

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
CHIROPRACTIC MEDICINE,)
)
Petitioner,)
)
vs.) Case No. 07-3514PL
)
FRANCIS J. FALOWSKI, D.C.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on October 31, 2007, by video teleconference, with the parties appearing in Fort Lauderdale, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: Cecelia D. Jefferson, Esquire
Tobey Schultz, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Neil G. Garfield, Esquire
470 South Carpenter Road
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STATEMENT OF THE ISSUE

Whether the Respondent committed the violations alleged in the Amended Administrative Complaint issued September 29, 2006, and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

On September 29, 2006, the Department of Health ("Department") issued a two-count Amended Administrative Complaint against Frank J. Falowski, D.C. In Count One of the Amended Administrative Complaint, the Department charged that Dr. Falowski had violated Section 460.413(1)(d), Florida Statutes (2003),¹ which subjects a chiropractic physician to discipline for false, deceptive, or misleading advertising, by transmitting to another chiropractor's office a flyer stating that he was "able to meet the injection needs of other chiropractic physicians" including prolotherapy, chelation therapy, and oxidative therapy. In Count Two of the Amended Administrative Complaint, the Department charged that Dr. Falowski violated Section 460.413(1)(ff), Florida Statutes (2003), which subjects a chiropractic physician to discipline for violating any provision of Chapters 456 or 460 or any rules adopted pursuant to these chapters. The Department charged specifically that Dr. Falowski had violated Florida Administrative Code Rules 64B2-15.001(2)(a), (e), and (g), which, respectively, prohibit chiropractic physicians from

advertising that contains a misrepresentation of fact, from advertising that gives the impression that the chiropractic physician possesses skills or attributes superior to other chiropractic physicians, and from advertising that contains representations or claims that the chiropractic physician fails to perform.

On October 2, 2006, the Department issued a one-count Administrative Complaint against Dr. Falowski, which was forwarded to the Division of Administrative Hearings for assignment of an administrative law judge and assigned DOAH Case No. 07-3513PL. On September 11, 2007, the Department filed a Motion to Consolidate in which it requested that DOAH Case No. 07-3513PL and DOAH Case No. 07-3514PL be consolidated for hearing. The motion was granted in an order entered September 24, 2007. These cases were originally assigned to Administrative Law Judge Larry J. Sartin, but were transferred to Administrative Law Judge Patricia M. Hart for hearing. After several continuances, the final hearing was held on October 31, 2007.

At the hearing, the Department presented the testimony of Ronald J. Hoffman, D.C., and Petitioner's Exhibits 4, 5, and 7 were offered and received into evidence.² Petitioner's Exhibits 3 and 6, for identification, were offered into evidence in lieu of live testimony and consisted of the transcripts of

the deposition of Alicia Campo. Petitioner's Exhibits 1 and 2, for identification, were attached as exhibits to Ms. Campos's deposition and were identified by Ms. Campos in her deposition testimony. Dr. Falowski objected to the admission of these four exhibits on the grounds that Ms. Campos had no personal knowledge of any of the material issues in this case and that her testimony was, therefore, irrelevant. Dr. Falowski also objected to the admission of Petitioner's Exhibits 1 and 2 because Ms. Campos was the only person who could identify and authenticate the documents.

The undersigned requested that Dr. Falowski specify, in writing, those portions of Ms. Campos's deposition to which he objected and state the legal basis for the objection. Dr. Falowski duly filed his Respondent's Submission of Pertinent Parts of the Campo Deposition Per Judge's Order, and an order was entered on January 18, 2008, overruling the objections to portions of Ms. Campos's deposition and the objections to Petitioner's Exhibits 1 and 2, and receiving into evidence Petitioner's Exhibits 1 through 3 and 6.

On October 11, 2007, Dr. Falowski filed Respondent's Motion for this Court to Take Judicial Notice, in which he requested that official recognition be taken of portions of the Florida Health Care Atlases purportedly published during the 1980's. On October 18, 2007, a telephone hearing was held on a number of

motions. During that hearing, the Department made an ore tenus motion for official recognition of the Final Order entered in Sullivan v. Department of Health, Board of Chiropractic Medicine, DOAH Case No. 02-4916, (Fla. DOAH October 5, 2003). Administrative Law Judge Van Laningham entered an order on October 19, 2007, granting official recognition to portions of the Florida Health Care Atlases, copies of which were to be provided, and to the Final Order in Sullivan. On November 13, 2007, Dr. Falowski filed Respondent's Notice of Filing, to which were attached excerpts from the 1987, 1989, and 1990 editions of the Florida Health Care Atlas; official recognition is, therefore, taken of these excerpts.

On October 22, 2007, the Petitioner filed Petitioner's Motion for Official Recognition of the final orders entered in Department of Health Case Nos. 199208590, 199406133, 199316255, and 110568. Official recognition was taken at the final hearing on October 31, 2007, of these final orders, subject to the limitation that these orders would be relevant only to the appropriate penalty to be imposed on Dr. Falowski if he were found to have committed the violations alleged in the Administrative Complaint and Amended Administrative Complaint in the instant cases.

