STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MEDICINE, Petitioner, vs. JOSEPH PIOTROWSKI, P.A., Respondent.	)	Case No. 11-3138PL

RECOMMENDED ORDER

On September 13, 2011, a duly-noticed hearing was held in Tallahassee, Florida, before Lisa Shearer Nelson, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Geoffrey Frederick Rice, Esquire
Sharmin Hibbert, Esquire
Department of Health
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Tallahassee, Florida 32399

For Respondent: Joseph Piotrowski, D11823
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STATEMENT OF THE ISSUES

The issues to be determined are whether Respondent is a licensed physician's assistant in Florida; whether he committed the allegations alleged in the Administrative Complaint, and if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On February 18, 2011, Petitioner, Department of Health (Petitioner or the Department), filed a two-count Amended Administrative Complaint against Respondent, Joseph Piotrowski (Respondent or Mr. Piotrowski), alleging that Respondent violated section 458.331(1)(c), Florida Statutes (2002)(being convicted or found guilty, of a crime in any jurisdiction of a crime which directly relates to the practice of medicine), and section 456.072(1)(w) (failing to report to the board in writing within 30 days that the licensee has been convicted). Respondent disputed the allegations in the Amended Administrative Complaint and requested a hearing pursuant to section 120.57(1), Florida Statutes. On June 21, 2011, the matter was referred to the Division of Administrative Hearings for the assignment of an administrative law judge.

The hearing was scheduled for September 13, 2011, and proceeded as scheduled. Respondent, who is incarcerated, participated by telephone. At hearing, the Department presented no witnesses, but submitted Petitioner's Exhibits 1-3, which were admitted into evidence. Respondent testified on his own behalf but submitted no documents.

A one-volume transcript was filed with the Division on September 28, 2011. Because of concerns with mailing associated with Respondent's incarceration, the time for submitting post-hearing submissions was extended to October 13, 2011. Petitioner

filed a Proposed Recommended Order on October 11, 2011, and Respondent filed a Proposed Recommended Order on October 14, 2011. Both submissions have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is the state agency charged with the licensing and regulation of health care professionals, including physicians assistants, pursuant to section 20.43 and chapters 456 and 458, Florida Statutes.

2. At the time of the events giving rise to the Administrative Complaint, Respondent was licensed to practice as a physician's assistant in the State of Florida, having been issued license number PA9101556.

3. Respondent received his license on January 16, 2001, and never renewed it. Under normal circumstances, his license would have expired on January 1, 2004. However, at the time of his licensure and until his discharge on April 1, 2008, Respondent was on active duty in the United States Air Force.

4. On April 1, 2001, Respondent was involved in an automobile accident in which the driver of the other car involved was killed, along with her unborn child. Respondent was under the influence of alcohol at the time. As a result of the accident, on April 19, 2001, he was hospitalized and placed in military custody. Respondent's clinical privileges with the United States Air Force were placed in abeyance as of April 20,

2001, and on April 28, 2001, he was reassigned to Fort Stewart, Georgia, and placed in pre-trial confinement.

5. On May 8, 2001, Respondent was notified that his clinical privileges in the Air Force were suspended pending the decision of his court martial, and that the action was taken "in response to your unprofessional conduct and three consecutive DUI arrests." The notice also stated that "[t]hese problems could potentially have adverse effects on patient care."

6. On August 8, 2001, Respondent was convicted by court martial under Articles 111, 119, 133, and 134 of the Uniform Code of Military Justice.

7. On October 3, 2001, an Arrest Warrant and Notice to Appear was filed in the Circuit Court for the Thirteenth Judicial Circuit in and for Hillsborough County, charging Respondent with D.U.I. manslaughter in violation of section 316.193(3), Florida Statutes (2001).

