

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND)
PROFESSIONAL REGULATION,)
BOARD OF VETERINARY MEDICINE,)
)
Petitioner,)
)
vs.) Case No. 11-3268PL
)
RICHARD LANGFORD, D.V.M.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

On September 9, 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: C. Erica White, Esquire
Elizabeth Fletcher Henderson, Esquire
Kathleen Brown-Blake, Esquire
Department of Business and
Professional Regulation
1940 North Monroe Street
Tallahassee, Florida 323399

For Respondent: Ann Bittinger, Esquire
The Bittinger Law Firm
13500 Sutton Place Drive South
Suite 201
Jacksonville, Florida 32224

STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent violated section 474.214(1)(ee), Florida Statutes (2008), and if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On September 24, 2011, Petitioner, Department of Business and Professional Regulation (Petitioner or the Department), filed an Amended Administrative Complaint charging Respondent, Richard Langford, D.V.M. (Respondent or Dr. Langford), with several record-keeping deficiencies with respect to his care and treatment of the dog, Awesomer, in violation of section 474.214(1)(ee), Florida Statutes. Respondent disputed the facts alleged in the Amended Administrative Complaint, and requested a hearing pursuant to section 120.57(1), Florida Statutes. The matter was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

On July 14, 2011, a Notice of Hearing was issued scheduling the case to be heard September 9, 2011, and the case proceeded as scheduled. The discovery and motion practice leading up to the hearing was extensive. The docket of the Division provides the best recitation of the history of the litigation with respect to this matter, and need not be repeated in this Recommended Order, with one exception. On August 19, 2011, the Department filed a Motion to Amend Administrative Complaint, which was granted by Order dated September 1, 2011, and consistent with that Order the

Second Amended Administrative Complaint was filed on September 8, 2011.

At hearing, the Department presented the testimony of Richard Langford, D.V.M., and the testimony of Melanie Donofro, D.V.M., by deposition. Petitioner's Exhibits numbered 2-5, 7, 11 and 13 were admitted into evidence. Respondent testified on his own behalf and presented the testimony of Dr. Sergio Vega, D.V.M. Respondent's Exhibits numbered 1-2, 5-6, 14-17, 19, and 37 were admitted. Prior to the hearing, the parties filed a Joint Prehearing Statement that included stipulated facts that, where relevant, have been included in the findings of fact below.

A two-volume transcript was filed with the Division on September 27, 2011. Both parties timely filed Proposed Recommended Orders that have been carefully considered in the preparation of this Recommended Order. Respondent also filed a Motion for Attorneys' Fees and Costs pursuant to section 57.105, Florida Statutes, to which Petitioner has filed a response. The motion will be addressed by separate Final Order.

FINDINGS OF FACT

1. The Department is the state agency charged with the licensing and regulation of veterinarians in the State of Florida, pursuant to section 20.165 and chapters 455 and 474, Florida Statutes.

2. At all times material to the allegations in the Second Amended Administrative Complaint, Respondent has been licensed as a veterinarian, having been issued license number VM 5290.

3. Respondent was the treating veterinarian for a dog named Awesomer, owned by Sheri Lawhun.

4. On April 28, 2009, Ms. Lawhun brought Awesomer to Respondent for examination and treatment.

5. Just prior to his provision of care for Awesomer, Respondent's office switched to a "paperless" system, which involved switching to electronic medical records, bookkeeping, etc. Respondent testified that the medical record itself is stored on the computer software and that there are a wide variety of "print screen" options available. Respondent demonstrated the complicated nature of the software and the ability of the software to "hide" different parts of the medical record from the print screen, as well as copy and paste entries to the "top" of the medical record. The software does not allow Respondent to delete medical record entries, but does allow a user to hide them or make them unavailable to print.

6. As a result, there are three different sets of medical records for Awesomer that were admitted into evidence in this proceeding. Petitioner's Exhibit numbered 2 is the copy of medical records printed on May 16, 2009, at the request of the dog's owner, Ms. Lawhun. Petitioner's Exhibit numbered 3 is the copy of the records printed on July 15, 2009, in response to a

complaint filed with the Department. Petitioner's Exhibit numbered 4 is a copy of the medical records for Awesomer printed August 2, 2011, and provided to Respondent's counsel.

