STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF CHIROPRACTIC MEDICINE Petitioner, vs. MIA A. HIGGINBOTHAM, D.C., Respondent.	)	Case No. 10-2796PL

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on August 4, 2010, and March 15, 2011, at sites in Tallahassee and Miami, Florida.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent was convicted or found guilty of a crime which directly relates to the practice of chiropractic medicine; and, if so, whether

Petitioner should impose discipline on Respondent's chiropractic license within the applicable penalty guidelines or take some other action.

PRELIMINARY STATEMENT

On May 21, 2010, Petitioner Department of Health ("Department") filed with the Division of Administrative Hearings ("DOAH") a Motion to Re-Open Case, to which it attached a Second Amended Administrative Complaint (the "Complaint") dated October 9, 2009. In its motion, the Department asserted that DOAH had relinquished jurisdiction in Case No. 06-3669PL (the "Original Action") so that the matter could be returned to a probable cause panel of the Board of Chiropractic Medicine, which would evaluate potential new charges against Respondent Mia Higginbotham, D.C., based on the disposition of a criminal proceeding against her that had recently been concluded. In its Complaint, the Department alleged that, in February 2009, Respondent had pleaded no contest in state court to multiple criminal charges relating to insurance fraud, thereby committing the offense of "[b]eing convicted or found guilty, regardless of adjudication, of any crime which directly relates to the practice of chiropractic medicine . . . ," as defined in section 460.413(1)(c), Florida Statutes (2008). Dr. Higginbotham denies the charge of having been "convicted" of a crime within the meaning of this statute.

By way of background, and in contrast to the instant Complaint, in the Original Action the Department had (a) alleged facts relating to the scheme to defraud in which the Department believed Respondent had engaged and (b) charged Respondent with one count each of (*i*) making or filing a report which the licensee knows to be false, as defined in section 460.413(1)(j), Florida Statutes (2003); (*ii*) making misleading, deceptive, untrue, or fraudulent representations in the practice of chiropractic medicine, as defined in section 460.413(1)(k); and (*iii*) submitting to any third-party payor a claim for a service or treatment which was not actually provided to a patient, as defined in section 460.413(1)(x). While the Original Action was pending, Respondent was being prosecuted in a parallel criminal proceeding based on the same or a substantially similar scheme to defraud. It is undisputed that the criminal prosecution ended in February 2009 when Respondent accepted a plea bargain, which will be discussed in further detail below.

The undersigned approved the Department's motion and reopened the Original Action, commencing the instant proceeding on May 21, 2010. The final hearing was scheduled for August 3 and 4, 2010. Upon receipt of the parties' Joint Pre-Hearing Stipulation, which stated that the hearing would not take more than one day, the final hearing was rescheduled to take place on August 4, 2010.

At hearing on August 4, 2010, the Department called Frank Figueredo, who was a medical malpractice investigator for the Department; and Dr. Higginbotham. Petitioner's Exhibits 1 through 4 were received in evidence without objection.

The Department had subpoenaed Deborah Eugene and Romer Ferguson, III, to give testimony at the final hearing of this case, but neither appeared. Both previously had been deposed, however, by Dr. Higginbotham's attorney, in the parallel criminal proceeding. The Department sought to introduce these depositions pursuant to section 90.804(2)(a), Florida Statutes, which excludes former testimony from the hearsay rule "provided the declarant is unavailable as a witness." The undersigned was not persuaded at hearing that either declarant was "unavailable" under the relevant definition of that term, which is set forth in section 90.804(1)(e), because the Department had not attempted to depose them and hence could not demonstrate inability to procure testimony concerning the statements comprising the former testimony——a prerequisite to establishing unavailability. Consequently, the undersigned deferred ruling on the admissibility of these depositions and continued the final hearing, over Respondent's objection, to give the Department an opportunity to seek judicial enforcement of the administrative subpoenas.

The Department also sought to introduce the depositions of Francisco Espinosa, Evelyn Cajuste, and Christopher Nelson, each of whom, like Eugene and Ferguson, had been deposed in the criminal proceeding by Respondent's defense attorney. The Department had not caused subpoenas to be served on these declarants, however, and thus the undersigned determined that none of these declarants was "unavailable" in accordance with section 90.804(1)(e).[1] The undersigned ruled that these depositions were not admissible under the former-testimony exclusion set forth in section 90.804(2)(a).

As a fallback, the Department argued that the depositions of Francisco Espinosa, Evelyn Cajuste, and Christopher Nelson were admissible under section 120.57(1)(c), "for the purpose of supplementing or explaining other evidence . . . ." This argument was rejected because there was no other evidence that the out-of-court statements of these declarants, who had been co-defendants of Respondent in the criminal case, could possibly have supplemented or explained, for the reasons that follow.

Petitioner's Exhibits 1 through 3, which consist of records from the criminal proceeding, establish the charges that were brought against Dr. Higginbotham, her plea, and the judicial disposition (facts that were not disputed)——but not the truth of any of the allegations behind the criminal case, as none of the charges against Dr. Higginbotham was ever proved beyond a

reasonable doubt to the satisfaction of a trier of fact. Petitioner's Exhibit 4 is the deposition of the Department's expert witness, who has no personal knowledge of the facts underlying the criminal case. Dr. Higginbotham herself testified almost exclusively about her plea agreement, which occurred after the depositions in question had been taken. The co-defendants' depositions could not have supplemented any of the evidence described above.

The extent of Dr. Higginbotham's testimony about the factual allegations underlying the criminal case was to deny any wrongdoing. She did not, in other words, testify about facts that, if found to be true, would demonstrate her non-involvement in any criminal activities. Dr. Higginbotham's testimony in this regard was, in short, clear, unambiguous, and complete as far as it went; it needed no explaining or supplementation.

