

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
MEDICINE,

Petitioner,

vs.

Case No. 13-3375PL

LEONARD R. MARQUEZ GARCIA, M.D.,

Respondent.

_____ /

RECOMMENDED ORDER

This case came before Administrative Law Judge Todd P. Resavage for final hearing by video teleconference on November, 1, 2013, at sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Diane K. Kiesling, Esquire
Marisa G. Button, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Mario A. Machado, Esquire
Avelino J. Gonzalez, P.A.
6780 Coral Way, Second Floor
Miami, Florida 33155

STATEMENT OF THE ISSUE

Whether Respondent, a medical doctor, practiced beyond the scope of his temporary certification and/or failed to notify the Board of Medicine of changes in employment, as Petitioner alleges; if so, whether (and what) disciplinary measures should

be taken against Respondent's temporary license, which authorizes him to practice only in areas of critical need.

PRELIMINARY STATEMENT

On July 23, 2013, Petitioner, Department of Health, issued an Administrative Complaint ("Complaint") against Respondent, Leonardo F. Marquez Garcia, M.D. On August 1, 2013, Respondent filed an Election of Rights, disputing certain material facts alleged in the Complaint and requesting an administrative hearing. On September 10, 2013, Petitioner referred the matter to the Division of Administrative Hearings ("DOAH").

Administrative Law Judge John G. Van Laningham was assigned to the matter, and the final hearing was scheduled for November 14, 2013. On November 13, 2013, this case was transferred to the undersigned for all further proceedings.

The parties entered into a Joint Pre-hearing Stipulation and stipulated to certain facts contained in Section E of the Joint Pre-hearing Stipulation.^{1/} To the extent relevant, those facts have been incorporated in this Recommended Order.

Both parties were represented by counsel at the hearing, which went forward as planned. The Department presented the testimony of Chandra Prine, JoAnne Trexler, Robert Radin, Jack Tucker, and Kevin Caswell (by deposition), and Petitioner's Exhibits 1-11 and 13 were admitted without objection. Respondent

testified on his own behalf. Respondent did not offer any exhibits that were admitted into evidence.

The final hearing Transcript was filed on December 12, 2013. Petitioner and Respondent timely filed proposed recommended orders ("PROs"), which were considered in preparing this Recommended Order.

Unless otherwise indicated, all rule and statutory references are to the versions in effect at the time of the alleged violation.

FINDINGS OF FACT

1. At all times relevant to this case, Respondent held a temporary conditional certification to practice as a medical doctor in an area of critical need ("ACN") within the state of Florida, having been issued license number ACN 313.

2. Petitioner has regulatory jurisdiction over licensed physicians such as Respondent. In particular, Petitioner 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.

3. Here, Petitioner alleges that Respondent committed three such offenses. In the three-count Complaint, Petitioner charges that Respondent violated section 458.331(1)(g), Florida Statutes,

"by failing to perform any statutory or legal obligation placed upon a licensed physician"; section 458.331(1)(v) by "practicing or offering to practice beyond the scope permitted by law or accepting and performing professional responsibilities which the licensee knows or has reason to know that he is not competent to perform"; and section 458.331(1)(m) by "violating any provision of Chapter 458 or Chapter 456, or any rules adopted pursuant thereto."

4. Respondent is certified to practice medicine pursuant to a Rear Admiral Leroy Collins, Jr., Temporary Certification to practice medicine only in ACNs that have been approved pursuant to section 458.315(3), Florida Statutes.

5. A doctor certified to practice in an ACN receives a temporary certificate from the Board of Medicine pursuant to section 458.315, Florida Statutes.

6. The certificate is temporary and conditional. Section 458.315(3) requires that an ACN certified physician practice in an ACN; a county health department; correctional facility; Department of Veterans Affairs clinic; community health center funded by section 329, section 330, or section 340 of the United States Public Health Services Act; or other agency or institution that is approved by the State Surgeon General and provides health care to meet the needs of underserved populations in this state; or for a limited time to address critical physician-specialty,

demographic, or geographic needs for this state's physician workforce as determined by the State Surgeon General.

7. Once issued, the certified ACN physician can practice in any Surgeon General approved area of critical need facility; however, within 30 days of accepting employment, the ACN physician must notify the Board of Health of all approved institutions in which the licensee practices and of all approved institutions where practice privileges have been denied.

