

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF )  
MEDICINE, )  
 )  
Petitioner, )  
 ) Case No. 12-3688PL  
vs. )  
 )  
GRIGORY KLIGER, M.D., )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference on January 2, 2013.

APPEARANCES

For Petitioner: Yolonda Y. Green, Esquire  
Robert A. Milne, Esquire  
Department of Health  
4052 Bald Cypress Way, Bin C-65  
Tallahassee, Florida 32399-3265

For Respondent: Mark L. Pomeranz, Esquire  
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STATEMENT OF THE ISSUES

The primary issue in this case is whether the crime of which Respondent was convicted directly relates to the practice

of medicine or the ability to practice. If so, it will be necessary to determine an appropriate penalty.

PRELIMINARY STATEMENT

On March 25, 2011, Petitioner Department of Health ("Department") issued an Administrative Complaint against Respondent Grigory Kliger, M.D. The Department alleged that Dr. Kliger had been convicted of a crime which directly relates to the practice of medicine. Dr. Kliger timely requested a formal hearing, and on November 15, 2012, the Department filed the pleadings with the Division of Administrative Hearings, where an Administrative Law Judge was assigned to preside in the matter.

The final hearing took place on January 2, 2013. Both parties appeared through counsel. Dr. Kliger himself, however, was not present. The Department called two witnesses: Jennifer L. Friedberg, Esquire; and Saundre D. Wilson. In addition, Petitioner's Exhibits 1 through 8 were received in evidence. Dr. Kliger presented no witnesses. Respondent's Exhibits 1 and 2 were admitted into evidence.

The one-volume final hearing transcript was filed on January 31, 2013. Accordingly, Proposed Recommended Orders were due, pursuant to the time frame agreed upon at the conclusion of the hearing, on March 4, 2013. On the Department's motion, however, that deadline was enlarged to March 25, 2013. Dr. Kliger thereafter sought, and was granted, an additional

extension of time; his Proposed Recommended Order was due on March 29, 2013. The parties' respective Proposed Recommended Orders have been considered.

On March 8, 2013, the Department filed a Motion to Reopen Record, which was granted on March 18, 2013. Petitioner's Exhibits 9-12 were filed on March 20, 2013; it is hereby ORDERED that these exhibits are admitted into evidence.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2008 Florida Statutes.

#### FINDINGS OF FACT

1. At all times relevant to this case, Grigory Kliger, M.D., was licensed to practice medicine in the state of Florida, having been issued license number ME82106.

2. Petitioner has regulatory jurisdiction over licensed physicians such as Dr. Kliger. In particular, the Department is authorized to file and prosecute an administrative complaint against a physician, as it has done in this instance, when a panel of the Board of Medicine has found that probable cause exists to suspect that the physician has committed a disciplinable offense. Exercising its prosecutorial authority, the Department has charged Dr. Kliger with one such offense, namely, being found guilty of a crime which directly relates to the practice of medicine.

3. On February 1, 2005, in a case styled United States v. Kliger, No. 05-CR-12, which was then pending in the U.S. District Court for the Eastern District of New York, Dr. Kliger pleaded guilty to one count of a single-count information. The criminal offense with which he had been charged was conspiracy to commit health care fraud as defined in sections 1347 and 1349 of Title 18 of the U.S. Code.

4. During the plea colloquy, Dr. Kliger testified under oath as follows regarding his criminal conduct:

Between 1996 and June 2003, I knowingly and willfully agreed with others to defraud no-fault insurance companies which provided healthcare benefit programs that effected [sic] interstate commerce.

\* \* \*

I was a doctor and had an ownership interest in several medical clinics, including medical clinics in Brooklyn, Queens and the Bronx, New York and elsewhere which submitted false claims to insurance companies for medical benefits, items and services that were never performed or delivered, were not ordered by a physician or were not necessary for treatment.

When I caused this [sic] false claims to be submitted and reimbursed by the insurance, I knew wadd [sic] I was doing was wrong.

The magistrate judge found that Dr. Kliger's testimony was given knowingly and voluntarily and that there was an adequate factual basis for his plea; she recommended that the district judge accept Dr. Kliger's plea of guilty.

5. Some time later, the court accepted the plea and, based thereon, adjudicated Dr. Kliger guilty as charged, entering a judgment of conviction on or about August 1, 2008. The judgment was later amended at least twice, most recently on March 13, 2012, to correct the spelling of Dr. Kliger's last name, which had been inscribed erroneously as "Kligor."

6. Based on this conviction, the court sentenced Dr. Kliger to a term of 18 months' incarceration in a federal prison, to be followed by three years of supervised release with special conditions. In addition, Dr. Kliger was ordered to make restitution to the various insurance companies and clinics he had conspired to defraud. The total amount of the required restitution payments is approximately \$2.5 million.

