

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

UNIQUE HEALTH CARE ORLANDO,            )  
  )  
      Petitioner,                            )  
  )  
vs.    )     Case No. 11-3366  
  )  
DEPARTMENT OF HEALTH,                 )  
  )  
      Respondent.                         )  
\_\_\_\_\_  
  )

RECOMMENDED ORDER

Pursuant to notice, on September 13, 2011, a formal hearing in this cause was held in Orlando, Florida, before the Division of Administrative Hearings by its designated Administrative Law Judge Linzie F. Bogan.

APPEARANCES

For Petitioner: A. Anthony Giovanoli, Esquire  
                  A. Anthony Giovanoli, P.A.  
                  Post Office Box 2429  
                  Winter Park, Florida 32790

For Respondent: Morris Shelkofsky, Esquire  
                  Department of Health  
                  4052 Bald Cypress Way, Bin A02  
                  Tallahassee, Florida 32399-1703

STATEMENT OF THE ISSUE

Whether Petitioner's certificate of registration as a pain management clinic should be revoked pursuant to section 458.3265, Florida Statutes (2010).<sup>1/</sup>

PRELIMINARY STATEMENT

Effective July 1, 2009, all privately-owned pain management clinics, facilities, or offices were required to register with Respondent, Department of Health (Department), by January 4, 2010, unless the clinics met certain enumerated statutory exceptions. On or about January 5, 2010, Petitioner, Unique Health Care Orlando (Unique or Petitioner), submitted to the Department an application for pain management clinic registration. On March 10, 2010, the Department issued to Petitioner pain management clinic certificate registration no. PMC 681 (License). On October 1, 2010, approximately seven months after Unique was registered as a pain management clinic, there was a change in the law such that the Department was required to revoke previously-issued certificates of registration if a clinic was neither fully owned by a properly licensed physician or group of physicians, nor licensed under part X of chapter 400, Florida Statutes.

The Department contends that Unique failed to meet the requirements that became effective October 1, 2010, and, accordingly, the Department, on or about November 19, 2010, advised Unique of its intent to revoke its License. In response to the Department's proposed action, Unique, on December 13, 2010, filed a request for formal hearing as authorized by chapter 120, Florida Statutes. On or about July 8, 2011, the

Department referred the matter to the Division of Administrative Hearings for a disputed fact hearing.

A Notice of Hearing was issued setting the case for formal hearing on September 13, 2011. At the hearing, Unique called one witness, Ronald Van Der Kuijl. Mr. Van Der Kuijl is part-owner of Unique. The Department also offered the testimony of only one witness, JoAnne Trexler. Unique's Exhibits 1 through 6 and 9 through 12 were offered and received into evidence without objection. By stipulation, Unique's Exhibits 7 and 8 were admitted for limited purposes.<sup>2/</sup> The Department's Exhibits 1 through 3 were offered and received into evidence without objection.<sup>3/</sup>

A Transcript of the proceeding was ordered and filed with the Division of Administrative Hearings on October 25, 2011. On October 31, 2011, Petitioner and Respondent each submitted a Proposed Recommended Order. The Proposed Recommended Orders submitted by the parties have been considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. By stipulation the parties agreed to the following:
  - A) Unique is a Florida for-profit corporation;
  - B) Unique is not a pain management clinic. However, Unique is registered as a pain management clinic with the Department; and

C) Ronald and Grace Van Der Juijl are not physicians licensed under chapters 458 or 459, Florida Statutes. Unique is, therefore, not fully owned by a physician licensed under chapters 458 or 459, or a group of physicians, each of whom is licensed under chapter 458 or 459.

2. Section 458.309(4), Florida Statutes (2009), reads, in part, as follows:

All privately owned pain-management clinics, facilities, or offices, hereinafter referred to as "clinics," which advertise in any medium for any type of pain-management services, or employ a physician who is primarily engaged in the treatment of pain by prescribing or dispensing controlled substance medications, must register with the department by January 4, 2010, unless that clinic is licensed as a facility pursuant to chapter 395.

3. On January 5, 2010, Unique, pursuant to section 458.309(4), submitted to the Department an application for pain clinic registration. On March 10, 2010, the Department issued to Unique, pain management clinic license no. PMC 681.<sup>4/</sup>

4. On October 1, 2010, approximately nine months after becoming effective, section 458.309(4) was repealed.

5. Also on October 1, 2010, section 458.3265 became effective. Section 458.3265(1) provides, in part, as follows:

(d) The department shall deny registration to any clinic that is not fully owned by a physician licensed under this chapter or chapter 459 or a group of

physicians, each of whom is licensed under this chapter or chapter 459; or that is not a health care clinic licensed under part X of chapter 400.

\* \* \*

(f) If the department finds that a pain-management clinic does not meet the requirement of paragraph (d), . . . the department shall revoke the certificate of registration previously issued by the department. As determined by rule, the department may grant an exemption to denying a registration or revoking a previously issued registration if more than 10 years have elapsed since adjudication. As used in this subsection, the term "convicted" includes an adjudication of guilt following a plea of guilty or nolo contendere or the forfeiture of a bond when charged with a crime. (Emphasis supplied.)

