debt "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss. . . ."

30. The Department of Health is a governmental unit within the executive branch of the government of the State of Florida. § 20.43, Fla. Stat. (2005). The Board of Pharmacy is a unit of the Division of Medical Quality Assurance located within the Department of Health. § 20.43(3)(g)10., Fla. Stat. (2005).

31. In this case, the \$2,000 fine, payable to and for the benefit of a governmental unit, is clearly exempted from dischargeable debt, and the Respondent remains obligated to pay the fine.

32. The courts have uniformly held that assessments of prosecutorial costs in criminal cases are properly classified as fines and are not dischargeable in bankruptcy. Such classification has been extended to disciplinary actions against Florida-licensed attorneys, where the goal of the disciplinary action was to protect the public and the assessment of costs was

penal in nature and not compensation for actual pecuniary loss. In re Cillo, 165 B.R. 46 (M.D. Fla. 1994).

33. The purpose of the Department of Health is to promote and protect the health of all residents and visitors in the state, and includes the regulation of health practitioners as necessary for the preservation of the health, safety, and welfare of the public. § 20.43(1)(m), Fla. Stat. (2005).

34. The Legislature has stated that the practice of pharmacy is a learned profession and had further stated that the "sole legislative purpose for enacting this chapter is to ensure that every pharmacist practicing in this state and every pharmacy meet minimum requirements for safe practice." § 465.002, Fla. Stat. (2005).

35. The Petitioner is specifically authorized to assess prosecutorial costs by Subsection 456.072(4), Florida Statutes (2005), which states that costs shall be assessed "[i]n addition to any other discipline imposed through final order," clearly indicating that costs are assessed as a form of disciplinary penalty, not simply to reimburse the governmental agency for expenses.

36. Accordingly, the assessed costs of \$10,852.66 are properly classified as a penalty in addition to the fine, suspension, and probation imposed in the 2005 Final Order and is not dischargeable in bankruptcy.

37. Subsection 456.072(2), Florida Statutes (2005), addresses the disciplinary penalties available to the Petitioner and provides as follows:

(2) 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.

38. Florida Administrative Code Rule 64B16-30.001(2)(k) sets forth disciplinary guidelines specifically applicable to a violation of Subsection 465.016(1)(n), Florida Statutes. The rule establishes a minimum penalty of a \$2,500 fine and one year of probation and a maximum penalty of revocation.

39. Florida Administrative Code Rule 64B16-30.001(3)(k) sets forth aggravating and mitigating circumstances which may support a deviation from the disciplinary guidelines. Insofar

as is relevant to this proceeding, the rule requires consideration of the Respondent's disciplinary history as an aggravating circumstance and consideration of the degree of financial hardship related to the imposition of fines as a mitigating circumstance.

40. As to the prior disciplinary history, the Respondent was disciplined by the Petitioner in 1997. The penalty in that instance included a suspension and fine and required the filing of quarterly reports. As in the 2005 disciplinary action, the penalty imposed in the 1997 case was explicitly based on a settlement stipulation that established the agreed penalty and which was executed by the parties.

41. Consideration of the Respondent's disciplinary history warrants increasing the recommended fine in this case from the \$2,500 minimum to \$3,500 and increasing the probationary period from one year to 18 months.

42. As to consideration of the degree of financial hardship as a result of the imposition of fines, the Respondent's discharge of debt through bankruptcy indicates that if such hardship existed at the time of the original fine and assessment of costs, such hardship no longer exists.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Health, Board of Pharmacy, enter a final order directing that the Respondent pay a total of \$16,352.66, to the Petitioner. The total reflects the \$12,852.66 imposed by the May 3, 2005, Final Order and the additional \$3,500 penalty related to the violations set forth herein. Additionally, the final order should extend the Respondent's current probationary period by 18 months to be served consecutively to the current probationary period.

DONE AND ENTERED this 10th day of August, 2007, 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 10th day of August, 2007.

COPIES FURNISHED:

Patrick L. Butler, Esquire
Billie Jo Owens, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

Denis R. Bousquet
5125 Cedar Springs Drive, Unit 203
Naples, Florida 34110

Josefina M. Tamayo, General Counsel
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1701

Rebecca Poston, R.Ph., Executive Director
Board of Pharmacy
Department of Health
4052 Bald Cypress Way, Bin C04
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.