Finally, it was clear that the Department wanted to use the depositions at issue, not to supplement or explain Respondent's testimony, but to prove facts tending to establish her guilt. Given that the Department had not alleged such facts in the Complaint, and given that there was no other evidence of such facts in the record, this would not have been a permissible use of hearsay under section 120.57(1)(c). The undersigned allowed the Department to proffer the depositions, and accordingly

Petitioner's Exhibits 5, 7, and 8, though not part of the evidentiary record, will be included in the file.

In addition to being examined by the Department as an adverse witness, Dr. Higginbotham took the stand in her own defense. Respondent also called Dr. Michael Nathanson, who testified via telephone, as a character witness. Dr. Higginbotham offered no exhibits in her case.

The hearing reconvened on March 15, 2011. Ms. Eugene and Mr. Ferguson testified as witnesses for the Department in compliance with a judgment issued by the circuit court, which directed them to appear on pain of contempt.

The transcript of the proceedings had on August 4, 2010, was filed on March 10, 2011. The last two volumes of the final hearing transcript were filed on April 1, 2011. The undersigned issued an order on April 5, 2011, reminding the parties that the deadline for filing proposed recommended orders was April 11, 2011. Respondent timely filed a Proposed Recommended Order, which has been considered. The Department's Proposed Recommended Order was filed inexcusably late, on April 15, 2011, but was considered nonetheless.[2]

Unless otherwise indicated, citations to the Florida Statutes refer to the 2010 Florida Statutes.

FINDINGS OF FACT

The Parties

1. At all times relevant to this case, Respondent Mia Ann Higginbotham, D.C., was licensed to practice chiropractic medicine in the state of Florida.

2. The Department has regulatory jurisdiction over licensed chiropractors such as Dr. Higginbotham. In particular, the Department is authorized to file and prosecute an administrative complaint against a chiropractic physician, as it has done in this instance, when a panel of the Board of Chiropractic Medicine has found that probable cause exists to suspect that the licensee has committed a disciplinable offense.

The Material Historical Facts

3. In April 2006, the State Attorney of the Eleventh Judicial Circuit filed an Amended Information in the Circuit Court of the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida, which charged Dr. Higginbotham with six counts of insurance fraud as defined in section 817.234(1), Florida Statutes (2004); four counts of grand theft in the third degree, as defined in section 812.014; 24 counts of communications fraud as defined in section 817.034(4)(b)1.; and one count of organized fraud as defined in section 817.034(4)(a)1.

Dr. Higginbotham had been arrested earlier on some or all of these (or similar) criminal charges, on October 21, 2004. The record does not contain the original information.

4. The 38-count Amended Information also charged five other defendants, namely Francisco Javier Espinosa, Evelyn Cajuste, Romer Ferguson, Deborah Eugene, and Christopher Wesley Nelson.[3] Two of these individuals——Mr. Ferguson and Ms. Eugene——testified at the final hearing in this case. Each admitted having participated in a staged (i.e. fake) automobile accident on March 18, 2004, and, afterwards, having seen Dr. Higginbotham for treatment of "injuries" purportedly sustained in the "accident." Each claimed to have received real treatment from Dr. Higginbotham and other providers in her office. (Ms. Eugene testified that her back truly hurt at the time, not as a result of the fake accident of course, but due to a previous injury.) Each disclaimed any personal knowledge that Dr. Higginbotham had been aware that the March 18, 2004, "accident" was staged to defraud insurance companies.[4] To the extent and as described in this paragraph, the undersigned credits the testimony of Mr. Ferguson and the testimony of Ms. Eugene and finds these facts, as stated, to be true.

5. By the time the criminal case finally came to trial in February 2009, Dr. Higginbotham was the last defendant remaining, the others having previously made deals with the

state pursuant to which they, or some of them, had agreed to testify against Dr. Higginbotham. During the nearly four and one-half years that elapsed between Dr. Higginbotham's arrest and the trial, the state had offered her numerous deals. Dr. Higginbotham had rejected all of the proposed deals because they would have required her to plead guilty, which she refused to do. Dr. Higginbotham consistently maintained her innocence throughout the criminal proceeding and has done the same in this proceeding as well.

6. At the outset of the criminal trial on February 3, 2009, the state offered Dr. Higginbotham a no-prison deal under which, if she agreed to plead nolo contendere to eight of the 35 charges pending against her, the state would recommend that adjudication of guilt be withheld and that she be sentenced to a term of probation. Significantly, the state did not demand that Dr. Higginbotham relinquish her chiropractic license as consideration for the deal.

7. Dr. Higginbotham had very little time to think about whether to accept the state's offer. Her defense attorney was adamant that she accept the deal because juries are unpredictable and the proposed plea bargain would eliminate the risk of incarceration. As Dr. Higginbotham recalled the scene, in testimony the undersigned accepts as credible and persuasive, "[My attorney] was screaming at me at the top of his lungs that

he felt I needed to take this deal and all he was concerned about was that . . . I wouldn't be going to jail and he said you never know what could happen."

8. The adverse consequences of a guilty verdict would have been devastating for Dr. Higginbotham. She faced the possibility of a lengthy prison sentence if convicted——in the worst case scenario, about 160 years, the prosecutor had stated. Were she to be incarcerated for even a fraction of that period, Dr. Higginbotham's professional life would be finished and her personal life shattered. In regard to the latter, Dr. Higginbotham wanted to start a family but felt she could not do so while the criminal case was pending. She likely would lose that opportunity if she spent her childbearing years behind bars.

9. Ultimately, Dr. Higginbotham accepted the state's offer because, as she put it, "at the time I was scared, I was nervous, I was under a lot of stress. My attorney was putting an enormous amount of pressure on me and I felt I really had no other choice." The undersigned accepts this testimony as truthful and finds that Dr. Higginbotham agreed to plead nolo contendere, not because she had a guilty conscience, but to avoid the catastrophic downside of a guilty verdict, which she needed to reckon a possibility, despite being conscious of her own innocence.

