

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
DENTISTRY,)
)
Petitioner,)
)
vs.) Case No. 12-0005PL
)
GUSTAVO B. BORGES, D.D.S.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on December 12, 2012, in Tallahassee, Florida, before Todd P. Resavage, an Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Adrienne C. Rodgers, Esquire
Tari Anne Rossitto-Van Winkle, Esquire
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For Respondent: Randall M. Shochet, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent's plea and adjudication of guilt to knowingly receiving child pornography, in violation of Title 18, United States Code, § 2252A(a)(2)(A), relates to Respondent's practice or ability to practice dentistry, violating section 466.028(1)(11) by violating 456.072 (1)(c), Florida Statutes, and if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

On or about July 29, 2008, the Board of Dentistry, issued an Administrative Complaint charging Respondent with violating section 466.028(1)(11), Florida Statutes, by violating section 456.072 (1)(c), Florida Statutes, by his plea and adjudication of guilt to knowingly receiving child pornography, in violation of Title 18, United States Code, § 2252A(a)(2)(A). Respondent timely requested a formal hearing to contest the allegations, and, on January 3, 2012, Petitioner Department of Health referred the matter to the Division of Administrative Hearings ("DOAH"), where it was assigned to Administrative Law Judge John G. Van Laningham.

The final hearing initially was set for March 13, 2012; however, Respondent, who was incarcerated, filed an unopposed motion to continue. The same was granted and the final hearing was re-scheduled for June 6, 2012.

On May 2, 2012, Respondent filed a Motion to Continue the final hearing until July 9, 2012. Respondent's continuance was granted and the cause was re-scheduled for final hearing on July 9, 2012. Respondent requested another continuance of the matter on June 19, 2012, and the same was granted re-scheduling the final hearing for December 12, 2012. This case was subsequently transferred to the undersigned for all further proceedings.

The final hearing was held on December 12, 2012. Petitioner presented the testimony of Respondent, and Petitioner's Exhibit 1 was admitted, together with Joint Exhibits numbered J1-13. Respondent testified on his own behalf, and Respondent's Exhibits 1 and 3 were admitted, over objection. The admitted facts contained within the parties previously filed Joint Pre-Hearing Stipulation were admitted into evidence.

The final hearing transcript was filed with DOAH on January 16, 2013. On January 25, 2013, the parties filed a Joint Motion for an Extension of Time to File and Serve Proposed Recommended Orders to February 18, 2013, and the same was granted. Both Parties timely submitted proposed recommended orders, which the undersigned has considered in the preparation of this Recommended Order. Unless otherwise indicated,

citations to the Florida Statutes refer to the 2007 Florida Statutes.

FINDINGS OF FACT

1. At all times relevant to this case, Respondent Gustavo Borges, D.D.S., was licensed to practice dentistry in the state of Florida, having been issued license number DN 14716.

2. Petitioner Department of Health, Board of Dentistry (the "Department") has regulatory jurisdiction over licensed dentists such as Dr. Borges. In particular, the Department is authorized to file and prosecute an administrative complaint against a dentist, as it has done in this instance, when a panel of the Board of Dentistry has found that probable cause exists to suspect the dentist has committed a disciplinable offense.

3. On May 17, 2007, the United States Attorney for the Southern District of Florida filed a one-count Information against Respondent, alleging that, on or about April 29, 2006, Respondent "did knowingly receive child pornography, as defined in Title 18, United States Code, Section 2256(8)(A), that had been mailed, shipped, and transported in interstate and foreign commerce by any means, including by computer; in violation of Title 18, United States Code, Section 2252A(a)(2)(A)." The case was filed in the Miami Division of the United States District Court, Southern District of Florida, and docketed as Case No. 07-20396-CR-MGC.^{1/}

4. On December 19, 2007, Respondent tendered a plea of guilty and was adjudicated guilty of one count of knowingly receiving child pornography in violation of 18 U.S.C. § 2252(a)(2)(A). Respondent was sentenced to serve seventy-one months in the United States Bureau of Prisons, followed by five years of supervised release, and a \$5,000.00 fine.^{2/}

5. On or about August 7, 2008, Petitioner served Respondent with an Administrative Complaint charging that Respondent, by his plea and adjudication of guilt to knowingly receiving child pornography, in violation of Title 18, United States Code, § 2252A(a)(2)(A), violated section 466.028(1)(11), Florida Statutes, by violating section 456.072 (1)(c), Florida Statutes.