8. On or about September 24, 2008, Respondent submitted to Petitioner an application for temporary certificate to practice in an ACN. Respondent was notified via correspondence dated June 11, 2009, that his application was approved, and that he had been issued license number ACN 313.

9. The June 11, 2009, correspondence summarily advised Respondent of the following conditions and limitations on his license:

Your license limits your practice to Project Access Foundation Medical Clinics, 8000 Biscayne Blvd., Miami, FL 33188. Practicing with that limitation is a very important statutory and legal requirement. Notifying this office of your current specific practice location is equally important. Your license will expire on 1/31/2010.

10. From June 11, 2009 through January 26, 2010, Respondent did not notify Petitioner that he had accepted employment at any medical facility.

11. On or about January 26, 2010, Petitioner processed Respondent's ACN renewal application. In the "Financial Responsibility Form" included within the renewal application, Respondent checked the box that provides, "I do not practice medicine in the State of Florida." Nearby, Respondent wrote, "In this moment." Respondent's ACN license was renewed on or about January 29, 2010, and was valid through January 31, 2012.

12. On or about November 17, 2010, the Agency for Health Care Administration ("ACHA") was notified that Respondent was acquiring 100 percent of the shares of stock for Global Rehabilitation Center, Inc. ("Global"). The undisputed evidence establishes that Respondent practiced medicine at Global. Respondent did not disclose this practice location to Petitioner until September 2012, during the course of an investigation. At that time, Respondent divulged that he had worked at Global for approximately two years.

13. It is further undisputed that, at the time Respondent acquired Global, and all material times subsequent, Global was not an ACN approved facility. Respondent never applied to have Global placed on the ACN approved facility list.

14. Respondent practiced medicine at another facility, Policlinico Pastorita, Inc. ("Policlinico"), from August 2009 to the present. Respondent first notified Petitioner of this practice location on or about January 10, 2012, as part of his

renewal package. Policlinico did not become an approved ACN facility until October 8, 2012.

15. The undisputed evidence established that Respondent also practiced medicine at Injury Rehabilitation Center, Inc.^{2/} Said facility was never an approved ACN facility. Respondent did not notify Petitioner of this practice location until September 2012, during the course of an investigation.

16. On May 18, 2011, Archy's Diagnostic Center was approved as an ACN facility. On or about January 23, 2012, Respondent, as part of his license renewal process, advised Petitioner that his current practice location was Archy's Diagnostic Center.

17. Respondent, in his PRO, makes the following concessions: (1) that he failed to notify the Board of Medicine within 30 days of accepting employment at either an ACN approved or non-approved facility; (2) that he failed to use his ACN temporary certificate to work exclusively at ACN-approved facilities; and (3) that he did not comply with sections 458.315(4)(a), 458.331(1)(g), and 458.331(1)(v).

18. Respondent, in mitigation, contends that he never attempted to evade the reporting requirements. Respondent testified that he initially believed Policlinico was an ACN approved facility because of the demographics of the practice and because the owner advised him that he could practice medicine at that facility. On this point, Respondent further testified as

follows: "[B]ut I ignored, I didn't know that I had to report myself to Tallahassee to the health department but later on I learned that I had to do that."

19. Concerning Global, Respondent testified that apparently he just forgot about the requirements of ACN approval or never thought of the requirements. The undersigned finds Respondent's testimony that he was unaware of the reporting requirements of his ACN license is not credible.

CONCLUSIONS OF LAW

20. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569, and 120.57(1), Florida Statutes.

21. 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, Petitioner must prove the charges against Respondent 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 Med., 654 So. 2d 205, 207 (Fla. 1st DCA 1995).

22. 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:

[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 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).

23. Section 458.315, entitled "Temporary certificate for practice in areas of critical need," provides, in pertinent part as follows:

(1) A certificate issued pursuant to this section may be cited as the "Rear Admiral

LeRoy Collins, Jr., Temporary Certificate for Practice in Areas of Critical Need."

* * *

(3) A certificate may be issued to a physician who:

(a) Will practice in an area of critical need;

(b) Will be employed by or practice in a county health department; correctional facility; Department of Veterans' Affairs clinic; community health center funded by s. 329, s. 330, or s. 340 of the United States Public Health Services Act; or other agency or institution that is approved by the State Surgeon General and provides health care to meet the needs of underserved populations in this state; or

(c) Will practice for a limited time to address critical physician-specialty, demographic, or geographic needs for this state's physician workforce as determined by the State Surgeon General.