On October 26, 2007, the Department filed Petitioner's Second Motion for Official Recognition, in which it requested

official recognition of documents excerpted by the Department from Dr. Falowski's licensure file; of Sections 460.403(9)(c)1. and 460.406, Florida Statutes; and of Florida Administrative Code Rules 64B2-11.0012, 64B2-15.001(2)(a) and (e), and 64B2-17.003.³ The motion was granted at the final hearing, and official recognition is taken of the statutes and rules identified in the motion.

At the final hearing, counsel for Dr. Falowski made an ore tenus motion to dismiss the Administrative Complaint and the Amended Administrative Complaint in these consolidated cases, a motion to strike, and a motion for contempt. The undersigned requested that Dr. Falowski file a written motion subsequent to the hearing. Dr. Falowski accordingly filed Respondent's Motion to Dismiss, Motion to Strike, and Motion for Contempt, and the Petitioner filed a response in opposition to the motion. On January 18, 2008, an order was entered on denying all three of Dr. Falowski's the motions.

The one-volume transcript of the proceedings was filed with the Division of Administrative Hearings on December 12, 2007. The parties had requested at the final hearing that they be permitted to file their proposed recommended orders on January 31, 2008. On January 24, 2008, counsel for Dr. Falowski filed a Motion by Counsel to Withdrawal. The Department filed a response in opposition to the motion, but Dr. Falowski did not

file a response within the time specified in Florida Administrative Code Rule 106.204(1). An order was entered on February 12, 2008, granting Neil F. Garfield leave to withdrawal and granting an extension of time to Dr. Falowski to file his proposed recommended order. The Department timely filed its Proposed Recommended Order, which has been considered in the preparation of this Recommended Order. Dr. Falowski failed to file proposed findings of fact and conclusions of law.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The Department is the state agency responsible for investigating and prosecuting complaints against persons holding licenses in the health professions and occupations, including chiropractic physicians. See § 456.073, Fla. Stat. The Board of Chiropractic Medicine ("Board") is the entity responsible for imposing penalties against chiropractic physicians for violations of Section 460.413(1), Florida Statutes. See § 460.413(2), Fla. Stat.

2. At the times material to this proceeding, Dr. Falowski was a chiropractic physician licensed to practice chiropractic medicine in Florida, having been issued license number CH 5108. Dr. Falowski was first certified in Florida to practice

chiropractic medicine in 1986. Dr. Falowski also is certified to administer propriety, or non-prescription, drugs.

3. At the times material to this proceeding, Dr. Falowski did business as Rainbow Rehabilitation, and his address of record was 4201 North State Road 7, Lauderdale Lakes, Florida 33319.

4. On August 17, 2003, Dr. Falowski sent to the office of John Campos, D.C., via facsimile transmittal, a document which stated

FINALLY DOCTORS OF CHIROPRACTIC CAN INJECT

Refresh your skills with

**"THE ESSENCE OF INTERVENOUS [sic]
AND INJECTABLE THERAPIES"**

Hands-on experience covering

TO INCLUDE

CHELATION THERAPY

OXIDATIVE THERAPY

PROLOTHERAPY

NEUROTHERAPY

FOR THE FIRST TIME NUTRIENTS FORMULARY FOR
CHIROPRACTIC

(Emphasis in original.) Dr. Falowski was among the five instructors for the course listed on the document, and the cost, date, time and location of the course was also included.

Finally, the document stated that the course was "Presented by the **FLORIDA ASSOCIATION OF CHIROPRACTIC MEDICINE.**" (Emphasis in original.)

5. On August 19, 2003, Dr. Falowski sent to the office of John Campos, D.C., via facsimile transmittal, a document in which he offered injections "available to the shoulders, elbows, knees and spine" and offered to

perform all your injectable needs
including
Prolotherapy-neurotherapy-chelation therapy
and oxidative therapy
(Our office or yours)
Well [sic] see your patients, treat your
patients and return them to you to continue
treatment in your office

(Emphasis in original). Dr. Falowski included his name, identified himself as a chiropractic physician, and gave his location as Rainforest Rehabilitation, Inc., at 4201 North State Road 7, Lauderdale Lakes, Florida 33319.

6. Chelation therapy involves the injection of a chemical into the body. Prolotherapy involves the injection of a glucose-based substance to the joints of the body.

7. The documents sent by Dr. Falowski to Dr. Campos were sent from one chiropractic physician to another and were not disseminated to the public. The first document sent to Dr. Campos solicited his attendance at a seminar clearly intended for chiropractic physicians. The second document solicited Dr. Campos to utilize Dr. Falowski's services by referring patients to him injections and for the various therapies listed in the document.

CONCLUSIONS OF LAW

8. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2007).

9. In its Amended Administrative Complaint, the Department seeks to impose penalties against Dr. Falowski that include suspension or revocation of his license and/or the imposition of an administrative fine. Therefore, it has the burden of proving by clear and convincing evidence that Dr. Falowski committed the violations alleged in the Amended Administrative Complaint.

Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

10. The Department has charged that Dr. Falowski violated Section 460.413(1)(d) and (ff), Florida Statutes, which provide:

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

* * *

(d) False, deceptive, or misleading advertising.