8. On October 17, 2001, Respondent's clinical privileges in the Air Force were revoked, in response to his court martial conviction. As with the notice of suspension of his privileges, the notice of revocation stated:

> 4. Depending on the outcome of this action, AFMOA/SGOC may report the matter to appropriate professional regulatory agencies.
> . . .
>
> 5. Providers who separate, retire, are discharge [sic], end employment with the DoD, or permanently change station within the DoD while an adverse action review is taking place may be reported to the National

> Practitioner Data Bank and/state licensing agencies. . . .

9. On January 2, 2002, an information was filed charging Respondent with two counts: one for D.U.I manslaughter, with regard to the death of the woman involved in the April 2001 accident; and one for vehicular homicide for the death of her viable fetus.

10. On or about May 14, 2003, in State of Florida v. Joseph Frank Piotrowski, Case No. 01-CF-015207 (13th Judicial Circuit), Respondent was tried and found guilty of both counts charged and described in paragraph 7. On May 13, 2003, Respondent was sentenced to serve 15 years for each count, with credit for 376 days jail time served. The court ordered that his sentences run consecutively, and concurrently with his federal sentence.

11. Respondent was discharged from the military on April 1, 2008.

12. Respondent remains incarcerated, with an anticipated release date of January 15, 2029.

CONCLUSIONS OF LAW

13. 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 (2011).

14. In this case, the Commission seeks to take disciplinary action against Respondent's license as a physician's assistant. This disciplinary action by Petitioner is a penal proceeding, and

Petitioner bears the burden of proof to demonstrate the allegations in the Amended 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).

15. As reiterated by the Supreme Court of Florida,

> 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)).

16. As a preliminary matter, Respondent challenges the Board of Medicine's authority to take action against him, because in his view, he does not currently have a license to discipline. He bases his position on the fact that he never renewed his license after receiving it, and by its terms, the license would have expired on January 31, 2004. The Department, on the other hand, lists him as having a license with the status "military active."

17. Respondent's position has a superficial appeal: why is the Department pursuing a license Respondent claims he does not have and will not be able to use until released from prison 18 years from now? However, Respondent's argument overlooks the

provisions of section 456.024, Florida Statutes, which provides in pertinent part:

> (1) Any member of the Armed Forces of the United States now or hereafter on active duty who, at the time of becoming such a member, was in good standing with any administrative board of the state, or the department when there is no board, and was entitled to practice or engage in his or her profession in the state shall be kept in good standing by such administrative board, or the department when there is no board, without registering, paying dues or fees, or performing any other act on his or her part to be performed, as long as he or she is a member of the Armed Forces of the United States on active duty and for a period of 6 months after discharge from active duty as a member of the Armed Forces of the United States, provided he or she is not engaged in his or her licensed profession or vocation in the private sector for profit. (emphasis supplied).

18. Technically, this provision should not apply to Respondent because he was not licensed before he became a member of the Armed Forces; in his case the opposite is true in that he was a member of the Armed Forces at the time he received his license. However, the only plausible explanation for Respondent's licensure status is the application of this section, consistent with the public policy of affording some latitude to those who serve this country through military service. Given Respondent's active duty status at the time of his licensure, application of section 456.024 would mean that Respondent's license would have been renewed automatically on January 31, 2004, with no action on his part. It would have been renewed

again, with no action on his part, on January 31, 2008, as he remained on active military duty, albeit confined, at that time. Given the automatic renewal of his license on January 31, 2008, it would not expire until January 30, 2012.

19. It is puzzling that the Department would continue to list his license as "military active" in the face of information that clearly indicates he is no longer in the military and has not been since August of 2008. However, resolution of that issue is unnecessary for any decision regarding this case. As is discussed more fully below, regardless of whether Respondent is currently licensed or, as he claims, his license has expired, the Board of Medicine is authorized to discipline his license because he was licensed at the time of the events giving rise to this action.

20. The Amended Administrative Complaint charges Respondent with violating sections 458.331(1)(c) and 456.072(1)(w), Florida Statutes. Those provisions state in pertinent part:

> **458.331 Grounds for disciplinary action; action by the board and department.**--
>
> (1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):
>
> * * *
>
> (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.

* * *

456.072 Grounds for discipline; penalties; enforcement.--

(1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:

* * *

(w) 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. 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.

