STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF PHYSICAL THERAPY PRACTICE,	)	
Petitioner,	)	
vs.	)	Case Nos. 11-1271PL 11-1272PL
MARLY DELIS CUETO, P.T.,	)	
Respondent.	)	

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on May 17, 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: (a) was convicted of a crime which directly relates to the practice of physical therapy; (b) failed to timely report a criminal conviction to the Board of Physical Therapy Practice; and (c) was terminated from the Medicaid program, as Petitioner has alleged; and, if one or more of these allegations are established, whether the Board should impose discipline on Respondent's physical therapy license within the applicable penalty guidelines or take some other action.

PRELIMINARY STATEMENT

On October 21, 2009, Petitioner Department of Health issued a two-count Administrative Complaint against Respondent Marly Delis Cueto, P.T. The Department alleged that Ms. Cueto had been convicted of a crime which directly relates to the practice of physical therapy, and that she had failed to report this conviction to the Board of Physical Therapy Practice within 30 days after it occurred, as the law requires. On April 21, 2010, the Department issued a second Administrative Complaint against Ms. Cueto, in which she was charged with having been terminated for cause from further participation as an enrolled Medicaid provider.

In response to each complaint, Ms. Cueto timely requested a formal hearing, and on March 11, 2011, the Department filed the

pleadings with the Division of Administrative Hearings. Upon receipt, the matters were docketed, respectively, as Case Nos. 11-1271PL (involving the two-count complaint) and 11-1272PL (involving the one-count complaint), and an Administrative Law Judge was assigned to preside in them. By order dated March 28, 2011, these two cases were consolidated for all purposes, including the final hearing.

The final hearing took place as scheduled on May 17, 2011, with both parties present. The Department called as witnesses Michael R. Coleman, Jennifer Wenhold, Horace L. Dozier, and William S. Quillen, Ph.D. In addition, Petitioner's Exhibits 1 through 4 and 7 were received in evidence.[1] (Petitioner's Exhibit 5 was not offered and those identified as 2A and 6 were withdrawn.)

Ms. Cueto testified on her own behalf and presented no other witnesses. Respondent's Exhibits 1 through 7 were admitted into evidence.

The one-volume final hearing transcript was filed on June 11, 2011. The time for submitting proposed recommended orders was enlarged to June 30, 2011, on Ms. Cueto's unopposed motion. Each party met this deadline, and their respective Proposed Recommended Orders have been considered.

FINDINGS OF FACT

1. At all times relevant to this case, Respondent Marly Delis Cueto ("Cueto"), P.T., was licensed as a physical therapist in the state of Florida.

2. Petitioner Department of Health ("Department") has regulatory jurisdiction over licensed physical therapists such as Cueto. In particular, the Department is authorized to file and prosecute an administrative complaint against a physical therapist, as it has done in this instance, when a panel of the Board of Physical Therapy Practice ("Board") has found that probable cause exists to suspect that the therapist has committed a disciplinable offense. Exercising its prosecutorial authority, the Department has charged Cueto with three such offenses, namely, being convicted of a crime which directly relates to the practice of physical therapy; failing to report this conviction to the Board; and being terminated from the state Medicaid program.

3. It is undisputed that, on November 5, 2008, in a case styled State of Florida v. Cueto, No. 08-16209CF10A, the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, accepted Cueto's plea of nolo contendere to the single count of grand theft (a third-degree felony) with which she had been charged; withheld adjudication of guilt; and sentenced her to a term of two years' probation with special

conditions. The conditions were that Cueto pay the Agency for Health Care Administration ("AHCA") $28,000 as restitution to the Medicaid program, from which she had stolen funds; and that she relinquish her Medicare and Medicaid provider numbers while on probation.

4. Cueto did not explain the reasons for, and circumstances surrounding, her plea of nolo contendere. There is, at bottom, no persuasive evidence in the record upon which to base any findings of an exculpatory nature concerning the underlying criminal charge for which Cueto was sentenced. Where, as here, there is insufficient proof of objectively reasonable grounds for entering a plea of no contest, which are consistent with innocence, the undersigned presumes that the licensee entered the plea because of a guilty conscience or in surrender to overwhelming odds of conviction. Thus, it is determined that Cueto's plea of nolo contendere constituted a conviction.