7. While much of the documentation is the same, there are some differences. Respondent attributes these differences to entries that he ordered "declined" or hidden, so that the client did not see them, or because information was on the "splash screen" in the program, which does not print. He also explained that the information related to Awesomer's final visit on the evening of April 30, 2009, was moved to the top of the record on May 16, 2009, so that her owner could see what happened the day the dog died. He claimed that the entry was originally recorded soon after the dog's death, but it was moved when providing the records to Ms. Lawhun. Similarly, the date of death for Awesomer is recorded in Petitioner's Exhibits numbered 2 and 3 as May 1, 2009, the first business day after the dog's final after-hours visit. It is corrected to April 30, 2009, in the records identified as Petitioner's Exhibit numbered 4.

8. The following findings of fact deal with the alleged deficiencies in the Respondent's medical records for Awesomer, in the order alleged in the Administrative Complaint.

9. Respondent did not record any recommendations for diagnostic tests or follow-up examinations to determine the cause of an elevated heart rate in Awesomer's medical records for April 28, 2009. He did not do so because in his professional

opinion, Awesome's heart rate was not elevated and was within normal limits.

10. Respondent did not record in Awesomer's medical records for April 28, 2009, any examination of feces. He did not do so because he did not perform any fecal tests.

11. Respondent's medical records for April 28, 2009, included laboratory results with test results for serum creatinine, serum albumin, serum sodium, and urine pH. He did not find any of these test results to be elevated.

12. Respondent did not record in the April 28, 2009, medical records any indication that Awesomer was drinking excessively, beyond a tentative diagnosis of psychogenic polydipsia. He did not do so because the history the owner gave his office on April 28, 2009, did not mention that the dog was drinking excessively.

13. Respondent's medical records for April 28, 2009, indicated that he administered Phenylpropanolamine but did not state the basis for doing so. Respondent testified that Phenylpropanolamine has one use in veterinary medicine: to help with urine retention in female dogs only, making further explanation unnecessary. His testimony on this issue, which was consistent with Dr. Vega's, is credited.

14. Ms. Lawhun brought Awesomer back to Respondent's office on April 29, 2009, for Respondent to conduct a modified water deprivation test. The medical records for Awesomer do not

include the dog's weight at the beginning or the end of the test. However, Respondent testified that, for a modified water deprivation test as opposed to a traditional water deprivation test, the weight of the animal at the beginning and end are not required, because the test simply measures the weight of the urine over time. Although the medical records sometimes refer to the test as a water deprivation test, in at least one entry in both Petitioner's Exhibits 3 and 4, the test is referred to as a modified water deprivation test. No persuasive evidence was presented by the Department that contradicts Respondent's distinction between a traditional modified water deprivation test and a modified water deprivation test.

15. The Second Amended Administrative Complaint alleges at paragraphs 23-24 that Respondent's written response from July 7, 2009, states that he provided Awesomer with some water at 2:30, and that the April 29, 2009, medical records fail to reflect that he received water during the water deprivation test. However, the Department did not introduce Respondent's written response dated July 7, 2009, into evidence.

16. There are also allegations in the Second Amended Administrative Complaint that reference the July 7, 2009, response regarding a visit to the clinic on April 29, 2009, in the evening. Respondent's medical records for Awesomer have no entries for the evening of April 29, 2009, but the Department presented no evidence that such a visit occurred.

17. On April 30, 2009, Respondent recorded Awesomer's heart rate as being 160. He did not record any recommendations for diagnostic tests or follow-up examinations to determine the cause of the elevated heart rate in Awesomer's medical records for April 30, 2009, because in his professional opinion, Awesomer's heart rate was within normal limits and was not tachycardic. The Department presented no evidence to support the premise that a heart rate of 160 is abnormal and needs further study.

18. Respondent did not record the total amount of fluid administered in Awesomer's medical records on April 30, 2009, but he did record the rates upon which the computerized fluid administration pump were set. Both of these rates were documented in the medical record.

19. Respondent performed a complete blood count (CBC) and general health profile with electrolytes on Awesomer on April 30, 2009. The lab results are included in the medical records, and indicated that the white blood count was high. While the Second Amended Administrative Complaint indicates that no explanation or discussion of the lab results was included in the medical records, there was no persuasive evidence that, as a record-keeping matter as opposed to a standard of care issue (with which Respondent was not charged), additional information was required.

