

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
MEDICINE,)
)
Petitioner,)
) Case No. 10-10229PL
vs.)
)
ALGIRDAS DR. KRISCIUNAS, M.D.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference and simultaneous telephone conference on April 18, 2011, at sites in Tallahassee and Lauderdale Lakes, Florida, with Respondent participating by telephone from Pensacola.

APPEARANCES

For Petitioner: Laura L. Glenn, Esquire
Diane K. Kiesling, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Algirdas Krisciunas, M.D., pro se
Legal Mail
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Federal Prison Camp
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Pensacola, Florida 32516

STATEMENT OF THE ISSUES

The primary issue in this case is whether the crimes of which Respondent was convicted are directly related to the practice of medicine. If so, it will be necessary to determine an appropriate penalty.

PRELIMINARY STATEMENT

On September 10, 2010, Petitioner Department of Health ("Department") issued an Administrative Complaint against Respondent Algirdas Krisciunas, M.D.¹ The Department alleged that Dr. Krisciunas had been convicted of crimes which directly relate to the practice of medicine. Dr. Krisciunas timely requested a formal hearing, and on November 16, 2010, the Department filed the pleadings with the Division of Administrative Hearings, where an Administrative Law Judge was assigned to preside in the matter.

The final hearing was to have been held on February 3, 2011. On January 18, 2011, however, the Department filed an emergency motion to place the case in abeyance because Dr. Krisciunas was being moved to a different federal prison and would be unavailable on the original hearing date. The final hearing was rescheduled for April 18, 2011.

The final hearing took place on April 18, 2011, with both parties present. The Department called as its sole witness Detective William Schwartz of the Broward County Sheriff's

Office. In addition, Petitioner's Exhibits 1 through 3 were received in evidence without objection.

Dr. Krisciunas testified on his own behalf and presented no other witnesses. He did not offer any exhibits.

The one-volume final hearing transcript was filed on May 17, 2011, and Proposed Recommended Orders were due on May 27, 2011. The Department's Proposed Recommended Order and Dr. Krisciunas's post-hearing submission have been considered.

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

FINDINGS OF FACT

1. At all times relevant to this case, Respondent Algirdas Krisciunas, M.D., was licensed to practice medicine in the state of Florida. His office was located in Broward County.

2. Petitioner has regulatory jurisdiction over licensed physicians such as Dr. Krisciunas. In particular, the Department is authorized to file and prosecute an administrative complaint against a physician, as it has done in this instance, when a panel of the Board of Medicine has found that probable cause exists to suspect that the physician has committed a disciplinable offense. Exercising its prosecutorial authority, the Department has charged Dr. Krisciunas with one such offense, namely, being tried and found guilty of a crime which directly relates to the practice of medicine.

3. It is an undisputed fact that, on October 13, 2010, in a case styled United States v. Krisciunas, No. 0:10-6007-CR-DIMITROULEAS-001, the U.S. District Court for the Southern District of Florida entered a judgment of conviction which adjudicated Dr. Krisciunas guilty of five counts of unlawfully dispensing oxycodone, a narcotic pain medication, and one count of conspiring to distribute oxycodone. Based on this conviction, the court sentenced Dr. Krisciunas to a term of 97 months' incarceration in a federal prison. At the time of the final hearing in this case, Dr. Krisciunas was serving his sentence in the custody of the U.S. Bureau of Prisons.

4. The crimes of which Dr. Krisciunas was convicted are directly related to the practice of medicine—a fact that Dr. Krisciunas concedes is true.

5. Because it is undisputed that Dr. Krisciunas was convicted of crimes that directly relate to the practice of medicine, the conduct which gave rise to Dr. Krisciunas's conviction is relevant only for the limited purpose of determining the appropriate penalty to be imposed in this proceeding. In this regard, the undersigned finds that the principal events which gave rise to Dr. Krisciunas's conviction occurred on July 13, 2009; August 6, 2009; and September 9, 2009. On each of these dates, Detective William Schwartz of the Broward County Sheriff's Office, working undercover, presented

to Dr. Krisciunas as "Bill Rix." During each visit, Dr. Krisciunas gave "Bill Rix" prescriptions for oxycodone and the anxiolytic alprazolam despite the absence of any legitimate medical justification for prescribing these medications. "Bill Rix" (Detective Schwartz) paid Dr. Krisciunas's staff in cash for the drugs, which he received in Dr. Krisciunas's office at the conclusion of each visit.

