

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CELESTE ANN DONALD,)
)
 Petitioner,)
)
 vs.) Case No. 10-0857
)
 BOARD OF PHARMACY,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

An administrative hearing was conducted in this case on April 26, 2010, by video teleconference in Tallahassee and Daytona Beach, Florida, before the James H. Peterson, III, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Paul Kwilecki, Esquire
327 South Palmetto Avenue
Daytona Beach, Florida 32118

For Respondent: Allison M. Dudley, Esquire
Office of the Attorney General
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STATEMENT OF THE ISSUE

Whether Petitioner's application for a license as a Registered Pharmacy Technician should be approved.

PRELIMINARY STATEMENT

On December 31, 2009, Respondent, the Board of Pharmacy (Board), filed a Notice of Intent to Deny which advised that the Board intended to deny Petitioner Celeste Ann Donald's application for a license as a Registered Pharmacy Technician on the grounds that "the Board has determined that the applicant was convicted of unlawful sexual activity with a minor in 2008" and "pursuant to Sections 465.016(2) and 456.072(2), Florida Statutes." The Notice of Intent to Deny further advised Petitioner that she had 21 days from receipt of the Notice of Intent to Deny within which to request an administrative hearing pursuant to Section 120.57(1), Florida Statutes. Petitioner timely requested a hearing and the Board transmitted the matter to the Division of Administrative Hearings on February 17, 2010, for assignment of an administrative law judge. Pursuant to notice, the final hearing in this case was held on April 26, 2010, in Daytona Beach and Tallahassee, Florida.

At the hearing, Petitioner presented the testimony of Randolph Margrave and testified on her own behalf. Respondent presented the testimony of Kelli Ferrell, R.Ph., and offered the application file for Petitioner, which was received into evidence as Exhibit "R-1." In addition, on Respondent's request, the undersigned took judicial notice of Florida Administrative Code Rules 64B16-27.410 and 64B17-27.420,

(Effective January 1, 2010). The parties also offered a joint exhibit consisting of a certified copy of Petitioner's Order of Sex Offender Probation, which was received into evidence as Joint Exhibit 1.

The proceedings were recorded and a transcript was ordered. The parties were given 20 days from the date of the filing of the transcript within which to file their respective proposed recommended orders. The transcript, consisting of one volume, was filed on May 25, 2010, and the parties timely filed their proposed recommended orders which were considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. On May 22, 2008, based on a plea of nolo contendere, Petitioner was adjudged guilty of the offense of Unlawful Sexual Activity with a Minor, a second-degree felony. She was placed on five years of Sexual Offender Probation.

2. The special conditions of Petitioner's probation included the following: a. Restitution to the victim in the amount of \$425.00; b. No contact with the victim; and c. Attend parenting classes.

3. The standard conditions of Sex Offender Probation were imposed upon Petitioner, including: (a) A mandatory curfew from 10 p.m. to 6 a.m.; (b) A prohibition on living within 1,000 feet of a school, day care center, park, playground, or other place

where children regularly congregate; (c) Participation in a sex offender treatment program; (d) No contact with any children under the age of 18, unless court approved; and (e) A prohibition on working for pay or as a volunteer at any place that children regularly congregate, including but not limited to any school, day care center, park, playground, pet store, library, zoo, theme park or mall.

4. On October 5, 2009, Petitioner submitted an application for licensure as a Registered Pharmacy Technician.

5. On December 9, 2009, the Board voted to deny Petitioner's application. A Notice of Intent to Deny reflecting the vote was filed on December 31, 2009.

6. Petitioner testified that she has been a pharmacy technician since 1981. There was no evidence presented, however, indicating that Petitioner has been licensed in Florida as a Registered Pharmacy Technician.

7. Petitioner is currently employed by Randolph Margrave, preparing intravenous medications (IVs) and supplies for administering to patients in their homes. She works in a clean room under a hood in an isolated barrier. She has no contact with the public, and she has no contacts with the patients.

8. Although her position does not require Petitioner to review patient records, she has access to patient records.

9. According to her current employer, Petitioner does an excellent job.

10. Prior to her current position, Petitioner worked in a retail pharmacy from 1981 to 1989. From 1989 to 1999 she worked in the pharmacy department of a hospital.

11. Petitioner's current employment does not require her to have contact with the public.

12. Petitioner described the circumstances that led to her arrest and subsequent conviction. She testified that she performed oral sex on her daughter's seventeen-year-old boyfriend. In her testimony, Petitioner stated:

My daughter's boyfriend was very abusive. We got a restraining order against him, and they only granted it for two weeks, temporary. And he threatened me through her. And as it turned out, I made a bad decision. And it was an oral sex one time and . . . [h]e was 17 years old at the time.

13. Petitioner testified that her daughter's boyfriend was a very mature 17-year-old. Petitioner further testified:

And I thought my daughter's life was being threatened, and it was like making a deal with the devil. And it was a one-time thing and a very bad thing.