5. The conduct which gave rise to Cueto's conviction is relevant only for the limited purpose of determining whether the crime directly relates to the practice of physical therapy. In this regard, the undersigned finds that during the period from January 1, 2007 to April 22, 2008, Cueto——who, as a licensed physical therapist, was an enrolled Medicaid provider——knowingly and intentionally submitted multiple claims to the Florida

Medicaid program for physical therapy services that she had not actually rendered, on which false claims she was paid at least $28,000 to which she was not entitled. It is determined that Cueto was convicted of a crime which directly relates to the practice of physical therapy.

6. Cueto did not report to the Board that fact that she had pleaded nolo contendere to a crime, as she was legally required to do within 30 days after entering the plea.

7. On September 30, 2009, AHCA entered a Final Order terminating Cueto from participation as a provider in the Florida Medicaid program. AHCA imposed this sanction against Cueto pursuant to Florida Administrative Code Rule 59G-9.070(8) (2008)——as it was authorized to do under section 409.913(13), Florida Statutes (2009)——because she had been convicted of grand theft on November 5, 2008. As of the final hearing in this case, Cueto had not been reenrolled as a Medicaid provider.

CONCLUSIONS OF LAW

8. 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 (2011).

9. 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 Cueto 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 Med., 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

10. 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).

11. In Count One of the Administrative Complaint which initiated Case No. 11-1271PL, the Department charged Cueto under section 486.125(1)(c), Florida Statutes (2008),[2] 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 physical therapy or to the ability to practice physical therapy. The entry of a plea of nolo contendere shall be considered a conviction for purpose [sic] of this chapter.

12. The evidence proves clearly and convincingly that Cueto entered a plea of nolo contendere to a crime that is directly related to the practice of physical therapy. She was not tried and found guilty of the crime, however, nor was she adjudicated guilty of grand theft.

13. 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 486.125(1)(c) attempts to override this general principle by equating a no contest plea with a conviction.

14. 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 the practice of physical therapy instead of medicine——was unconstitutional for creating a conclusive presumption of guilt on the predicate fact of a no contest plea. 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. at 1118. 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. See also Dep't of Health v. Higginbotham, Case No. 10-2796PL, 2011 Fla. Div. Adm. Hear. LEXIS 106 (Fla. DOAH May 11, 2011).

15. Ayala says, in short, that the Department is entitled to rely on a presumption, which arises from the no contest plea, that the respondent was convicted of a crime for which administrative discipline may be imposed. 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.

16. As a matter of fact, as found above, Cueto failed to rebut the Ayala presumption. The evidence shows clearly and convincingly that she was in fact "convicted" of a crime which directly relates to the practice of physical therapy. Therefore, Cueto is guilty of the offense described in section 486.125(1)(c).

17. In Count Two of the Administrative Complaint which initiated Case No. 11-1271PL, the Department charged Cueto under section 456.072(1)(x), Florida Statutes (2008), which states as follows:

> Failing to report to the board, or the department if there is no board, in writing within 30 days after the licensee has been convicted or found guilty of, or entered a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction [shall constitute grounds for discipline]. Convictions, findings, adjudications, and pleas entered into prior to the enactment of this paragraph must be reported in writing to the board, or department if there is no board, on or before October 1, 1999.

Cueto failed to report her conviction to the Board as required. She is therefore guilty of the offense described in section 456.072(1)(x).

18. In the Administrative Complaint which initiated Case No. 11-1272PL, the Department charged Cueto under section 456.072(1)(kk), Florida Statutes (2009), which provides:

> Being terminated from the state Medicaid program pursuant to s. 409.913, any other

> state Medicaid program, or the federal Medicare program [shall constitute grounds for discipline], unless eligibility to participate in the program from which the practitioner was terminated has been restored.

Cueto was in fact terminated from the state Medicaid program pursuant to section 409.913, and she had not been reenrolled therein at the time of the final hearing in this case. She is therefore guilty of the offense defined in section 456.072(1)(kk), Florida Statutes (2009).