7. The crime of which Dr. Kliger was convicted is directly related to the practice of medicine.

#### 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 (2012).

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 Dr. Kliger 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 Regulation, Bd. of Medicine, 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 the Administrative Complaint, the Department charged Dr. Kliger under section 458.331(1)(c), Florida Statutes, 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 medicine or to the ability to practice medicine.

12. In Doll v. Department of Health, 969 So. 2d 1103, 1106 (Fla. 1st DCA 2007), the court held that the crime of conspiring to defraud a health beneficiary program relates to the practice of chiropractic medicine or the ability to practice, explaining:

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.

969 So. 2d at 1006; see also Dep't of Health v. Pichardo, Case No. 12-2629PL, 2013 Fla. Div. Adm. Hear. LEXIS 29, \*12-\*14 (Fla. DOAH Jan. 25, 2013) )(conspiracy to commit health care fraud relates to the practice of medicine or the ability to practice medicine); accord Dep't of Health v. Zamora, Case No. 07-1454PL, 2007 Fla. Div. Adm. Hear. LEXIS 405, \*21-\*22 (Fla. DOAH July 20, 2007; Fla. DOH Oct. 18, 2007).

13. The evidence proves clearly and convincingly that Dr. Kliger was convicted of a crime that directly relates to the practice of medicine. Therefore, Dr. Kliger is guilty of the offense described in section 458.331(1)(c).



14. The Board of Medicine imposes penalties upon licensees in accordance with the disciplinary guidelines prescribed in Florida Administrative Code Rule 64B8-8.001 (2007). For a first first-time offender found guilty of the offense defined in section 458.331(1)(c) whose criminal conviction involved "healthcare fraud in dollar amounts in excess of \$5,000.00," the prescribed penalty is "[r]evocation . . . and a fine of \$10,000.00." Fla. Admin. Code R. 64B8-8.001(2)(c)1.

15. Rule 64B8-8.001(3) provides that, in applying the penalty guidelines, the following aggravating and mitigating circumstances are to be taken into account:

- (3) Aggravating and Mitigating Circumstances. Based upon consideration of aggravating and mitigating factors present in an individual case, the Board may deviate from the penalties recommended above. The Board shall consider as aggravating or mitigating factors the following:
- (a) Exposure of patient or public to injury or potential injury, physical or otherwise: none, slight, severe, or death;
  - (b) Legal status at the time of the offense: no restraints, or legal constraints;
  - (c) The number of counts or separate offenses established;
  - (d) The number of times the same offense or offenses have previously been committed by the licensee or applicant;
  - (e) The disciplinary history of the applicant or licensee in any jurisdiction and the length of practice;
  - (f) Pecuniary benefit or self-gain inuring to the applicant or licensee;
  - (g) The involvement in any violation of Section 458.331, F.S., of the provision of

controlled substances for trade, barter or sale, by a licensee. In such cases, the Board will deviate from the penalties recommended above and impose suspension or revocation of licensure.

(h) Where a licensee has been charged with violating the standard of care pursuant to Section 458.331(1)(t), F.S., but the licensee, who is also the records owner pursuant to Section 456.057(1), F.S., fails to keep and/or produce the medical records.

(i) Any other relevant mitigating factors.

16. The undersigned does not find cause to deviate from the guideline and therefore recommends that the Board of Medicine impose a penalty that falls within the recommended range.

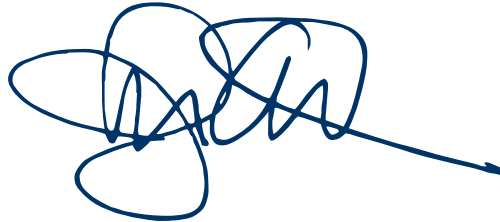
17. The Department proposes that Dr. Kliger's license be revoked and that he be required to pay an administrative fine of \$10,000. This penalty matches the applicable guideline and is appropriate under the facts and circumstances of this case.

18. Finally, Dr. Kliger urges that the Administrative Complaint be involuntarily dismissed due to various alleged delays and procedural irregularities occurring under the Department's jurisdiction during this proceeding's investigative phase, and based on certain matters which, he contends, the Department should be deemed to have admitted pursuant to rule 1.370(a), Florida Rules of Civil Procedure. These arguments are rejected. See Carter v. Dep't of Prof'l Reg., 633 So. 2d 3 (Fla. 1994); Heshmati v. Dep't of Health, 983 So. 2d 632 (5th DCA 2008).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Medicine enter a final order finding Dr. Kliger guilty the offense described in section 458.331(1)(c), Florida Statutes, i.e., being convicted of a crime that directly relates to the practice of medicine. It is further RECOMMENDED that the Board of Medicine revoke Dr. Kliger's medical license and impose an administrative fine of \$10,000.

DONE AND ENTERED this 9th day of April, 2013, in Tallahassee, Leon County, Florida.



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JOHN G. VAN LANINGHAM  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 9th day of April, 2013.

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.