* * *

(ff) Violating any provision of this chapter or chapter 456, or any rules adopted pursuant thereto.

11. In the Amended Administrative Complaint, the Department has identified Florida Administrative Code Rule 64B2-15.001(2)(a), (e), and (g) as the rules underlying the violation of Section 460.413(1)(ff), Florida Statutes. That Rule provides in pertinent part:

(2) No chiropractor shall disseminate or cause the dissemination of any advertisement or advertising which is in any way fraudulent, false, deceptive or misleading. Any advertisement or advertising shall be deemed by the Board to be fraudulent, false, deceptive, or misleading if it:

(a) Contains a misrepresentation of facts;
or

* * *

(e) Conveys the impression that the chiropractor or chiropractors, disseminating the advertising or referred to therein, possess qualifications, skills, or other attributes which are superior to other chiropractors, other than a simple listing of earned professional post-doctoral or other professional achievements. However, a chiropractor is not prohibited from advertising that he has attained Diplomate status in a chiropractic specialty area recognized by the Board of Chiropractic Medicine.

* * *

(g) Contains any representations or claims, as to which the chiropractor, referred to in the advertising, fails to perform.

12. Florida Administrative Code Rule 64B2-15.001(3), defines "advertisement" and "advertising" as follows:

(3) As used in the rules of this Board, the terms "advertisement" and "advertising" shall mean any statements, oral or written, disseminated to or before the public or any portion thereof, with the intent of furthering the purpose, either directly or indirectly, of selling professional services, or offering to perform professional services, or inducing members of the public to enter into any obligation relating to such professional services. The terms advertisement or advertising shall include the name under which professional services are performed.

13. Based on the findings of fact herein, the Department has failed to prove by clear and convincing evidence that Dr. Falowski engaged in the dissemination of false, misleading, or deceptive advertising. Without a doubt, the document soliciting patient referrals from Dr. Campos was misleading because Dr. Falowksi was offering to sell or perform professional services that do not come within the practice of chiropractic medicine. Chiropractic physicians are prohibited from prescribing or administering any legend drug, and chiropractic physicians may not administer any form of injectable substance. § 460.403(9)(c)1., Fla. Stat. ("[C]hiropractic physicians are expressly prohibited from prescribing or administering to any person any legend drug [with exceptions not germane to this proceeding]."); Fla. Admin. Code

R. 64B2-17.0025(4) ("A legend drug is defined as a drug required by federal or state law to be dispensed only by prescription. For the purpose of this rule, any form of injectable substance is beyond the scope of practice for chiropractors.").

14. The documents sent by Dr. Falowski to Dr. Campos were not, however, "advertisements" or "advertising" as defined in Florida Administrative Code Rule 64B2-15.001(3) because the Department failed to prove that the documents were disseminated or placed before the "public." It is clear from the context of the definition of "advertisement" and "advertising" that "the public or any portion thereof" refers to potential patients of a chiropractic physician. Even though Dr. Falowski intended, through these documents, to effectuate the sale or performance of his professional services, the Department's evidence established only that Dr. Falowski sent these documents to one chiropractic physician, Dr. Campos, for the purpose of soliciting patient referrals and his attendance at a seminar on injectable therapies. The Department has failed, therefore, to prove by clear and convincing evidence that Dr. Falowski violated Section 460.413(1)(d) or (ff), Florida Statutes.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Chiropractic Medicine

enter a final order dismissing both counts of the Amended Administrative Complaint against Francis J. Falowski, D.C.

DONE AND ENTERED this 20th day of March, 2008, in Tallahassee, Leon County, Florida.



PATRICIA M. HART
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of March, 2008.

ENDNOTES

^{1/} All references herein to the Florida Statutes are to the 2003 edition unless indicated otherwise.

^{2/} The transcript reflects that only six exhibits were received into evidence in DOAH Case No. 07-3514PL. At the final hearing, Petitioner's Exhibit 4 was received into evidence in DOAH Case No. 07-3513PL; this exhibit consisted of a composite of Dr. Falowksi's responses to requests for admissions, responses to requests for production, and answers to interrogatories for both DOAH Case No. 07-3513PL and DOAH Case No. 07-3514PL. Because these two cases were consolidated for hearing only and have been severed by an order entered March 17, 2008, two Recommended Orders have been written. For purposes of clarity, the undersigned separated the discovery responses for the two cases and created Petitioner's Exhibit 7 for DOAH Case No. 07-3514PL, which consists of Dr. Falowksi's responses to requests for admissions, responses to requests for production, and answers to interrogatories for DOAH Case No. 07-3514PL.

Petitioner's Exhibit 4 in DOAH Case No. 07-3513PL consists of Dr. Falowksi's responses to requests for admissions, responses to requests for production, and answers to interrogatories for DOAH Case No. 07-3514PL.

^{3/} It is noted that the Department attached to its second motion for official recognition copies of statutes and rules not identified in the motion and failed to attach a copy of Section 460.406, Florida Statutes. Those statutes and rules attached to the motion but not included in the request have not been officially recognized. Section 460.406, Florida Statutes, has, however, been officially recognized because it was included in the request.

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.