10. Consequently, Dr. Higginbotham pleaded no contest to four counts of insurance fraud as defined in section 817.234(1), Florida Statutes (2004), and four counts of communications fraud as defined in section 817.034(4)(b)1. (the "Uncontested Charges"). The court accepted the plea and entered an order disposing of the case, which is captioned "Finding of Guilt and Order Withholding Adjudication/Special Conditions" (the "Order"). In the Order, after reciting that it appeared Dr. Higginbotham "ha[d] been found guilty" of the Uncontested Charges "upon the entry of a nolo contendere plea," and that it appeared Dr. Higginbotham should not "presently [be required] to suffer the penalty imposed by law," the court ordered that "adjudication of guilt be . . . stayed and withheld." The court placed Dr. Higginbotham on probation for a period of four years, subject to early termination after the successful completion of two years. The court further ordered Dr. Higginbotham to pay about $2,300 in costs but reserved ruling on whether to require her to make restitution.

11. Due to the insufficiency of the evidence, the undersigned is unable to make any findings of fact regarding the conduct of Dr. Higginbotham which gave rise to the Uncontested Charges. Simply put, given the minimal persuasive evidence regarding Dr. Higginbotham's conduct, the undersigned cannot determine what she actually did as a result of, or in connection

with, the fake accident described above, besides (a) provide some chiropractic treatment to persons who falsely told her they had been hurt, as found above, and (b) plead no contest to the Uncontested Charges. In short, other than the undisputed fact of the plea, there is no persuasive evidence in the record to support a finding that Dr. Higginbotham committed any crime.

Ultimate Factual Determinations

12. Dr. Higginbotham did not impliedly admit guilt when she pleaded nolo contendere to the Uncontested Charges. Her explanation of the reasons for accepting the state's offer provides objectively reasonable grounds——consistent with innocence——for having entered the plea, refuting the implication that she acted on a guilty conscience or the substantial likelihood of a conviction.

13. In this connection, it is further determined that Dr. Higginbotham, while being conscious of her innocence and never admitting guilt, entered the plea to avoid the possibility of being found guilty and sent to prison, potentially for many years; to be able to get on with her personal life; and to retain the ability to resume her professional career as a chiropractic physician. In addition, given that the state was willing to give up more than three-quarters of the criminal charges against Dr. Higginbotham; and that the sentence imposed (four years' probation subject to early termination) was lenient

as compared to the range of potential sentences, including many years of imprisonment, which could have been imposed were she tried and convicted; the undersigned infers that the prosecutor's offer was a generous one, reflecting the strength of Dr. Higginbotham's position relative to the state's.

14. In sum, under the circumstances, the no-prison plea bargain offered to Dr. Higginbotham was too good to refuse, given that an acquittal would have been only marginally more beneficial than a sentence of probation with a withhold of adjudication, whereas a guilty verdict would have been ruinous. Accordingly, it is determined as a matter of fact, based on the totality of the evidence including the plea of nolo contendere and the presumption of a conviction which arises therefrom, that Dr. Higginbotham was not "convicted or found guilty" of crimes relating to the practice of chiropractic medicine.

15. Dr. Higginbotham is not guilty, as a matter of fact, of committing an offense punishable under section 460.413(1)(c), Florida Statutes (2008).

CONCLUSIONS OF LAW

16. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, and 120.57(1), Florida Statutes.

17. A proceeding, such as this one, to suspend, revoke, or impose other discipline upon a license is penal in nature.

State ex rel. Vining v. Fla. Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, to impose discipline, the Department must prove the charges against Dr. Higginbotham by clear and convincing evidence. Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 933-34 (Fla. 1996)(citing Ferris v. Turlington, 510 So. 2d 292, 294-95 (Fla. 1987)); Nair v. Dep't of Bus. & Prof'l Reg., Bd. of Medicine, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

18. Regarding the standard of proof, in Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983), the court developed a "workable definition of clear and convincing evidence" and found that of necessity such a definition would need to contain "both qualitative and quantitative standards." The court held that:

> clear 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 testimony 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 a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Id. The Florida Supreme Court later adopted the Slomowitz court's description of clear and convincing evidence. See In re Davey, 645 So. 2d 398, 404 (Fla. 1994). The First District

Court of Appeal also has followed the Slomowitz test, adding the interpretive comment that "[a]lthough this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991), rev. denied, 599 So. 2d 1279 (Fla. 1992)(citation omitted).

19. In the Complaint, the Department charged Dr. Higginbotham under section 460.413(1)(c), which provides in pertinent part as follows:

> (1) The following acts constitute grounds for denial of a license or disciplinary action . . . :
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> * * *
>
> (c) Being convicted or found guilty, regardless of adjudication, of a crime in any jurisdiction which directly relates to the practice of chiropractic medicine or to the ability to practice chiropractic medicine. Any plea of nolo contendere shall be considered a conviction for purposes of this chapter.

20. Being penal in nature, the foregoing statute "must be construed strictly, in favor of the one against whom the penalty would be imposed." Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992); see Camejo v. Dep't of Bus. & Prof'l Reg., 812 So. 2d 583, 583-84 (Fla. 3d DCA 2002); McClung v. Crim. Just. Stds. & Training Comm'n, 458 So. 2d 887, 888 (Fla. 5th DCA 1984) ("[W]here a statute provides for

revocation of a license the grounds must be strictly construed because the statute is penal in nature. No conduct is to be regarded as included within a penal statute that is not reasonably proscribed by it; if there are any ambiguities included, they must be construed in favor of the licensee."); see also, e.g., Griffis v. Fish & Wildlife Conserv. Comm'n, 36 Fla. L. Weekly D 639 (Fla. 1st DCA Mar. 28, 2011)(statues imposing a penalty must never be extended by construction).