19. Cueto contends that she was not terminated from Medicaid "for cause" as the Department has alleged. Section 456.072(1)(kk) does not require, as a prerequisite to imposing discipline, that the Medicaid provider have been terminated for cause. Nevertheless, Cueto was terminated for cause, that being her conviction for grand theft, which crime relates to the practice of physical therapy. At the time AHCA terminated Cueto's participation as an enrolled provider, the penalty guidelines then in effect for violations of Medicaid-related laws required that the sanction of termination be imposed for a violation of section 409.913(13)(b), which statute directs AHCA to immediately terminate the participation of a Medicaid provider who has been convicted of a crime relating to the practice of the provider's profession. See Fla. Admin Code R. 59G-9.070(8)(a)2. (2008). The same rule defined "termination"

as "a twenty-year preclusion from any action that results in a claim for payment to the Medicaid program as a result of furnishing, supervising a person who is furnishing, or causing a person to furnish goods or services." Fla. Admin Code R. 59G-9.070(2)(y).

20. The Department might have alleged that Cueto's termination had been for cause because under the Board's current disciplinary guidelines, which took effect on June 30, 2010, a termination for cause from the Medicaid program warrants a harsher penalty than does a termination "not . . . for cause." Fla. Admin. Code R. 64B17-7.001(1)(ff)(2010). Although this Board rule does not define "cause," AHCA's current disciplinary guidelines, which became effective on September 7, 2010, provide that a "termination pursuant to this rule is also called a 'for cause' or 'with cause' termination." Fla. Admin. Code R. 59G-9.070(3)(p)(2010). Neither rule, however, applies in this case, which must be decided under the disciplinary guidelines in effect at the time the offense was committed. See Orasan v. Ag. for Health Care Admin., 668 So. 2d 1062, 1063 (Fla. 1st DCA 1996); Willner v. Dep't of Prof'l Reg., 563 So. 2d 805, 806 (Fla. 1st DCA 1990).

21. Cueto was convicted of a crime relating to the practice of physical therapy in November 2008. Under the then applicable disciplinary guidelines, the range of penalties for a

first offense involving section 486.125(1)(c), when the underlying crime was a felony, is from "a minimum of fine of $5,000 and two years probation, up to a fine of $10,000 and/or revocation." Fla. Admin. Code R. 64B17-7.001(1)(c)(2007).

22. Cueto's failure to report her conviction to the Board within 30 days occurred in December 2008. Under the then applicable disciplinary guidelines, the range of penalties for a first offense involving section 456.072(1)(x) is "from a minimum fine of $1,000 and/or a letter of concern, up to a maximum fine of $3,000 and/or one month suspension of license followed by two years of probation." Fla. Admin. Code R. 64B17-7.001(1)(x)(2007).

23. Cueto was terminated from the Medicaid program in September 2009. Rule 64B17-7.001 (2007), which was in effect at that time, does not prescribe a punishment for the offense defined in section 456.072(1)(kk), Florida Statutes (2009). Cueto can be sanctioned for this offense, however, through section 486.125(1)(k), Florida Statutes (2009), which, as the Department alleged in the Administrative Complaint, provides that a violation of chapter 456 is grounds for discipline.

24. Under the disciplinary guidelines in effect in September 2009, the range of penalties for a first offense involving section 486.125(1)(k) is "from a minimum fine of $1,000 and/or a letter of concern, up to a maximum fine of

$5,000 and/or suspension of license for two years followed by two years of probation." Fla. Admin. Code R. 64B17-7.001(1)(x)(2007).

25. Rule 64B17-7.001(2)(2007) provides that, in applying the penalty guidelines, the following aggravating and mitigating circumstances are to be taken into account:

> (a) The danger to the public;
> (b) The number of distinct charges;
> (c) The actual damage, physical or otherwise, to the patient(s);
> (d) The length of time since the date of the last violation(s);
> (e) The length of time that the licensee has held a license in any jurisdiction;
> (f) The deterrent effect of the penalty imposed;
> (g) Rehabilitation efforts of the licensee including remorse, restitution, and corrective action(s);
> (h) The effect of the penalty on the licensee's livelihood;
> (i) Efforts of the licensee to report or stop violations or the failure of the licensee to correct or stop violations;
> (j) The willfulness and/or negligence of the licensee pertaining to any violation;
> (k) Any other mitigating or aggravating circumstances.