14. In a typical retail pharmacy setting, a pharmacy technician is the first point of contact for patients that drop off or pick-up a prescription. A pharmacy technician in a retail setting gathers the patient's information, enters it into

the computer, prepares the label and counts and pours the medication.

15. Pharmacy technicians have access to personal information of the patients that patronize the pharmacy. This information includes but is not limited to the patient's name, gender, phone number (including cell number), address, allergy information and prescription medication history.

16. Minors may purchase and pick-up medications from a pharmacy.

17. A licensed Registered Pharmacy Technician may practice at any location without restriction.

CONCLUSIONS OF LAW

18. 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 (2009).^{1/}

19. As an applicant for a license, Petitioner is asserting the affirmative, and therefore bears the ultimate burden of proving her entitlement to a license. Florida Dept. of Transportation v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981).

20. Petitioner's Proposed Recommended Order suggests that the Board has the burden of showing by clear and convincing evidence that Petitioner's conviction does not relate to the

practice of a Registered Pharmacy Technician. The Board, however, does not have that burden. Because a proceeding involving the granting or denying of an application for licensure is not penal in nature, the burden is upon the applicant to establish fitness for licensure by a preponderance of the evidence. Id.; § 120.57(1)(j), Fla. Stat. (findings of fact based on preponderance of evidence except in penal, licensure disciplinary, or as otherwise provided by statute).

21. While a 1994 opinion by Florida's First District Court of Appeal suggested that once an applicant had established qualification for licensure by a preponderance of the evidence, the agency could not deny the application for statutory violations of the licensing practice act unless the agency established those violations by clear and convincing evidence, that opinion was overturned by the Florida Supreme Court. Osborne Stern & Co. v. Dep't of Banking & Finance, Division of Securities & Investor Protection, 647 So. 2d 245, 248 (Fla. 1st DCA 1994), approved in part and quashed in part, 670 So. 2d 932 (Fla. 1996). In overturning the First District Court of Appeal's opinion, the Florida Supreme Court specifically declined to extend to licensure application proceedings the clear and convincing standard required in disciplinary proceedings under Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987), even where a violation of a disciplinary provision of a

licensure statute is the basis for denying an applicant's license. 670 So. 2d at 934.

22. Subsection (4) of Section 465.004, Florida Statutes, creating the Board, provides that "[a]ll provisions of Chapter 456 relating to the activities of the [B]oard shall apply. Section 456.072(2)(a), Florida Statutes, in turn, authorizes the Board to deny a license application for any violation found in Section 456.072(1) or the Pharmacy Practice Act.

23. Pursuant to Section 456.072(1)(c), Florida Statutes (2009), the Board may deny an application for a license when the applicant has been "convicted or found guilty of, or entering a plea of guilty or nolo contendere to, regardless of adjudication, a crime in any jurisdiction which relates to the practice of, or the ability to practice, a licensee's profession."

24. Petitioner admits that she was convicted of Unlawful Sexual Activity with a Minor. The proscription for that crime is found in Section 794.05, Florida Statutes,^{2/} which provides in pertinent part:

(1) A person 24 years of age or older who engages in sexual activity with a person 16 or 17 years of age commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. As used in this section, "sexual activity" means oral, anal, or vaginal penetration by, or union with, the sexual organ of another;

however, sexual activity does not include an act done for a bona fide medical purpose.

25. In upholding the constitutionality of Section 794.05, Florida Statutes, the First District Court of Appeal, in Wright v. State, 739 So. 2d 1230, 1232 (Fla. 1st DCA 1999), noted:

In regards to *section 794.05*, the legislature limited criminal responsibility to persons twenty-four years of age and over because the legislature felt that persons in this group were more likely than others to understand the consequences of their actions and to cause harm to minors who cannot appreciate the seriousness of their activities. Therefore, the age limitation in *section 794.05* is not arbitrary when balanced against the goals of protecting minors from sexual exploitation. Accordingly, we will not substitute our judgment for that of the legislature. We, therefore, find that the statute is reasonably related to the goal of protecting minors from sexual exploitation by adults and its age restriction is constitutional.

Id. (Emphasis in original).

26. As a result of her conviction, Petitioner is classified as a sexual offender under Section 943.0435(1)(a)1.a., Florida Statutes. Section 943.0435(12), Florida Statutes, provides in pertinent part:

The Legislature finds that sexual offenders, especially those who have committed offenses against minors, often pose a high risk of engaging in sexual offenses even after being released from incarceration or commitment and that protection of the public from sexual offenders is a paramount government interest. Sexual offenders have a reduced expectation of privacy because of the

public's interest in public safety and in the effective operation of government.

27. While Petitioner asserts that she and her daughter sought a restraining order against her daughter's boyfriend, Petitioner did not submit any documentary evidence in that regard in this proceeding, and there is no evidence that she presented such evidence or evidence of the alleged threat to the Florida Seventh Judicial Circuit Court which convicted her and placed her on probation for her crime.

