

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
BOARD OF VETERINARY MEDICINE,)
)
Petitioner,)
)
vs.) Case No. 11-0912PL
)
JOSE DAVILA-DELGADO, D.V.M.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On April 29, 2011, a duly-noticed hearing was held by means of video teleconference with sites in Gainesville and Tallahassee, Florida, before Lisa Shearer Nelson, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Elizabeth F. Henderson, Esquire
Department of Business and
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For Respondent: William Furlow, III, Esquire
Veronica Bayo, Esquire
Grossman, Furlow and Bayo
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STATEMENT OF THE ISSUES

The issues to be determined in this proceeding are whether Respondent's actions are exempt from the provisions of chapter 474, Florida Statutes, pursuant to section 474.203(5), and if

not, whether Respondent violated section 474.214(1)(ee), Florida Statutes (2008). If Respondent's actions are not exempt and violate section 474.214(1)(ee), then what penalty should be imposed?

PRELIMINARY STATEMENT

On October 7, 2010, Petitioner, Department of Business and Professional Regulation (Petitioner or the Department), filed a two-count Administrative Complaint against Respondent, Jose Davila-Delgado, D.V.M. (Respondent or Dr. Davila), alleging that Respondent violated section 474.214(1)(r) and (ee) with respect to his care and treatment of three horses. On October 13, 2010, Respondent filed a Petition for Formal Hearing disputing the allegations in the Administrative Complaint and requesting a hearing pursuant to section 120.57(1), Florida Statutes. On February 18, 2011, the matter was referred to the Division of Administrative Hearings for the assignment of an administrative law judge. On March 8, 2011, a Notice of Hearing was issued scheduling the case for video hearing on April 29, 2011.

On April 12, 2011, an Amended Administrative Complaint was filed with the Division, but without an accompanying motion for leave to amend the Administrative Complaint. See Fla. Admin. Code R. 28-106.202. At the commencement of hearing, counsel for Petitioner moved to amend the Administrative Complaint without objection, and the case proceeded on the Amended Administrative Complaint. The amended complaint deleted the standard of care

violation originally alleged as Count I of the Administrative Complaint and alleged only that Respondent violated section 474.214(1) (ee) alone.

Prior to hearing, the parties also filed a Prehearing Stipulation in which the parties stipulated to certain facts that, where relevant, have been incorporated into the findings of fact below. At the commencement of the hearing, the undersigned asked for clarification of the parties' positions. The parties confirmed that Respondent is relying on the exemption in section 474.203(5), and that the Department is contending that the exemption does not apply.

Petitioner presented the testimony of Erin Cameron and Ben Schachter, D.V.M., and Petitioner's Exhibits 1 and 2 were admitted into evidence. Ruling on the admissibility of Petitioner's Exhibit 3 was deferred, and the parties were instructed to address the issue in their proposed recommended orders. As explained in the Conclusions of Law, Petitioner's Exhibit 3 is not admitted. Respondent presented no evidence.

The Transcript of the proceedings was filed with the Division on May 13, 2011. Both parties submitted Proposed Recommended Orders that have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the state agency charged with regulating the practice of veterinary medicine pursuant to section 20.165 and chapters 455 and 474, Florida Statutes.

2. Respondent is and has been, at all times material to this Administrative Complaint, licensed to practice veterinary medicine in the State of Florida, having been issued license number VM 8029.

3. Respondent's company, Equitransfer, LLC, is a limited liability company in the state of Florida. Equitransfer is involved with performing embryo transfers in recipient mares.

4. Dr. Davila owned horses #331, #645, and T14. These horses died. Horse #645 had a foal out on September 16, 2009, and horses #331 and T14 had embryo placements which had not been birthed at the time of the horses' deaths.

5. There are records of some sort that were requested from and turned over to the Department by Dr. Davila. Included is a document entitled "Verification of Completeness of Records" (Verification of Completeness form), which is a form on Department letterhead with blanks to be completed with the relevant information. This document as completed and received with the documents states the following:

I, Jose R. Davila, DVM am the official custodian of patient records from recipient mares under Frances Ramirez. My title is Owner/President Equitransfer LLC. My employer's address is: PO Box 770, Summerfield FL 34492 (352)307-0944. I hereby

verify that the I have searched the patient records maintained at Equitransfer, LLC and have determined that the attached records consisting of 1203 pages are true and correct copies of the patient records as requested pursuant to subpoena No. (left blank).

6. The Verification of Completeness does not indicate that the records are for horses #645, #331 or T14, and does not state that the records were made at or near the time of the occurrence of the matters set forth, or from information kept in the course of regularly conducted activity. The Verification of Completeness form also does not state that the records were made as a regular practice in regularly conducted activity.