* * *

(2) When the board, or the department when there is no board, finds any person guilty of the grounds set forth in subsection (1) or of any grounds set forth in the applicable practice act, including conduct constituting a substantial violation of subsection (1) or a violation of the applicable practice act which occurred prior to obtaining a license, it may enter an order imposing one or more of the following penalties:
(a) Refusal to certify, or to certify with restrictions, an application for a license.
(b) Suspension or permanent revocation of a license. . . .

21. Respondent cites to Haggerty v. Department of Business and Professional Regulation, 716 So. 2d 873, 874 (Fla. 1st DCA 1998), which held that the Board of Employee Leasing Companies did not have the authority to discipline a licensee whose license

had expired prior to the filing of the Administrative Complaint against it. In doing so, however, the court stated:

> The language of [section 468.532(2)] only permits the department to discipline a licensee--not a former licensee or future applicant.
>
> Most disciplinary statutes phrase the authority of a professional board in language similar to the following:
>
> (1) The following acts shall be grounds for the disciplinary actions provided for in subsection (2):
>
> [list of prohibited acts]
>
> (2) When the agency finds <u>any</u> <u>person</u> guilty of any of the prohibited acts set forth in subsection (1), the agency may enter an order imposing one or more of the following penalties[.]
>
> (Emphasis added.) This wording permits the discipline of a former licensee for conduct committed while the license was active. . . .

22. The language in section 456.072(2) is like that illustrated by the First District, in that authorizes discipline against any person committing the enumerated offenses listed in the statute. Therefore, the Board continues to have the authority to impose discipline in this case.

23. Count I charges Respondent with violating section 458.331(1)(c). The Department correctly asserts that whether the conviction is directly related to the practice or the ability to practice medicine is not limited to the technical ability of Respondent in his practice setting. As stated by the First

District in Doll v. Department of Health, 969 So. 2d 1103, 1106 (Fla. 1st DCA 2007),

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

24. The same can be said here. Driving while intoxicated by its nature exhibits a reckless disregard for the lives of those who may cross one's path. In this instance, the death of a woman and her unborn child occurred as a result of Respondent's reckless behavior. The Department has demonstrated a violation of section 458.331(1)(c) by clear and convincing evidence.

25. Count II of the Amended Administrative Complaint charges Respondent with failing to report his conviction to the Board within 30 days. He acknowledged at hearing that he did not do so, but asserted that he was relying on the representations by the Air Force that it was notifying licensing agencies. His reliance is misplaced. The letters related to his clinical privileges in the Armed Forces, referenced in paragraph 8, indicated that "[D]epending on the outcome of this action, AFMOA/SGOC may report the matter to appropriate professional regulatory agencies." Clearly, this language does not affirmatively state that in fact the Board office would be notified. Further, in no way does this language relieve Respondent of his statutory responsibility to notify the Board office of his conviction. The Department has proven the allegations in Count II by clear and convincing evidence.

26. The Board of Medicine has adopted Disciplinary Guidelines to apprise the public and licensees of the range of penalties typically imposed for violations of sections 458.331 and 456.072 and the applicable rules. Fla. Admin. Code R. 64B8-8.001. The undersigned has considered the range of penalties for a violation of section 458.331(1)(c), as well as the applicable aggravating and mitigating factors identified in rule 64B8-8.001(3), including the death of the victim and her unborn child; the length of time Respondent had been licensed; and the length

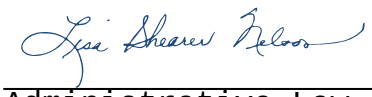
of time Respondent will be out of practice by virtue of his incarceration.

RECOMMENDATION

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

RECOMMENDED that the Florida Board of Medicine enter a Final Order finding that Respondent has violated section 458.331(1)(c) and section 456.072(1)(w), Florida Statutes (2002). It is further recommended that Respondent's license be revoked.

DONE AND ENTERED this 4th day of November, 2011, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 4th day of November, 2011.

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.