28. In fact, the excuse asserted by Petitioner in this proceeding (that she was intimidated and coerced into committing an unlawful sexual act with a minor) is inconsistent with the Circuit Court's imposition of \$425.00 restitution against Petitioner and in favor of the 17-year-old victim. Therefore, Petitioner's assertion that she was coerced to commit her offense is afforded no weight.

29. In construing whether a crime "related to" a licensee's health care "practice" within the meaning of Section 456.072(1)(c), Florida Statutes, the First District Court of Appeal, in a case involving revocation of a chiropractor's license where the burden was on the agency (as opposed to an application for a license where the burden is on the Petitioner), observed:

Several cases demonstrate that, although the statutory definition of a particular

profession does not specifically refer to acts involved in the crime committed, the crime may nevertheless relate to the profession. In *Greenwald v. Department of Professional Regulation*, the court affirmed the revocation of a medical doctor's license after the doctor was convicted of solicitation to commit first-degree murder. 501 So. 2d 740 (Fla. 3d DCA 1987). The Fifth District Court of Appeal has held that although an accountant's fraudulent acts involving gambling did not relate to his technical ability to practice public accounting, the acts did justify revocation of the accountant's license for being convicted of a crime that directly relates to the practice of public accounting. *Ashe v. Dep't of Prof'l Regulation, Bd. of Accountancy*, 467 So. 2d 814 (Fla. 5th DCA 1985). We held in *Rush v. Department of Professional Regulation, Board of Podiatry*, that a conviction for conspiracy to import marijuana is directly related to the practice or ability to practice podiatry. 448 So. 2d 26 (Fla. 1st DCA 1984). These cases demonstrate, in our view, that appellee did not err by concluding Doll's conviction was "related to" the practice of chiropractic medicine or the ability to practice chiropractic medicine. We therefore affirm appellee's actions finding appellant in violation of section 456.072(1)(c) and revoking appellant's license.

Doll v. Dep't of Health, 969 So. 2d 1103, 1106 (Fla. 1st DCA 2007). (Emphasis in original).

30. The duties of a Registered Pharmacy Technician are described in Florida Administrative Code Rule 64B16-27.420, as follows:

(a) Retrieval of prescription files, patient files and profiles and other such

records pertaining to the practice of pharmacy;

(b) Data Entry;

(c) Label preparation;

(d) The counting, weighing, measuring, pouring and compounding of prescription medication or stock legend drugs and controlled substances, including the filling of an automated medication system;

(e) Initiate communication to a prescribing practitioner or their medical staffs (or agents) regarding patient prescription refill authorization requests. For the purposes of this section "prescription refill" means the dispensing of medications pursuant to a prescriber's authorization provided on the original prescription;

(f) Initiate communication to confirm the patient's name, medication, strength, quantity, directions and date of last refill;

(g) Initiate communication to a prescribing practitioner or their medical staff (or agents) to obtain clarification on missing or illegible dates, prescriber name, brand/generic preference, quantity, DEA registration number or license numbers; and

(h) May accept authorization for a prescription renewal. For the purposes of this section, "prescription renewal" means the dispensing of medications pursuant to a practitioner's authorization to fill an existing prescription that has no refill.

31. Considering the duties of a Registered Pharmacy Technician set forth above, together with the probationary terms imposed upon Petitioner for her conviction of Unlawful Sexual

Activity with a Minor, as well as the nature of the offense and holding in Doll, supra, it is concluded that Petitioner's crime directly relates to her ability to practice as a Registered Pharmacy technician.

32. Specifically, the Order of Sex Offender Probation entered against Petitioner on May 22, 2008, imposed conditions that are incompatible with the duties of one licensed as a Registered Pharmacy Technician. Compare Finding of Fact 3, supra, with the duties set forth in Florida Administrative Code Rule 64B16-27.420 (quoted above).

33. Although Petitioner does not currently work in a setting where she has direct contact with the public, as a licensed Registered Pharmacy Technician, Petitioner would not be restricted from public access and Petitioner could obtain employment in other settings that would bring her in direct contact with patients, including minors. Such access would be contrary to the terms of Petitioner's current probation, as well as the designs of the licensing statute -- to protect the public. Cf. Goldfarb v. Virginia State Bar, 421 U.S. 773, 792 (1975) ("We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish

standards for licensing practitioners and regulating the practice of professions.").

34. In sum, Petitioner failed to prove that her application for a license as a Registered Pharmacy Technician should be approved.

RECOMMENDATION

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

RECOMMENDED:

That the Board of Pharmacy enter a final order denying Celeste Donald's application for licensure as a Registered Pharmacy Technician.

DONE AND ENTERED this 30th day of June, 2010, in Tallahassee, Leon County, Florida.



JAMES H. PETERSON, III
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of June, 2010.

ENDNOTES

1/ Unless otherwise indicated, all references to Florida Statutes are to the 2009 version.

2/ Section 794.05, Florida Statutes, was last revised in 1996.

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.