CONCLUSIONS OF LAW

6. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, and 120.57(1), Florida Statutes.

7. 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. Florida Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973). Accordingly, to impose discipline, the Department must prove the charges against Dr. Krisciunas 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 Regulation, Bd. of Medicine, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

8. 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).

9. In the Administrative Complaint, the Department charged Dr. Krisciunas under section 458.331(1)(c), Florida Statutes, which provides in pertinent part as follows:

(1) The following acts constitute grounds for denial of a license or disciplinary action . . . :

* * *

(c) Being convicted or found guilty of, or entering a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the practice of medicine or to the ability to practice medicine.

10. The evidence proves clearly and convincingly that Dr. Krisciunas was convicted of crimes that directly relate to the practice of medicine. Therefore, Dr. Krisciunas is guilty of the offense described in section 458.331(1)(c).

11. The Board of Medicine imposes penalties upon licensees in accordance with the disciplinary guidelines prescribed in Florida Administrative Code Rule 64B8-8.001 (2010). The range of penalties for a first offense involving section 458.331(1)(c) is set forth in rule 64B8-8.001(2) as follows:

From probation to revocation or denial of the license, an administrative fine ranging from \$1,000.00 to \$10,000.00, and 50 to 100 hours of community service.

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

(3) Aggravating and Mitigating Circumstances. Based upon consideration of aggravating and mitigating factors present in an individual case, the Board may deviate from the penalties recommended above. The Board shall consider as aggravating or mitigating factors the following:

(a) Exposure of patient or public to injury or potential injury, physical or otherwise: none, slight, severe, or death;

- (b) Legal status at the time of the offense: no restraints, or legal constraints;
- (c) The number of counts or separate offenses established;
- (d) The number of times the same offense or offenses have previously been committed by the licensee or applicant;
- (e) The disciplinary history of the applicant or licensee in any jurisdiction and the length of practice;
- (f) Pecuniary benefit or self-gain inuring to the applicant or licensee;
- (g) The involvement in any violation of Section 458.331, F.S., of the provision of controlled substances for trade, barter or sale, by a licensee. In such cases, the Board will deviate from the penalties recommended above and impose suspension or revocation of licensure.
- (h) Where a licensee has been charged with violating the standard of care pursuant to Section 458.331(1)(t), F.S., but the licensee, who is also the records owner pursuant to Section 456.057(1), F.S., fails to keep and/or produce the medical records.
- (i) Any other relevant mitigating factors.

13. No mitigating circumstances were shown. On the other hand, subparagraphs (a), (f), and (g) of rule 64B8-8.001(3) set forth relevant aggravating factors in this case. This is because on July 13, August 6, and September 9, 2009, Dr. Krisciunas exposed his "patient" (actually, an undercover detective) and the public to potential harm by unlawfully dispensing oxycodone to someone who did not demonstrate any need for such medication. Further, Dr. Krisciunas benefitted financially from the sale of controlled substances—for cash—to a patient who did not demonstrate any need for them. Finally, Dr. Krisciunas's

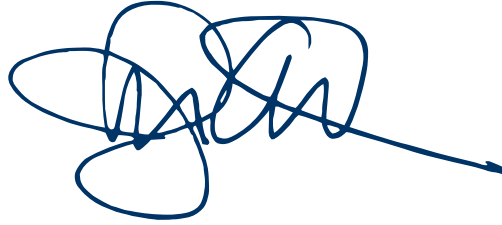
criminal conduct involved the provision of controlled substances for trade, barter, or sale.

14. The Department proposes that Dr. Krisciunas's license be revoked and that he be required to pay an administrative fine of \$10,000. This penalty falls within the applicable range of penalties and is appropriate under the facts and circumstances of this case.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Medicine enter a final order finding Dr. Krisciunas guilty the offense described in section 458.331(1)(c), Florida Statutes, i.e., being convicted of a crime that directly relates to the practice of medicine. It is further RECOMMENDED that the Board of Medicine revoke Dr. Krisciunas's medical license and impose an administrative fine of \$10,000.

DONE AND ENTERED this 27th day of June, 2011, in
Tallahassee, Leon County, Florida.



JOHN G. VAN LANINGHAM
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of June, 2011.

ENDNOTE

^{1/} Due to a clerical error, Respondent's first name was misspelled in the file of the Division of Administrative Hearings. The style of this case has been amended to reflect the correct spelling of Respondent's name.

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.