21. Generally speaking, "[i]n the eyes of the law a person is not deemed to have committed a crime until an adjudication of guilt has been entered against him." Holland v. Fla. Real Estate Comm'n, 352 So. 2d 914, 916 (Fla. 2d DCA 1977)(real estate agent who had pleaded nolo contendere to, and been found guilty of, the felony charge of gross fraud could not subsequently be disciplined for having "[b]een guilty of a crime" because the court had withheld adjudication). Section 460.413(1)(c) attempts to override this general principle by equating a no contest plea with a conviction.

22. In Ayala v. Dep't of Prof'l Reg., 478 So. 2d 1116 (Fla. 1st DCA 1985), the court considered the question of whether section 458.331(1)(c), Florida Statutes (1983)——to which section 460.413(1)(c) is identical except that it refers to chiropractic medicine——was unconstitutional for creating a conclusive presumption of guilt on the predicate fact of a no

contest plea. The appellant in Ayala was a medical doctor who had pleaded no contest to charges relating to insurance fraud and, as a result, had been placed on five years' probation, with adjudication withheld. Id. at 1116. He had maintained his innocence throughout and considered his plea to have been a "plea of convenience." Id. at 1117. Nevertheless, the department filed an administrative complaint against the doctor, charging him with having been convicted of a crime relating to the practice of medicine. Id. at 1116.

23. Following an informal hearing before the Board of Medical Examiners (the "board"), at which the doctor testified that he had pleaded nolo contendere "to avoid the hassle and risks involved in a criminal trial," the board found the doctor guilty as a matter of law of the disciplinable offense defined in section 458.331(1)(c), on the ground that his plea necessarily constituted a "conviction." Id. at 1117. The doctor's license was suspended for one year (with nine months stayed), and he was placed on administrative probation for five years. Id.

24. On appeal, the appellant's arguments caused the court to have "substantial concern" that section 458.331(1)(c) would be unconstitutional if it were construed and applied, as the board had done, to deprive a medical doctor of the right to dispute his criminal culpability by demonstrating the reasons,

facts, and circumstances surrounding a prior plea of nolo contendere. Id. at 1118. Rather than decide the constitutional issue, however, the court instead elected to interpret the statute in a way that would "allow it to withstand constitutional attack." Id. Announcing its holding, the court wrote:

> We find that section 458.331(1)(c) is clearly constitutional by construing the word "shall" in the last sentence of that subsection as permissive rather than mandatory in meaning. Rich v. Ryals, 212 So. 2d 641, 643. As so construed, the Board of Medical Examiners may presumptively consider the nolo contendere plea as evidence of a conviction for purposes of chapter 458; however, in accordance with the Supreme Court's opinion in The Florida Bar v. Lancaster, 448 So. 2d 1019, the Board must allow appellant the opportunity to rebut this presumption and assert his innocence of the underlying criminal charges by explaining the reasons and circumstances surrounding his plea of nolo contendere, and thereby attempt to convince the Board that he is not guilty of a crime in violation of the provisions of section 458.331(1)(c). The Board must consider this evidence in deciding appellant's guilt or innocence for purposes of the disciplinary charges. Such explanation may, of course, always be considered in mitigation of punishment if appellant should be adjudicated guilty by the Board.

Id. at 1118-19. The order imposing discipline, having been based on an erroneous interpretation of the statute, was reversed and the case remanded for further proceedings. Id. at 1119.

25. The Department argues that Ayala does not apply here because Dr. Higginbotham——like the real estate agent in Holland, supra, whose license could not be suspended——was "found guilty" and, for that reason, has committed the offense defined in section 460.413(1)(c), regardless of the circumstances surrounding her plea of nolo contendere, her persistent protestations of innocence, and the fact that adjudication was withheld.[5] This argument is rejected, for several reasons.

26. To begin, the Department misreads the statute's plain language, which must be applied strictly in favor of the licensee. The Department's argument——which is premised on the notion that a person who has neither pleaded nor been adjudicated guilty can yet be "found guilty" by a court without a trial——would impermissibly expand the scope of section 460.413(1)(c). This is because, as commonly used and understood in the context of a criminal prosecution, the term "found guilty" denotes the factual decision (typically a verdict) reached after a trial where the government has proved beyond a reasonable doubt——by evidence presented to the trier of fact (usually a jury but sometimes the court)——that the defendant committed the crime(s) charged. Thus, the defendant is said to be "found guilty" when the jury returns a guilty verdict.[6]

27. When the licensee pleads nolo contendere and receives a withheld adjudication, as happened in this case, no trier of

fact ever finds that person guilty beyond a reasonable doubt. See Kinney v. Dep't of State, Div. of Licensing, 501 So. 2d 129, 133 (Fla. 5th DCA 1987)("The record of the criminal proceedings does not reveal that appellant was 'found guilty of the commission of a crime' [after entering a plea of nolo contendere] because adjudication of guilt was withheld."). Unlike a guilty plea, moreover, a no contest plea is neither a confession nor a conviction; it "simply means that the defendant, for whatever reason, chooses not to contest the charge." Garron v. State, 528 So. 2d 353, 360 (Fla. 1988); see also, Kinney, 501 So. 2d at 132 ("A plea of nolo contendere may be submitted by a defendant who deems the plea to be in his best interest, while maintaining his innocence.").

28. Therefore, hewing to the unambiguous statutory text, and conscious of the need to avoid extending section 460.413(1)(c) by construction, the undersigned concludes that a licensee has been "convicted or found guilty" of a crime "which directly relates to the practice of chiropractic medicine" (hereafter, a "medical crime") only if he has: (a) pleaded guilty to a medical crime, regardless of adjudication; (b) been tried and found guilty of a medical crime by the trier of fact (usually a jury), regardless of adjudication; or (c) pleaded no contest to a medical crime and received an adjudication of guilt. Having settled upon this strict construction of the

statute in favor of the accused, the inevitable conclusion is that a licensee who pleads no contest and is not thereafter adjudicated guilty has not been "found guilty" as that term is used in section 460.413(1)(c), although he may be considered "convicted," in accordance with Ayala, depending on the circumstances surrounding the plea.