(4) The Board of Medicine may issue this temporary certificate with the following restrictions:

(a) The State Surgeon General shall determine the areas of critical need. Such areas include, but are not limited to, health professional shortage areas designated by the United States Department of Health and Human Services.

1. A recipient of a temporary certificate for practice in areas of critical need may use the certificate to work for any approved entity in any area of critical need or as authorized by the State Surgeon General.

2. The recipient of a temporary certificate for practice in areas of critical need shall, within 30 days after accepting employment, notify the board of all approved institutions

in which the licensee practices and of all approved institutions where practice privileges have been denied.

24. In Count I of the Complaint, Petitioner charged Respondent with violations of section 458.331(1)(g). Section 458.331(1)(g) provides as follows:

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):

* * *

(g) Failing to perform any statutory or legal obligation placed upon a licensed physician.

25. Petitioner alleges Respondent violated this section by failing to notify the Board of Medicine within 30 days of accepting employment at an ACN approved facility; failing to notify the Board of Medicine within 30 days of accepting employment at non-ACN-approved facilities; and failing to use his ACN temporary certification to work exclusively at ACN approved facilities. As noted above, Respondent concedes he violated section 458.331(1)(g) as alleged above. The undersigned concludes that Petitioner established by clear and convincing evidence that Respondent violated section 458.331(1)(g).

26. In Count II of the Complaint, Petitioner charged Respondent with violating section 458.331(1)(v). Section 458.331(1)(v) provides, in pertinent part, as follows:

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):

* * *

(v) Practicing or offering to practice beyond the scope permitted by law or accepting and performing professional responsibilities which the licensee knows or has reason to know that he or she is not competent to perform.

27. Petitioner alleges that Respondent practiced beyond the scope authorized by law when he practiced beyond the scope allowed pursuant to section 458.315. Respondent concedes he violated section 458.331(1)(v) as alleged above. The undersigned concludes that Petitioner established by clear and convincing evidence that Respondent violated section 458.331(1)(v).

28. Petitioner alleges in Count III of the Complaint that Respondent violated section 458.331(1)(nn). Said section provides as follows:

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):

* * *

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

29. Petitioner alleges that Respondent violated section 458.331(1)(nn) by violating the requirements and limitations of section 458.315. Respondent concedes that he violated section 458.315 by "failing to notify Petitioner of all the facilities at which he practiced." The undersigned concludes Petitioner established by clear and convincing evidence that Respondent violated section 458.331(1)(nn) by violating section 458.315.

30. The Board of Medicine imposes penalties upon licensees in accordance with the disciplinary guidelines prescribed in Florida Administrative Code Rule 64B8-8.001. The range of penalties for a first offense involving section 458.331(1)(g) is set forth in rule 64B8-8.001(2)(g), as follows:

For any offense not specifically listed herein, based upon the severity of the offense and the potential for patient harm, from a letter of concern to revocation or denial, and an administrative fine from \$1,000.00 to \$10,000.00, unless otherwise provided by law.

31. The range of penalties for a first offense involving section 458.331(1)(v) is from two years' suspension to revocation or denial, and an administrative fine from \$1,000.00 to \$10,000.00. Fla. Admin. Code R. 64B8-8.001(2)(v). The range of penalties for a first offense involving section 458.331(1)(nn) is

from a reprimand to revocation or denial, and an administrative fine from \$1,000.00 to \$10,000.00.

32. Rule 64B8-8.001(3) provides that, in applying the penalty guidelines, the following aggravating and mitigating circumstances shall be considered:

- (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.

33. 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 Medicine 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 Medicine enter a final order finding Respondent guilty of violating section 458.331(1)(g), (v), and (nn); and imposing the following penalties: a two-year suspension, a \$1,000.00 administrative fine, and a one-hour lecture on the reporting requirements of a temporary certificate for practice in areas of critical need.

DONE AND ENTERED this 13th day of January, 2014, 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 13th day of January, 2014.

ENDNOTES

^{1/} The parties also stipulated to modification of several scrivener's errors contained in the Complaint as well as the Pre-hearing Stipulation and further stipulated to Respondent's address of record.

^{2/} No evidence was presented concerning Respondent's dates of employment at Injury Rehabilitation Center, Inc.; however, Petitioner presented evidence that demonstrates Respondent was working as a medical doctor at that location in February and March, 2012.

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.