7. The Verification of Completeness indicates that there are 1203 pages of records. The records submitted at hearing consist of approximately 955 pages. Moreover, the documents have Bates stamps on the bottom right hand corner, but no one could state who put the Bates-stamped numbers on the documents or why the documents were not in Bate-stamp order. Finally, while Erin Cameron testified that she was present when the records were received, she could not testify that the records presented at hearing consisted of all of the records provided by Dr. Davila.

8. Dr. Davila stipulated that the documents in Petitioner's Exhibit 3 did not contain the items enumerated as required medical records in the Administrative Complaint. In other words, the documents did not constitute medical records under chapter 474.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this action in accordance with sections 120.569 and 120.57(1), Florida Statutes.

10. This is a disciplinary action by Petitioner in which Petitioner seeks to discipline Respondent's license as a veterinarian. Petitioner bears the burden of proof to demonstrate the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking and Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

11. As stated by the Florida Supreme Court:

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 lacking in confusion as to the facts in issue. The evidence must be of such a 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.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005), quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

12. As a preliminary, and in this case, dispositive matter, Respondent asserts that he is entitled to the exemption contained in section 474.203(5), and Petitioner asserts that the conduct at issue fits within an exception to the exemption. Should Respondent be correct, then he is not subject to disciplinary action as alleged in the Amended Administrative Complaint.

Should the Department's position be correct, then Respondent's alleged actions could be the basis for disciplinary action, assuming Petitioner proves the allegations.

13. In disciplinary proceedings, the statutes and rules for which a violation is alleged, and here, the exception to the exemption in section 474.203(5), must be strictly construed in favor of the Respondent.^{1/} Elmariah v. Dep't of Prof'l Reg., 574 So. 2d 164 (Fla. 1st DCA 1990); Taylor v. Dep't of Prof'l Reg., 534 So. 2d 782, 784 (Fla. 1st DCA 1988).

14. The burden of proof related to the application of the exemption is on the party asserting the affirmative of the issue. Young v. Dep't of Cmty. Aff., 625 So. 2d 831 (Fla. 1993); Balino v. Dep't of Health and Rehab. Svcs., 348 So. 2d 349 (Fla. 1st DCA 1977). Thus, Respondent has the burden to show that he fits within the exemption in section 474.203(5). The burden then shifts to the Department to show that Respondent's alleged conduct fits within an exception enumerated in the exemption, and thus is subject to disciplinary action.

15. Section 474.203 provides in pertinent part:

474.203 Exemptions.-- This chapter shall not apply to:

* * *

(5) (a) Any person, or the person's regular employee, administering to the ills or injuries of her or his own animals, including, but not limited to, castration, spaying, and dehorning of herd animals, unless title has been transferred or employment provided for the purpose of

circumventing this law. This exemption shall not apply to out-of-state veterinarians practicing temporarily in the state. However, only a veterinarian may immunize or treat an animal for diseases which are communicable to humans and which are of public health significance.

Accordingly, Respondent must demonstrate that he owns the animals for whom the Administrative Complaint alleges he was caring. The Department would then have to prove that 1) title had been transferred or employment provided for the purpose of circumventing Chapter 474; 2) that Respondent was an out-of-state veterinarian practicing temporarily in the State of Florida; or 3) that Respondent was treating or immunizing his animals for diseases that are communicable to humans and which are of public health significance.

16. The parties stipulated that Respondent owned the only horses giving rise to allegations regarding medical records in the Amended Administrative Complaint, #645, #331 and T14. Given Respondent's undisputed ownership of the three animals named in the Administrative Complaint, any care he rendered to these horses would not be subject to the provisions of section 474.214, because the administration to the ills and injuries of his own animals is entitled to the exemption contained in section 474.203.

17. The Department has argued that Respondent leased the animals and then charged for their care. Charging for their care, the Department contends, is evidence of the creation of a

veterinarian/client/patient relationship that would then bring the conduct within the parameters of Chapter 474.

18. However, as noted at hearing, nothing in the Amended Administrative Complaint alleges that Respondent charged for services to his own animals. Nor does the exemption in section 474.203(5) refer to the veterinarian/client/patient relationship as creating an exception to the exemption. While the Amended Administrative Complaint references the leasing of the animals, it does not allege that any leases constitute a transfer of ownership. Respondent can only be held accountable for those allegations actually contained in the Administrative Complaint. Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005); Luskin v. Ag. for Health Care Admin., 731 So. 2d 67, 69 (Fla. 4th DCA 1999).

19. The second exception to the exemption does not come into play, as neither party contends that Respondent is an out-of-state veterinarian. Petitioner asserts that Respondent's behavior fits into the third exception contained within the "owner" exemption, i.e., that Respondent was treating or immunizing his animals for diseases that are communicable to humans and which are of public health significance.