29. Next, although the Department's argument might be superficially persuasive, the formal appeal of the contention that Dr. Higginbotham was "found guilty" for purposes of section 460.413(1)(c) simply because the trial court's Order contains the words "finding of guilt" in its title and "found guilty" in its text must bow to the substance of the transaction that took place in the circuit court. Legally speaking, once Dr. Higginbotham's plea of nolo contendere was accepted, "'no issue of fact exist[ed], and none [could] be made while the plea remain[ed] of record.'" Vinson v. State, 345 So. 2d 711, 716 (Fla. 1977)(quoting U.S. v. Norris, 281 U.S. 619, 623 (1930)). After the plea, therefore, the "'court was no longer concerned with the question of guilt, but only with the character and extent of the punishment.'" Id. The bottom line is that, in the face of Dr. Higginbotham's plea, the trial court was without authority (i.e., lacked jurisdiction) to decide, as a trier of fact, any factual questions pertaining to her guilt or innocence; rather, all that was left was to render a judgment of

guilty (or withhold adjudication) and impose the sentence. Id. at 716-17.

30. Consequently, the trial court's statement that Dr. Higginbotham "has been found guilty . . . upon the entry of a nolo contendere plea" was not a true finding of fact (for the court did not have the power to make such) but merely an acknowledgment of the legal effect of the no contest plea, which has been deemed "to be equivalent to a guilty plea only insofar as it gives the court the power to punish." Id. at 715. That is, in reciting that Dr. Higginbotham had been "found guilty," the court did no more than declare something which, by operation of law, is true of all defendants whose pleas of nolo contendere are accepted, namely, that the law considers them guilty for purposes of rendering a judgment of conviction and/or imposing a sentence; such declaration merely made explicit that which was necessarily implicit, adding nothing of substance to the disposition. The Department errs in concluding that Dr. Higginbotham was determined, as a matter of fact, to be guiltier than other defendants who similarly plead no contest and receive a withheld adjudication.

31. Finally, Ayala has been held to be applicable in a situation where the licensee was "found guilty" upon the entry of a nolo contendere plea. In Son v. Fla. Dep't of Prof'l Reg., 608 So. 2d 75, 75-76 (Fla. 3d DCA 1992), the court reversed a

final order suspending the license of a real estate agent who was charged, under a statute nearly identical to section 460.413(1)(c), with having pleaded "nolo contendere and [been] found guilty of unlawfully acting in the capacity of a contractor without" a contractor's certificate. The court held that the hearing officer (whose recommended order the agency had rejected) "correctly applied the Ayala court's reasoning" because he (a) gave the licensee an opportunity to rebut the presumption of a conviction by explaining the reasons and circumstances surrounding the plea and (b) made "findings of fact [regarding the licensee's lack of criminal culpability] that were supported by competent substantial evidence" in the record. Id. at 76.

32. The findings of fact, which the Son court upheld, included the following:

> 4. Respondent entered a plea of nolo contendere on June 11, 1990. The court found Respondent guilty of the charge against him. Adjudication was withheld, and Respondent was sentenced to serve 60 days in the county jail. Court costs were assessed against Respondent in the amount of $ 423. Respondent was placed on probation and allowed to serve 100 hours of community service in lieu of 60 days in the county jail. Respondent never served time in the county jail.

Fla. Dep't of Prof'l Reg. v. Son, Case No. 91-0347, 1991 Fla. Div. Adm. Hear. LEXIS 6551, *4 (Fla. DOAH June 29,

1991)(emphasis added)(endnote omitted). Thus, the court was clearly aware that, as alleged, the licensee had been "found guilty" of a crime——but not adjudicated guilty——after entering a plea of no contest. Armed with this knowledge, the court nonetheless held that the hearing officer had "correctly applied" Ayala in recommending that that complaint be dismissed.

33. In general terms, Son shows that in the absence of a judgment of conviction, the fact that the licensee was "found guilty" of a crime based on a plea of nolo contendere is insufficient to establish the administrative offense of being "convicted or found guilty." To prove such offense in that event, the prosecuting agency must rely upon the Ayala presumption——provided, of course, the disciplinary statute specifies that a "plea of nolo contendere shall be considered a conviction." Vis-à-vis this case, Son instructs that the Department not only may rely upon Ayala (because the statute allows a plea of no contest to be considered a conviction) but must resort to the Ayala presumption (because the "finding of guilt" in the Order is insufficient to establish the offense charged here).

34. The lessons of Son are reinforced by Molinari v. Dep't of Bus. & Prof'l Reg., 688 So. 2d 388, 389 (Fla. 4th DCA 1997). In that case, the court reversed a final order revoking the license of a plumbing contractor who, having pleaded no contest

to a crime as to which adjudication of guilt was withheld, was determined to have been "convicted or found guilty, regardless of adjudication" for purposes of imposing administrative discipline. In his recommended order, which the agency adopted, the hearing officer, applying Ayala, had found that the licensee failed to rebut the presumption that the plea of nolo contendere constituted a conviction. Id. The court, however, determined that the final order "was not supported by Ayala," because the relevant disciplinary statute did not contain a provision specifying that a "plea of nolo contendere shall be considered a conviction." Id.

35. The findings of fact before the court in Molinari included the following:

> 3. On or about July 30, 1990, Respondent pled nolo contendere to the misdemeanor charge. Based upon Respondent's plea of nolo contendere, the Dade County Judge entered a judgement [sic] finding Respondent guilty as charged, withholding adjudication and imposing costs in the amount of $ 300.00.
>
> 4. In the Dade County judicial circuit, a judge usually makes a finding of guilt when a defendant pleads nolo contendere even if adjudication is withheld.