6. Unique is not a health care clinic licensed under part X of chapter 400.

#### CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding. §§ 120.569 and 120.57(1).

8. The Department, pursuant to section 458.3265(1), seeks to revoke occupational license no. PMC 681 issued by the Department to Unique. Accordingly, the Department has the burden of establishing by clear and convincing evidence the facts necessary to support revocation. See, e.g., Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987). Clear and convincing evidence has been described by the courts as follows:

[C]lear 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 the 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) (citing Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

9. The undisputed evidence shows that Unique is neither fully owned by a physician or group of physicians licensed under chapter 458 or chapter 459, nor is it licensed under part X of chapter 400. Consequently, Unique does not meet the requirements of section 458.3265(1)(d), and the Department, in accordance with section 458.3265(1)(f), must revoke Unique's license, unless Unique can show that its license is exempt from revocation.

10. Unique argues that it is exempt from having its license revoked by the Department because it is affiliated with "an accredited medical school at which training is provided for medical students, residents, or fellows" as authorized by sections 458.3265(1)(a)4. and 459.0137(1)(a)2.d. As more fully illuminated below, the essence of Unique's argument is that the relevant statutory framework provides, by implication, for the exception that it seeks. The burden of proof related to

establishing entitlement to an 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 HRS, 348 So. 2d 349 (Fla. 1st DCA 1977). In the instant case, Unique bears the burden of proving that it fits within the scope of any purported exemption.

11. As applied to the instant case, sections 458.3265(1)(f) and 459.0137(1)(f), contain parallel provisions which provide that the Department may exempt a clinic from license revocation "if more than 10 years have elapsed since adjudication."<sup>5/</sup> Contrary to Unique's assertion, the "10 year adjudication" exemption is the only exemption contained in either section 458.3265(1)(f) or 459.0137(1)(f), and Unique makes no claim to its entitlement.

12. Inclusio unius est exclusio alterius is the Latin maxim which instructs that the inclusion of one thing implies the exclusion of another. Smith v. State, 982 So. 2d 69, 70 (Fla. 1st DCA 2008) (citing Rivera v. Singletary, 707 So. 2d 326 (Fla. 1988)). If the Legislature intended to exempt from license revocation pain management clinics that may be affiliated with accredited medical programs, as set forth in sections 458.3265(1)(a)4. and 459.0137(1)(a)2.d., then it could have said so. By expressly providing for the "10 year adjudication" exemption and setting forth no other, it is

evident that the Legislature intended not to create other exemptions (either express or implied), including those suggested by Petitioner.<sup>6/</sup> Unique has failed to satisfy its burden of demonstrating entitlement to the exemption provided for in either section 458.3265(1)(f) or 459.0137(1)(f).

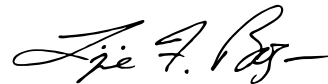
13. The Department has met its burden of proof by clearly and convincingly establishing that Unique has failed to satisfy the statutory requirements for holding a license as a pain management clinic.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law set forth herein, it is

RECOMMENDED that Respondent, Department of Health, enter a final order revoking Petitioner, Unique Health Care Orlando's, license to operate as a pain management clinic.

DONE AND ENTERED this 8th day of November, 2011, in Tallahassee, Leon County, Florida.



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LINZIE F. BOGAN  
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Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 8th day of November, 2011.

ENDNOTES

<sup>1/</sup> All references to Florida Statutes are to the 2010 edition unless otherwise indicated.

<sup>2/</sup> As for Petitioner's Exhibit 7, the parties stipulated that "Central Florida Institute Orlando is, at a minimum, a health education school accredited by the accrediting bureau of health education schools at which training is provided for medical students to become medical assistants." As for Petitioner's Exhibit 8, the parties stipulated that "Sanford Brown Orlando is, at a minimum, a health education school accredited by the accrediting council for independent colleges and schools and the accrediting bureau of health education schools at which training is provided for medical students to become nurses and medical assistants."

<sup>3/</sup> Petitioner objected to pages 10, 29, and 30 of Respondent's Exhibit 1. Respondent removed each objectionable page, and the remaining pages were admitted as evidence.

<sup>4/</sup> Petitioner was actually issued a certificate of registration. Section 120.52(10) provides generally that a "registration" is considered a license.

<sup>5/</sup> Section 459.0137, which also became effective on October 1, 2010, contains the same material proscriptions as found in section 458.3265.

<sup>6/</sup> The issue of whether Unique is affiliated with an accredited program, as contemplated by sections 458.3265(1)(a)4. and 459.0137(1)(a)2.d., may be germane in a proceeding dealing with whether Unique can operate as a pain management clinic without registering with the Department. However, the Notice of Intent to Revoke Certification of Registration filed by the Department makes no mention of whether Unique can continue its operations post revocation. Because this issue is not before the Division of Administrative Hearings, the undersigned need not, and arguably cannot, address the same.

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.