20. Before this question can be reached, the admissibility of Petitioner's Exhibit 3 must be addressed. As noted in the findings of fact, there are substantial concerns regarding the completeness of the document submitted for admission into

evidence. While the Verification of Completeness form indicates that there should be 1203 pages, there are approximately 955, well short of the stated number. The pages are not in order, and there is no knowledge as to who numbered them or where the missing pages are located. Ms. Cameron, who was the only person who testified at hearing regarding the authenticity of the documents, was present when documents were retrieved from Dr. Davila's place of business. However, she worked in a different region from where the documents were retrieved, and could not confirm how the documents were maintained once retrieved by the Department.

21. The Department has asserted that Petitioner's Exhibit 3 is the complete set of records retrieved by the Department from Dr. Davila. In order to meet the authentication requirements of section 90.901, Florida Statutes, there must be sufficient evidence to establish "that the matter in question is what its proponent claims." Here, given that the exhibit is some 248 pages short of what is identified in the Verification of Records form, it cannot be authenticated.

22. Petitioner argues that the Verification of Completeness form included with Petitioner's Exhibit 3 makes it a self-authenticating document pursuant to section 90.902(11). This section provides in pertinent part:

Self-authentication.—Extrinsic evidence of authenticity as a condition precedent to admissibility is not required for:

* * *

(11) An original or a duplicate of evidence that would be admissible under s. 90.803(6), which is maintained in a foreign country or domestic location and is accompanied by a certification or declaration from the custodian of the records or another qualified person certifying or declaring that the record:

(a) Was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person having knowledge of those matters;

(b) Was kept in the course of the regularly conducted activity; and

(c) Was made as a regular practice in the course of the regularly conducted activity, provided that falsely making such a certification or declaration would subject the maker to criminal penalty under the laws of the foreign or domestic location in which the certification or declaration was signed.

23. Evidence admissible pursuant to section 90.803(6) is hearsay evidence which is admissible under the business records exception to the hearsay rule. However, as noted in the findings of fact, the Verification of Completeness form does not state that the records were made at or near the time of the occurrence of the matters set forth or from information kept in the course of the regularly conducted activity. The Verification of Completeness form also does not state that the records were made as a regular practice in regularly conducted activity. Accordingly, Petitioner's Exhibit 3 is not self-authenticating, cannot be assumed to be complete and is inadmissible hearsay. As a result, Petitioner's Exhibit 3 cannot be admitted into evidence.

24. Without Petitioner's Exhibit 3, Petitioner is left with relying on the testimony of its expert, Dr. Schachter. However, section 90.702 provides,

[i]f scientific, technical, or other specialized knowledge will assist the trier of fact in understanding the evidence or in determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify about it in the form of an opinion; however, the opinion is admissible only if it can be applied to evidence at trial.

25. Thus, Dr. Schachter's opinion regarding information contained in Petitioner's Exhibit 3 cannot be considered.

26. Even assuming that Petitioner's Exhibit 3 was admissible, the Department has not established the factual predicate for the third exception to the owner exemption contained in section 474.203(5). This exception provides "only a veterinarian may immunize or treat an animal for diseases which are communicable to humans and which are of public health significance." Dr. Schachter testified based upon information in Petitioner's Exhibit 3 that the bacterium in the horses' systems was Clostridium, and that the bacteria is transmissible to humans. He was not asked and did not answer whether the disease from which the horses died was one of public health concern. Given the language of section 474.203(5), proof that the disease is communicable to humans and that the disease is one of public health concern is required. That proof was not presented here.

27. While it may be appropriate from a policy standpoint to regulate the type of business at issue here under the auspices of chapter 474, this case must be decided based upon the express language of the exemption in effect at the time of the conduct alleged. Any change in the exemption would be a legislative decision beyond the reach of this case.

RECOMMENDATION

Upon consideration of the facts found and conclusions of law reached, it is

RECOMMENDED that the Board of Veterinary Medicine enter a final order dismissing the charges in the Amended Administrative Complaint.

DONE AND ENTERED this 16th day of June, 2011, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 16th day of June, 2011.

ENDNOTE

^{1/} Established case law states that exemptions are strictly construed against the person seeking the exemption. Young v. Dep't of Cmty. Aff., 625 So. 2d 831 (Fla. 1993); Balino v. Dep't

of Health & Rehab. Svcs., 348 So. 2d 349 (Fla. 1st DCA 1977). However, here it is not the exemption that is at issue, because the parties have stipulated to the ownership of the animals. It is the exceptions to the exemption, which would bring Respondent's behavior within the confines of chapter 474, and must be interpreted by the same standards as the disciplinary provisions themselves.

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.