Dep't of Bus. & Prof'l Reg. v. Molinari, Case No. 94-5259, 1995 Fla. Div. Adm. Hear. LEXIS 4399, *4 (Fla. DOAH Aug. 29, 1995)(emphasis added). The court therefore obviously knew that the licensee had been found guilty based on his no contest plea,

even though adjudication had been withheld, and yet it still held that the "no contest plea could not . . . be the basis of the revocation of [the licensee's] license." Molinari, 688 So. 2d at 389. Molinari teaches, then, that being "found guilty" based on a no contest plea is not a disciplinable offense (if adjudication was withheld) under a statute which (a) authorizes punishment for being "convicted or found guilty" of a crime but (b) does not allow a plea of no contest to be considered a conviction.

36. In this case, unlike Molinari, the disciplinary statute does allow a no contest plea to be considered a conviction, which is why Ayala applies here, where in Molinari it did not. Yet, although Molinari is distinguishable for this reason, the distinction does not help the Department because in Molinari, just as in Son, the fact that the licensee had been "found guilty" based on a plea of nolo contendere was insufficient, in the absence of a judgment of conviction, to establish the offense of being "convicted or found guilty" of a crime. In Molinari, the prosecuting agency was unable to rely upon the Ayala presumption and thus lost. In Son, the prosecuting agency needed, and was able, to rely upon the Ayala presumption, but the licensee rebutted the presumption. In this case, as both Molinari and Son make clear, the Department needs the presumption to prove the offense charged because Dr.

Higginbotham was not adjudicated guilty after entering a plea of nolo contendere, even though she was "found guilty" by the trial court. As in Son, the Department is entitled to rely upon a presumption of conviction. The determinative question——which is a factual one——is whether Dr. Higginbotham rebutted the Ayala presumption.

37. To review briefly, Ayala says that the Department is entitled to rely on a presumption, which arises from the no contest plea, that the respondent was convicted of a medical crime. The presumption is rebuttable, however, and thus the respondent must be allowed to "assert his innocence" of the crime——not, significantly, by proving his innocence (although the option of proving that his conduct did not violate the criminal law should be open to the respondent), but rather by proving the circumstances surrounding his plea and the reasons for entering such a plea, which evidence then must be considered in determining whether the respondent is guilty of the disciplinable offense.

38. The court did not elaborate on the operation of this presumption. Legally, however, a

> presumption is an assumption of fact which the law makes from the existence of another fact or group of facts. § 90.301(1), Fla. Stat. (1987). A presumption is typically an evidentiary tool which compels a trier of fact to find the truth of an ultimate fact which is only supported circumstantially by

> evidence of predicate facts and which is not satisfactorily rebutted by the opposing party's evidence. See C. Ehrhardt, Florida Evidence, § 301.1 (2d ed. 1984); McCormick on Evidence, § 342 (2d ed. 1972). Similar to an inference, in terms of logical analysis, if the predicate fact of a presumption is true, then the ultimate fact is also presumed to be true; if A, then B. Because of the regularity of our mail service, for example, a judge may find that the predicate fact A (a letter was mailed) compels a finding that the ultimate fact B (the letter was received) is also true. See Brown v. Giffen Indus., Inc., 281 So.2d 897 (Fla. 1973). Nevertheless, the mailing of a letter is merely circumstantial evidence that the letter was actually received.

Tomlinson v. Dep't of Health & Rehab. Serv., 558 So. 2d 62, 66 (Fla. 2d DCA 1990).

39. Where the Ayala presumption is in play, at least one of the predicate facts is, obviously, the no contest plea. The presumed (or ultimate) fact, i.e., the fact which the law assumes is true based on the existence of a certain predicate fact or facts, is the respondent's conviction of the underlying criminal charge.[7] The Ayala court instructed that the respondent could defeat the presumption of a conviction, not by disproving the obvious predicate fact of the plea or by proving that he did not actually commit a crime (although doing either should defeat the presumption), but by establishing facts relating to the plea itself (as opposed to the criminal conduct with which the respondent had been charged).

40. In this regard, the court implicitly recognized another predicate fact; namely, that most people who plead no contest to (and thereby accept punishment for) a crime are actually guilty of such crime, the plea being tantamount to an "implied confession" of guilt, albeit a limited one which "does not admit the allegations of the charge in a technical sense" and is made solely for the purposes of the pending prosecution. Vinson, 345 So. 2d at 714-15. It is this implied predicate fact which, when paired with the predicate fact of the respondent's plea of no contest, creates the rational connection between the plea and the respondent's presumed conviction.[8] (If we were to assume, contrarily, that most people who plead no contest are actually innocent, then it would be illogical to presume a conviction from the fact of a no contest plea.)[9]

41. The implied predicate fact is one that, as a practical matter, cannot be disproved. See Tomlinson 558 So. 2d at 67 n.2 ("Some presumptions probably involve predicate facts which cannot be disproven either as a practical matter or as a matter of policy. For example, the presumption of sanity is based on the predicate fact that most people are sane."). Yet, the decision in Ayala clearly authorizes a respondent to circumvent the implied predicate fact by showing that he is not like "most people" who plead no contest. Unfortunately, the court did not clearly state what sort of reasons for, and circumstances

surrounding, a plea of no contest will suffice to rebut the presumption of a conviction which arises from such plea. Ayala thus leaves the fact-finder with little guidance as to the facts which bear on the determination of whether the respondent has refuted the implied predicate for the presumption of a conviction.