6. Respondent was released from prison on November 27, 2012. Pursuant to the terms of Respondent's supervised release, he is precluded from committing any crime; unlawfully possessing controlled substances; possessing a firearm, destructive device, or any other dangerous weapon; and must comply with numerous other standard conditions.

7. In addition to the standard conditions of supervision, Respondent is mandated to comply with certain special conditions of supervision that are tailored to the crime for which he was adjudicated guilty. In general, he is mandated to have no unsupervised contact with minors; required to participate in a

sex offender treatment program; restricted from the possession of sexually explicit materials; required to maintain a daily log of his computer activity; directed to refrain from accessing via computer any material that relates to the activity in which he was engaged in committing his offense; and is required to maintain full-time, legitimate employment, subject to certain exceptions.

8. Moreover, as a result of his conviction, Respondent is classified as a sexual offender under section 943.0435(1)(a)1.a., Florida Statutes. As such, Respondent has registered as a sexual offender with the Florida Department of Law Enforcement, as required by section 943.0435(11), and must maintain such registration, subject to certain exceptions, for the duration of his life.

9. Respondent, in his Proposed Recommended Order, has conceded that his conviction under 18 U.S.C. § 2252(a)(2)(A) is a crime related to the ability to practice dentistry, in violation of section 456.072(1)(c).

10. Respondent has no prior disciplinary history concerning his dental license.

11. Respondent has provided volunteer dental services both locally and internationally, as well as local social work.

CONCLUSIONS OF LAW

12. 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.

13. 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 Dr. Gustavo 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 Medicine, 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

14. 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 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) (citations omitted).

15. Disciplinary statutes and rules "must be construed strictly, in favor of the one against whom the penalty would be imposed." Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992); see Camejo v. Dep't of Bus. & Prof'l Reg., 812 So. 2d 583, 583-84 (Fla. 3d DCA 2002); McClung v. Crim. Just. Stds. & Training Comm'n, 458 So. 2d 887, 888 (Fla. 5th DCA 1984) ("[W]here a statute provides for revocation of a license the grounds must be strictly construed because the statute is penal in nature. No conduct is to be regarded as included within a penal statute that is not reasonably proscribed by it; if there are any ambiguities included, they must be construed in favor of the licensee.");

see also Griffis v. Fish & Wildlife Conserv. Comm'n, 57 So. 3d 929 (Fla. 1st DCA 2011) (statutes imposing a penalty must never be extended by construction).

16. Due process prohibits an agency from taking disciplinary actions against a licensee based on matters not specifically alleged in the charging instrument. See § 120.60 (5), Fla. Stat. ("No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the entry of a final order, the agency has served, by personal service or certified mail, an administrative complaint which affords reasonable notice to the licensee of facts or conduct which warrant the intended action"); see also Trevisani v. Dep't of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005) ("A physician may not be disciplined for an offense not charged in the complaint."); Marcelin v. Dep't of Bus. & Prof'l Reg., 753 So. 2d 745, 746-747 (Fla. 3d DCA 2000); Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1991) ("[T]he conduct proved must legally fall within the statute or rule claimed [in the administrative complaint] to have been violated.").

17. The Complaint alleges that Respondent "has violated Section 466.028(1)(11), Florida Statutes (2007) by violating Section 456.072(1)(c), Florida Statutes (2007) by being convicted of Knowingly Receiving Child Pornography in Federal

Court which relates to the practice of dentistry or his ability to practice dentistry."

18. Chapter 466 is a special statute concerned with the regulation of dentists, dental hygienists, and dental laboratories. Section 466.028 sets forth the grounds for discipline, as well as the action that may be taken by the Board of Dentistry upon a violation of a disciplinable offense.