20. Respondent discharged Awesomer on April 30, 2009. However, he received an emergency call that evening about the

dog, and returned to the clinic to see her. When Ms. Lawhun arrived with Awesomer, the dog was already dead.

21. Respondent did not fail to record an entry regarding Awesomer's emergency evening examination in Awesomer's April 30, 2009, medical records until May 16, 2009. Respondent entered the original post on April 30, 2009. On May 15, 2009, Awesomer's owner, Ms. Lawhun, requested to know what happened to Awesomer. On May 16, 2009, the Respondent directed a receptionist to print Awesomer's medical records, excluding non-medical notes, for Ms. Lawhun's boyfriend. The notes from April 30, 2009, were copied out of a post containing medical and non-medical notes to the top of the record on May 16, 2009, in order to exclude the non-medical notes. Given that the medical records record Awesomer's death as occurring either April 30 or May 1, Respondent's testimony is credited.

22. The Board of Veterinary Medicine's rule regarding recordkeeping requirements does not define "contemporaneous." Moreover, Dr. Melanie Donofro, D.V.M., the Department's expert and a former board member, could not identify a standard length of time recognized in veterinary practice in which medical records could be considered contemporaneous.

23. The Second Amended Administrative Complaint refers to a response dated March 16, 2011, prepared by Respondent to present to the probable cause panel of the Board of Veterinary Medicine, and several entries in the response that are labeled as

"clarifications" but that are different from the entries in the medical records for Awesomer. However, this March 16, 2011 response was not submitted into evidence by the Department.

24. Dr. Sergio Vega, former board member and expert witness for Respondent, testified that the purpose for accurate medical records is to allow other treating veterinarians or anyone else reading the records to be able to understand what a veterinarian did or did not do. Whether the appropriate treatment was given is not a medical records issue, but a standard of care issue. His testimony is credited.

CONCLUSIONS OF LAW

25. 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.

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

27. 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)).

28. The Second Amended Administrative Complaint in this case charges Respondent with violating section 474.214(1)(ee), Florida Statutes (2008-2009), which provides in pertinent part:

474.214 Disciplinary proceedings.--

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

* * *

(ee) Failing to keep contemporaneously written medical records as required by rule of the board.

29. Florida Administrative Code Rule 61G18-18.002 provides in pertinent part:

61G18-18.002 Maintenance of Medical Records.

(1) There must be an individual medical record maintained on every patient examined or administered to by the veterinarian, except as provided in (2) below, for a period of not less than three years after date of last entry. The medical record shall contain all clinical information pertaining to the patient with sufficient information to justify the diagnosis or determination of

health status and warrant any treatment recommended or administered.

* * *

(3) Medical records shall be contemporaneously written and include the date of each service performed. They shall contain the following information:

- Name of owner or agent
- Patient identification
- Record of any vaccinations administered
- Complaint or reason for provision of services
- History
- Physical examination
- Any present illness or injury noted
- Provisional diagnosis or health status determination

(4) In addition, medical records shall contain the following information if these services are provided or occur during the examination or treatment of an animal or animals:

- Clinical laboratory reports
- Radiographs and their interpretation
- Consultation
- Treatment - medical, surgical
- Hospitalization
- Drugs prescribed, administered, or dispensed
- Tissue examination report
- Necropsy findings

(6) A veterinarian shall, upon a written request, furnish, in a timely manner without delays for legal reviews, a true and correct copy of all of the patient records to the client, or to anyone designated by the client. Such records release shall not be conditioned upon payment of a fee for services rendered, except for the reasonable cost of duplication.

* * *

(8) It is understood that there may be several files in different locations. Sufficient cross indexes are to be maintained for prompt retrieval when required.

(9) Medical records may be maintained in an

easily retrievable electronic data format; however, the licensee shall be responsible for providing an adequate backup system to assure data is not lost due to system failure.

30. After careful review of the three sets of medical records in this case, the Department did not establish by clear and convincing evidence that Dr. Langford's medical records for Awesomer did not include the specific items listed in the Second Amended Administrative Complaint.