42. Because, the undersigned reasons, focusing exclusively on subjective facts surrounding the plea of nolo contendere, such as the respondent's state of mind and motives, would tend to diminish the utility of the Ayala presumption as a prosecutorial tool, it is concluded that the respondent's explanation must provide objectively reasonable grounds for entering the plea, which are consistent with innocence. Such grounds must be more than a mere protestation of innocence, and be sufficiently persuasive to outweigh the presumptive determination, to which the fact-finder otherwise defaults, that the respondent entered the plea because of a guilty conscience or in surrender to overwhelming odds of conviction. The respondent might do this by showing, e.g., that he pleaded no contest while being conscious of innocence because, under the circumstances, the net advantages of accepting the plea bargain (after accounting for the burdens thereof) were such that the other or additional benefits which would have flowed from an acquittal were not so valuable as to justify taking the risk,

however small, of being found guilty (which is always at least some possibility, even for the falsely accused) and sentenced accordingly.

43. Another relevant factor to consider in this regard is the extent to which one side or the other, the state or the defendant, seems to have gotten the better of the plea bargain. Because each party to the transaction presumably sought to obtain the best outcome consistent with its interests, the state would have tried to secure the harshest punishment for as many charges as possible, while the defendant would have sought the opposite, i.e., the lightest punishment for the fewest charges. Thus, the relative severity or lenience of the sentence imposed; the number of charges which the defendant elected not to contest versus the number of charges, if any, the state was willing to dismiss; the seriousness of the charges to which the plea was entered as compared to the charges dismissed, if any——these and similar considerations provide a rough reflection of the relative strengths and weaknesses of the state's and the defendant's respective bargaining positions at the time of the plea. The better the deal for the defendant, the weaker the presumption of a conviction, and vice versa.

44. As found above, Dr. Higginbotham gave objectively reasonable grounds, consistent with innocence, for the plea that she entered. She thus demonstrated that she was not like "most

people" who enter a plea of nolo contendere because they know they are guilty and/or recognize that a conviction is likely. She successfully rebutted the Ayala presumption.

45. The Department argues in the alternative that if Ayala were applicable in this case (which it is), the presumption of a conviction arising from the plea of nolo contendere shifts the burden of proof to Dr. Higginbotham to establish that she did not actually commit the crime for which she was sentenced——that, in other words, her conduct was in fact innocent. Dr. Higginbotham, in contrast, contends that the Ayala presumption is a vanishing presumption which disappears in the face of credible evidence concerning the reasons for and circumstances surrounding the plea of nolo contendere. Dr. Higginbotham maintains that once the presumption vanishes, which she argues happened here, the Department must prove by clear and convincing evidence that she actually committed the underlying criminal offenses. Common to both parties' positions is the idea that, under Ayala, it is necessary for the fact-finder to ascertain whether Dr. Higginbotham's historical conduct was criminal in nature or not.

46. As is apparent from the preceding discussion, the undersigned concludes that both parties have misread Ayala, which does not hold, either explicitly or by necessary implication, that the parties must relitigate the underlying

criminal case where, as here, the agency has elected to rely entirely on the effect of the plea. Rather, the Ayala court chose its words carefully, explaining that the licensee must be allowed to assert his innocence "by explaining the reasons and circumstances surrounding his plea of nolo contendere" and by that means (as opposed to asserting his innocence by explaining the reasons for, and circumstances surrounding, his allegedly criminal conduct, which is a different kettle of fish) "attempt to convince the [agency] that he is not guilty of a [medical] crime in violation of" the disciplinary statute. Ayala, 478 So. 2d at 1118-19. Under Ayala, the question of whether the licensee actually committed the crime is irrelevant unless (a) proof of such underlying conduct is necessary to establish other disciplinary offenses with which the agency has charged the licensee, in which case the agency will necessarily have alleged the conduct to be proved in the administrative complaint[10]; or (b) the licensee chooses to rebut the Ayala presumption by proving his innocence of the underlying crime(s), which Ayala neither requires nor prohibits.[11]

47. This reading of Ayala conforms to the disciplinary statute at issue——section 460.413(1)(c)——which does not require proof of criminal conduct to establish the offense.[12] This section merely proscribes being "convicted or found guilty" of a medical crime, not committing a medical crime. Because a plea

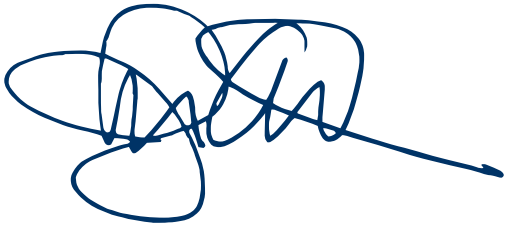
of nolo contendere, according to Ayala, is not necessarily a conviction, entering such a plea is not necessarily a disciplinable offense, as long as adjudication of guilt was withheld. The ultimate issue of fact under Ayala is whether the no contest plea constituted a conviction, not whether the licensee actually committed a crime. The agency is entitled to a rebuttable presumption that the plea is equivalent to a conviction for purposes of section 460.413(1)(c); it is not entitled to a presumption that the licensee engaged in conduct which violated the criminal law.

48. Dr. Higginbotham rebutted the Ayala presumption; the evidence fails to show clearly and convincingly that she was in fact "convicted or found guilty" of a medical crime. Alternatively, as set forth in the findings above, the evidence as a whole, including the no contest plea, fails to establish, clearly and convincingly, that Dr. Higginbotham actually committed any crime; this finding is the same whether the Ayala presumption shifts the burden of proof or vanishes in the face of persuasive evidence to the contrary.

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 finding Dr. Higginbotham not guilty of the charge set forth in the Complaint.

DONE AND ENTERED this 11th day of May, 2011, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
This 11th day of May, 2011.

ENDNOTES

[1]/ See, e.g., Wilson v. State, 45 So. 3d 514, 516 (Fla. 4th DCA 2010)("The party seeking the admission of a witness's former testimony carries the burden of demonstrating the witness's unavailability for trial, and that the party exercised due diligence in its attempt to procure the witness's attendance or testimony.").