19. Section 466.028(1)(11), provides as follows:

(1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):

* * *

(11) Violating any provision of this chapter or chapter 456, or any rules adopted pursuant thereto.

20. Chapter 456 sets forth general provisions regarding regulation of health-care professionals. As noted above, the Department alleges Respondent violated section 466.028(1)(11), by a violation of section 456.072(1)(c). Section 456.072(1)(c), in turn, provides as follows:

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

* * *

(c) Being convicted or found guilty of, or entering a plea of guilty or nolo contendere to, regardless of adjudication, a crime in any jurisdiction which relates to the

practice of, or the ability to practice, a licensee's profession.

21. Pursuant to the findings of fact contained herein, Petitioner has adduced clear and convincing evidence that Respondent pled guilty to, and was ultimately adjudicated guilty of, one count of receiving child pornography in violation of 18 U.S.C. § 2252(a)(2)(A).

22. The remaining issue, therefore, is whether the crime to which Respondent pled guilty relates to the practice of dentistry or to the ability to practice dentistry. The practice of dentistry is defined in section 466.003, Florida Statutes, as follows:

"Dentistry means the healing art which is concerned with the examination, diagnosis, treatment planning, and care of conditions within the human oral cavity and its adjacent tissues and structures. It includes the performance or attempted performance of any dental operation, or oral or oral-maxillofacial surgery and any procedures adjunct thereto, including physical evaluation directly related to such operation or surgery pursuant to hospital rules and regulations. It also includes dental service of any kind gratuitously or for any remuneration paid, or to be paid, directly or indirectly, to any person or agency. The term "dentistry" shall also include the following:

(a) The taking of an impression of the human tooth, teeth, or jaws directly or indirectly and by any means or method.

(b) Supplying artificial substitutes for the natural teeth or furnishing, supplying,

constructing, reproducing, or repairing any prosthetic denture, bridge, appliance, or any other structure designed to be worn in the human mouth except on the written work order of a duly licensed dentist.

(c) The placing of an appliance or structure in the human mouth or the adjusting or attempting to adjust the same.

(d) Delivering the same to any person other than the dentist upon whose work order the work was performed.

(e) Professing to the public by any method to furnish, supply, construct, reproduce, or repair any prosthetic denture, bridge, appliance, or other structure designed to be worn in the human mouth.

(f) Diagnosing, prescribing, or treating or professing to diagnose, prescribe, or treat disease, pain, deformity, deficiency, injury, or physical condition of the human teeth or jaws or oral-maxillofacial region.

(g) Extracting or attempting to extract human teeth.

(h) Correcting or attempting to correct malformations of teeth or jaws.

(i) Repairing or attempting to repair cavities in the human mouth.

23. Although the statutory definition of dentistry does not, on its face, specifically refer to acts involved in the crime of knowingly receiving child pornography, that does not conclude the analysis. Indeed, it is not necessary to evaluate Respondent's "technical ability" to practice dentistry, nor must Petitioner necessarily demonstrate that Respondent's criminal

acts are referenced in the statutory definition of dentistry.

See Doll v. Dep't of Health, 969 So. 2d 1103 (Fla. 1st DCA

2007). In Doll, the court held:

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. We therefore affirm appellee's actions finding appellant in violation of section 456.072(1)(c) and revoking appellant's license.

Doll, 969 So. 2d at 1006; see also Dep't of Health, Bd. of

Medicine v. Carter, Case No. 12-1575, 2012 Fla. Div. Adm. Hear.

LEXIS 746 (Fla. DOAH Dec. 26, 2012) (citing Doll and concluding that a guilty plea to possession of child pornography related to the practice or ability to practice medicine).

24. In analyzing whether a particular crime relates to the practice or ability to practice dentistry, the potential danger to the public is to be considered. The Rush court's discussion of this concern is instructive. Specifically, the court held:

By confining the convictions upon which disciplinary action may be based to those directly related to the practice of podiatry, the Legislature has not limited the grounds for disciplinary action to only those crimes which relate to the technical ability to practice podiatry or to those which arise out of misconduct in the office setting. A conviction for a crime, such as importing marijuana, which presents a danger to the public welfare will be adequate basis for disciplinary action to be taken against a practitioner.