31. Much of the confusion surrounding these records stems from the fact that there were different printed versions that varied, depending on the print commands involved. While Dr. Langford contends that the actual medical record is in his computer, his view is rejected. Rule 61G18-18.002(5) and (6) specifically requires that a complete copy of all patient records should be available, upon request by a client or upon subpoena. The documents retrieved should be the same, regardless of when printed, and, consistent with rule 61G18-18.002(1), should include "all clinical information pertaining to the patient with sufficient information to justify the diagnosis or determination of health status and warrant any treatment recommended or administered."

32. The three printed versions, standing individually, did not necessarily meet this standard. However, in terms of the specific deficiencies alleged, Dr. Langford's medical records contained the specific items required by rule. He can only be

disciplined for deficiencies specifically alleged in the Second Amended Administrative Complaint. Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005); Ghani v. Dep't of Health, 714 So. 2d 1113 (Fla. 1st DCA 1998); and Willner v. Dep't of Prof. Reg., 563 So. 2d 805 (Fla. 1st DCA 1990).

33. Petitioner asserts that the intent of chapter 474 is "to require Florida licensed veterinarians to keep records that are accurate, clear and made near the time of the treatment of the animal in question." The undersigned agrees. However, the actual statutory language used requires a veterinarian to "keep contemporaneously written medical records as required by rule of the board." § 474.214(1)(ee).

When the language of the statute is clear and unambiguous and conveys a clear and definite meaning . . . the statute must be given its plain and obvious meaning. Further, we are without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power.

Mendenhall v. State, 48 So. 3d 740, 748 (Fla. 2010) (quoting Velez v. Miami-Dade Cnty. Police Dep't, 934 So. 2d 1162, 1164-65 (Fla. 2006) (quotation marks and citations omitted)). Under the plain language of section 474.214(1)(ee), the type of medical records necessary need to be defined by Board rule. The Board rule here does not define "contemporaneous" and the Department's expert could not identify an industry standard for the term as applied to medical records.

34. In Breesmen v. Department of Professional Regulation, 567 So. 2d 469, 471-472 (Fla. 1st DCA 1990), a physician was disciplined for failing to record a patient's refusal of treatment in her medical records. In reversing the Board's order, the First District stated:

There was no showing on this record that Dr. Breesmen did not record all medical treatment administered to his patient, or that the entries he made were false or inaccurate. The entire case against him rests on failing to note why he did not follow other courses of treatment. Thus, it cannot be said that Dr. Breesmen violated the statutory standard established by the language set forth in section 458.331(1)(m).

. . .

We also note that at no time during these proceedings has the Board made reference to any statute or rule that fixes the standard of conduct to be followed by a physician whose patient refuses treatment and requests that his or her refusal not be documented in the hospital records. Nor has the Board set forth any statute or rule that requires a physician to document in the patient's medical chart the physician's reason for not performing particular tests or procedures. Basic due process requires that a professional or business license not be suspended or revoked without adequate notice to the licensee of the standard of conduct to which he or she must adhere. The opinions of the expert witnesses offered by the parties cannot make certain, after the fact, those standards of conduct that are not clearly set forth in the statute or rule.

35. With respect to this case, rule 61G18-18.002 provides a laundry list of those items that must be included in an animal's medical records, and those items that must be included if the services are provided. Those items identified in the Second

Amended Administrative Complaint are found in Respondent's medical records for Awesomer. The closer question is whether, if the entries for treatment given April 30, 2009, were actually posted May 16, 2009, they could be considered contemporaneous. While the time period involved would stretch the envelope, there is no evidence of an accepted standard by which to measure the time period and the rule does not provide a standard. Under these circumstances, it cannot be concluded that Respondent has violated section 474.214(1)(ee) by failing to record medical records contemporaneously.

RECOMMENDATION

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

RECOMMENDED that a Final Order be entered dismissing the Second Amended Administrative Complaint.

DONE AND ENTERED this 14th day of November, 2011, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of November, 2011.

COPIES FURNISHED:

Ann M. Bittinger, Esquire
The Bittinger Law Firm
13500 Sutton Park Drive South, Suite 201
Jacksonville, Florida 32224

C. Erica White, Esquire
R. Kathleen Brown-Blake, Esquire
Department of Business
and Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399

Juanita Chastain, Executive Director
Board of Veterinary Medicine
Department of Business
and Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399

Layne Smith, General Counsel
Department of Business
and Professional Regulation
1940 North Monroe Street, Suite 42
Tallahassee, Florida 32399

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.