[2]/ Dr. Higginbotham's motion to strike the Department's late Proposed Recommended Order is denied, albeit with regret that an appropriate remedy is unavailable in this instance. Striking an overdue proposed recommended order disadvantages the administrative law judge, who is then deprived of one party's post-hearing views of the relevant facts and applicable law. The undersigned considered giving Dr. Higginbotham the opportunity to file a reply to the Department's Proposed Recommended Order but ultimately decided against that to spare her the additional expense.

[3]/ Three of Dr. Higginbotham's co-defendants had been her employees at the time the alleged crimes were committed. These were Ms. Cajuste, who was Dr. Higginbotham's secretary and receptionist; Ms. Eugene, who cleaned the doctor's office and substituted for Ms. Cajuste on occasion; and Mr. Espinosa, a massage therapist.

[4]/ Ms. Eugene testified, based on "hearsay" (her word), that "everyone said [Dr. Higginbotham] knew [the accident was staged]. Everyone knew she knew." The undersigned rejects this obvious hearsay, for which no exception was established, not only because it neither supplements nor explains other admissible evidence, but also because it lacks sufficient persuasive force to support a finding of fact based on any standard of proof, much less the stringent clear and convincing standard applicable here. In this regard, the undersigned observes that, in conducting his affairs, he would not rely upon the hearsay statement of a person who, in practically the same breath that such hearsay is uttered, admits to having participated in a scheme to perpetrate insurance fraud, particularly when, as here, (a) the statement is based solely upon what "everyone" in the person's circle of acquaintances (or accomplices) supposedly "knew," (b) no attempt is made to identify all individuals comprising the set of "everyone," and (c) there is no way to ascertain how "everyone" came to "know" what "everyone" is reported to have "known." The undersigned concludes that no reasonably prudent person would rely upon such rank and unreliable hearsay as the basis for taking any action of importance. See § 120.569(2)(g), Fla. Stat.

[5]/ Although the Department argues that Ayala is not applicable, its position is more accurately viewed as an assertion that the Department does not need to rely upon the Ayala presumption to make its case. This is because the Ayala presumption exists to assist the prosecuting agency, not the accused.

[6]/ A person who pleads guilty might also be regarded as "found guilty" for purposes of section 460.413(1)(c), even though his plea obviates the need for a trial and verdict. See Romano v. Dep't of Bus. & Prof'l Reg., 948 So. 2d 938, 941 (Fla. 5th DCA 2007)("[I]t is undisputed that [the licensee] was found guilty on all charges" to which he had pleaded guilty). Such a construction would not extend the statute, however, because "the courts of this state have long equated a guilty plea with a conviction." Id. at 941; see also Garron v. State, 528 So. 2d

353, 360 (Fla. 1988)(The "guilty plea is more than a confession; it is a conviction").

[7]/ Although the Ayala court did not explicate this point, the term "conviction"——as in, "the nolo contendere plea [may presumptively be considered] as evidence of a conviction for purposes of" § 460.413(1)(c)——clearly refers to an externally imposed legal status rather than the prosecutor's factual allegations regarding the licensee's conduct. In other words, the court was saying that, for purposes of imposing administrative discipline under a statute such as § 460.413(1)(c), the agency may presume that the licensee was determined via the judicial process to be guilty of a crime—— "guilt" here being a legal condition. The court did not say that the nolo contendere plea gives rise to a presumption that the licensee committed the alleged conduct underlying the criminal charge. Such a presumption is unnecessary in the context of § 460.413(1)(c), which is principally concerned with what was done to the licensee in consequence of his conduct, not with what the licensee did (except to the extent necessary to establish that the crime of which he was convicted or found guilty directly related to the practice of, or ability to practice, chiropractic medicine). The difficulty is that a licensee such as Dr. Higginbotham who pleads no contest and is not thereafter adjudicated guilty has not actually been found guilty in fact or in law; hence the "conviction" which Ayala permits the agency to presume is a kind of a legal fiction: the licensee may be disciplined as if he had been convicted or found guilty.

[8]/ The syllogism is as follows: Most people who plead no contest are guilty. The respondent pleaded no contest. Thus, we can reasonably infer that the respondent, like most people who enter such a plea, is probably guilty and therefore may be considered to have been convicted.

[9]/ All of this presupposes that guilt is not to be presumed based merely on the respondent's arrest and prosecution. To be clear, the undersigned does not read Ayala to suggest that it should be assumed, as an implied predicate fact, that most people who have been charged with a crime are guilty of the crime. Nothing in Ayala overturns the proposition that persons are presumed innocent of crimes charged unless and until proven guilty thereof.

[10]/ Due process prohibits an agency from taking penal action against a licensee based on matters (either factual or legal) not specifically alleged in the charging instrument. See Trevisani v. Dep't of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005)("A physician may not be disciplined for an offense not charged in the complaint."); Marcelin v. Dep't of Bus. & Prof'l Reg., 753 So. 2d 745, 746-747 (Fla. 3d DCA 2000); Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992)("[T]he conduct proved must legally fall within the statute or rule claimed [in the administrative complaint] to have been violated.").

[11]/ The Ayala court's statement that "[t]he Board must consider [evidence of the facts and circumstances surrounding the plea] in deciding [the licensee's] guilt or innocence for purposes of the disciplinary charges," id. at 1119, plainly refers to the licensee's guilt or innocence of the disciplinable offense, not the underlying crime. This is clear not only from the text of the sentence itself, but also from the context, as the court immediately thereafter authorizes consideration of the licensee's evidence in mitigation of punishment should the licensee "be adjudicated guilty by the Board." Id. Obviously the administrative agency cannot adjudicate the licensee guilty of a crime.

[12]/ There might be a need for such proof if the question is whether the crime of which the respondent was convicted or found guilty was a medical crime. That is not an issue in this case.

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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.