Rush, 969 So. 2d at 1006.

25. Section 466.001, Florida Statutes, entitled "Legislative purpose and intent," provides in part:

. . . It is the further legislative intent that dentists and dental hygienists who fall below minimum competency or who otherwise present a danger to the public shall be prohibited from practicing in this state. All provisions of this chapter relating to the practice of dentistry and dental hygiene shall be liberally construed to carry out such purpose and intent.

26. As noted above, as a result of his conviction, Respondent is classified as a sexual offender under section 943.0435(1)(a)1.a., Florida Statutes. Section 943.0435(12), addresses the potential risk sexual offenders pose to the public:

The Legislature finds that sexual offenders, especially those who have committed offenses against minors, often pose a high risk of engaging in sexual offenses even after being released from incarceration or commitment and that protection of the public from sexual offenders is a paramount government interest.

27. Respondent has conceded that the crime of knowingly receiving child pornography, to which he pled guilty, is a crime that relates to the ability to practice the profession of dentistry, in violation of section 456.072(1)(c). Accordingly, Respondent is subject to discipline under section 466.028(11), as charged in the Complaint.

28. The Board of Dentistry imposes penalties upon licensees in accordance with the disciplinary guidelines prescribed in Florida Administrative Code Rule 64B5-13.005. The disciplinary guideline for Respondent's offending conduct—a plea and adjudication of guilt to a crime that relates to the ability to practice dentistry—is set forth in rule 64B5-13.005(1)(c). The range of penalties for a first offense is a minimum penalty of a \$1,000 fine to a maximum penalty of a "denial or two years

suspension, two years probation with conditions and \$10,000 fine, or revocation."

29. Rule 64B5-13.005(2) provides direction in the application of aggravating and mitigating circumstances to the penalty guidelines, and provides in pertinent part, as follows:

(2) Based upon consideration of aggravating or mitigating factors, present in an individual case, except for explicit statutory maximum and minimum penalty requirements, the Board may deviate from the penalties recommended in subsection (1) above and subsection (3) below. The Board shall consider as aggravating or mitigating factors the following:

- (a) The danger to the public;
- (b) The number of specific offenses, other than the offense for which the licensee is being punished;
- (c) Prior discipline that has been imposed on the licensee;
- (d) The length of time the licensee has practiced;
- (e) The actual damage, physical or otherwise, caused by the violation and the reversibility of the damage;
- (f) The deterrent effect of the penalty imposed;
- (g) The effect of the penalty upon the licensee;
- (h) Efforts by the licensee towards rehabilitation;
- (i) The actual knowledge of the licensee pertaining to the violation;

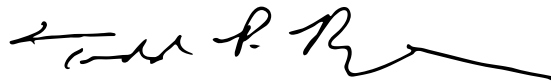
- (j) Attempts by the licensee to correct or stop the violation or refusal by the licensee to correct or stop violation;
- (k) Any other relevant mitigating or aggravating fact under the circumstances.

30. Having considered the potential aggravating and mitigating factors, the undersigned does not find compelling reasons to deviate from the guidelines, and, therefore, recommends that the Board of Dentistry impose a penalty that falls within the recommended range.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Dentistry enter a final order finding Dr. Borges guilty of violating section 466.028(1)(11) by violating section 456.072(1)(c), Florida Statutes, and revoking his license to practice dentistry.

DONE AND ENTERED this 11th day of March, 2013, in Tallahassee, Leon County, Florida.



TODD P. RESAVAGE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of March, 2013.

ENDNOTES

^{1/} Respondent's undisputed conduct that initiated the federal investigation and subsequent prosecution is contained within Exhibit J-11.

^{2/} On September 4, 2008, Respondent's judgment was amended, *nunc pro tunc* to December 19, 2007, to reflect that Respondent was permitted to have supervised contact with minors.

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.