The undersigned concludes that consideration of the aggravating and mitigating factors leads to a wash. Thus, an appropriate penalty should fall squarely within the prescribed range.

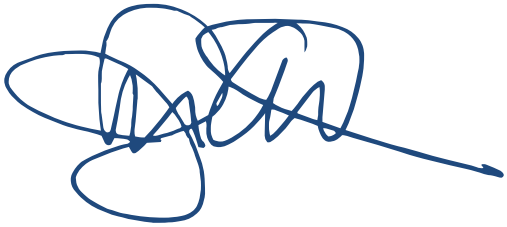
26. The Department has proposed that Cueto's license be revoked and that she be required to pay an administrative fine of $10,000. Although this penalty comes within the applicable

range of penalties and hence is within the Board's discretion to impose, it is harsher than necessary to protect the public.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Physical Therapy Practice enter a final order finding Marly Delis Cueto guilty of the offense described in section 486.125(1)(c), Florida Statutes, i.e., being convicted of a crime that directly relates to the practice of physical therapy; guilty of the offense defined in section 456.072(1)(x), namely failing to timely report a criminal conviction to the Board; and guilty of the offense defined in section 486.125(1)(k), in consequence of having been terminated from the Medicaid program, which latter constitutes a disciplinable offense under section 456.072(1)(kk). It is further RECOMMENDED that the Board impose an administrative fine of $14,000 and suspend Cueto's physical therapy license for two years, to be followed by two years of probation on such reasonable terms and conditions as the Board establishes, which may include the requirement that Cueto pay in full the $28,000 she has been ordered to remit to AHCA as restitution of the stolen funds.

DONE AND ENTERED this 19th day of July, 2011, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of July, 2011.

ENDNOTES

[1]/ Petitioner's Exhibit 7 is Dr. Quillen's curriculum vitae, which the Department was permitted to submit after the final hearing. Before filing this CV, the Department had marked it for identification as Petitioner's Exhibit 1. The undersigned renumbered the document so that no two Petitioner's Exhibits would bear the same number.

[2]/ Additionally, or in the alternative, the Department charged Cueto under section 486.125(1)(k)(violating any provision of chapter 486 or chapter 456 subjects licensee to punishment), alleging that her no contest plea was disciplinable pursuant to section 456.073(1)(c), which makes it an offense to enter a plea of guilty or nolo contendere to a crime relating to the practice of the licensee's profession. The undersigned need not decide in this case whether it is legally permissible to charge a physical therapist under section 456.073(1)(c)——a general statute which applies without apparent limitation to all licensed health care providers——as an alternative to charging the therapist under section 486.125(1)(c), which is a specific

statute applicable only to licensed physical therapists. See B.D.M. Fin. Corp. v. Dep't of Bus. & Prof'l Reg., 698 So. 2d 1359, 1362 (Fla. 1st DCA 1997)(agency erred in revoking registration under statute generally authorizing "affirmative action" to enforce law because another statute having more rigorous criteria specifically addressed revocations); Sheils v. Jack Eckerd Corp., 560 So. 2d 361, 363 (Fla. 2d DCA 1990)(in action against pharmacy for damages, shorter limitation period specifically applicable to professional malpractice claims controlled over longer period governing products liability actions generally because "where a general law that applies to numerous classes of cases conflicts with the law that applies only to a particular class, the latter, or more specific law, generally controls . . . ."). The outcome here happens to be the same under either section. At any rate, moreover, Cueto's criminal conviction constitutes but a single disciplinable "act" for which she cannot fairly receive multiple administrative punishments. Cf. Syder v. State, 921 So. 2d 871, 873 (Fla. 4th DCA 2006)(Double Jeopardy Clause prohibits the government from securing multiple criminal convictions based on same conduct).

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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.