

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,  
BOARD OF MEDICINE,

Petitioner,

vs.

Case No. 14-1283PL

ROBERTO E. RIVERA, M.D.,

Respondent.

\_\_\_\_\_ /

RECOMMENDED ORDER

Pursuant to notice, an administrative hearing was conducted in Tallahassee, Florida, on May 20, 2014, before Lisa Shearer Nelson, an administrative law judge assigned by the Division of Administrative Hearings. Respondent, who is incarcerated in the State of New Jersey, participated by telephone.

APPEARANCES

For Petitioner: Diane K. Kiesling, Esquire  
Hillary A. Ryan, Esquire  
Department of Health  
Prosecution Services Unit  
4052 Bald Cypress Way, Bin C-65  
Tallahassee, Florida 32399

For Respondent: Roberto E. Rivera, M.D., pro se  
Inmate #E-1215  
Bergen County Jail  
160 South River Street  
Hackensack, New Jersey 07601

### STATEMENT OF THE ISSUE

The issue presented is whether Respondent, Roberto Rivera, M.D. (Dr. Rivera or Respondent), violated section 458.331(1) (b) and (kk), Florida Statutes (2012), as alleged in the Administrative Complaint, and if so, what penalty should be imposed.

### PRELIMINARY STATEMENT

On September 24, 2013, Petitioner, Department of Health (Petitioner or the Department), filed an Administrative Complaint against Respondent, alleging violations of section 458.331(1) (b) and (kk). On December 2, 2013, Respondent filed an Election of Rights form disputing the allegations contained in paragraphs 6-17 of the Administrative Complaint and requesting a hearing pursuant to section 120.57, Florida Statutes. On March 18, 2014, the case was referred to the Division of Administrative Hearings for assignment of an administrative law judge.

The case was noticed for hearing to occur on May 20, 2014. Petitioner asked that Respondent be able to appear by telephone, due to his incarceration out of state. Respondent preferred to appear by video teleconference. Inquiries were made regarding the ability of the Division to conduct a video teleconference with an out-of-state facility. However, to do so was problematic in light of firewall and safety concerns. Accordingly, arrangements were made for Respondent to appear by telephone.

Respondent also filed a Motion to Postpone Future Proceedings, requesting that his Florida license be suspended but that no further action with respect to his Florida license be taken until all criminal proceedings in New Jersey are completed.<sup>1/</sup> Petitioner opposed the motion, and by Order dated April 15, 2014, the Motion was denied.

The hearing began and concluded as scheduled. At hearing, Petitioner presented no witnesses. Petitioner's Exhibits 1-4 were admitted into evidence. Respondent testified on his own behalf but submitted no exhibits.

A one-volume Transcript of the proceedings was filed with the Division on June 4, 2014, and the Department provided a copy of the Transcript to Respondent. A Scheduling Order was issued extending the time for the filing of proposed recommended orders to June 20, 2014. Both parties timely filed Proposed Recommended Orders that have been carefully considered in the preparation of this Recommended Order.

#### FINDINGS OF FACT

1. Respondent is a medical doctor licensed in the State of Florida, having been issued license number ME 54313. Respondent did not dispute his status as a licensed medical doctor in this proceeding.

2. Petitioner is the state agency charged with regulating the practice of allopathic medicine in the State of Florida,

pursuant to section 20.43 and chapters 456 and 458, Florida Statutes.

3. Respondent is also licensed as a medical doctor in the State of New Jersey.

4. No evidence was presented regarding Respondent's board certification or lack thereof.

5. The licensing authority regulating the practice of medicine in the State of New Jersey is the New Jersey State Board of Medical Examiners (New Jersey Board), within the Department of Law and Public Safety, Division of Consumer Affairs.

6. On January 7, 2013, the Hearing Committee of the New Jersey Board entered an Order of Temporary Suspension and Report of Hearing Committee to the Board (Committee Order). The Committee Order was issued nunc pro tunc to December 20, 2012, the date an evidentiary hearing was conducted before the Committee.

7. The Committee Order temporarily suspended Dr. Rivera's license to practice medicine, effective December 20, 2012, with the suspension to continue until such time as the New Jersey Board considered the record at its next scheduled meeting, and until further order of the New Jersey Board. The Committee Order also required Dr. Rivera to immediately cease the practice of medicine in New Jersey; to surrender his original medical license, biennial registration, New Jersey controlled dangerous

substances (CDS) registration and Drug Enforcement Administration (DEA) registration to the New Jersey Board office pending further Order of the New Jersey Board; and to comply with the directives regarding licensees who have been disciplined, which were attached to the Committee Order and incorporated by reference. The Committee Order was subject to review and ratification by the full New Jersey Board at its meeting scheduled for January 9, 2013.

8. The New Jersey Board considered the Committee Order at its meeting on January 9, 2013. At that time, the Board voted to ratify and adopt, in its entirety, the Committee Order, and on January 17, 2013, the New Jersey Board issued an Order Continuing Temporary Suspension of License (Continued Suspension Order). The Continued Suspension Order adopts, in its entirety, the Committee Order; continues the suspension of Dr. Rivera's medical license in New Jersey pending review following completion of plenary proceedings in the matter; and stayed those further proceedings at the request of Dr. Rivera, until the resolution of the criminal charges pending against him following his arrest on November 17, 2012, in Ridgewood, New Jersey.

9. The Committee Order, standing alone, does not constitute action by the licensing authority of another jurisdiction. However, the Committee Order as ratified by the Continuing

Suspension Order does constitute action by the licensing authority of another jurisdiction.

10. Respondent did not report either New Jersey action to the Florida Board of Medicine within 30 days.

#### CONCLUSIONS OF LAW

11. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2013).

12. This is a proceeding in which Petitioner seeks to suspend Respondent's license to practice medicine. Because disciplinary proceedings are considered to be penal in nature, Petitioner is required to prove the allegations in the 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).

13. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). As stated by the Florida Supreme Court, the standard:

entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to

convince the trier of fact without  
hesitancy.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (citing, with  
approval, Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA  
1983)); see also In re Henson, 913 So. 2d 579, 590 (Fla. 2005).

"Although 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., 590 So. 2d 986, 989  
(Fla. 1991).

14. The Administrative Complaint contains two counts  
against Dr. Rivera, charging him with violations of section  
458.331(1)(b) and (kk). Section 458.331 provides, in pertinent  
part:

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

\* \* \*

(b) Having a license or the authority to  
practice medicine revoked, suspended, or  
otherwise acted against, including the  
denial of licensure, by the licensing  
authority of any jurisdiction, including its  
agencies or subdivisions. The licensing  
authority's acceptance of a physician's  
relinquishment of a license, stipulation,  
consent order, or other settlement, offered  
in response to or in anticipation of the  
filing of administrative charges against the  
physician's license, shall be construed as  
action against the physician's license.

\* \* \*

(kk) Failing to report to the board, in writing, within 30 days if action as defined in paragraph (b) has been taken against one's license to practice medicine in another state, territory, or country.

15. Disciplinary provisions such as section 458.331 must be strictly construed in favor of the licensee. Elamariah v. Dep't of Prof'l Reg., 574 So. 2d 164 (Fla. 1st DCA 1990); Taylor v. Dep't of Prof'l Reg., 534 So. 2d 782, 784 (Fla. 1st DCA 1988). Disciplinary statutes must be construed in terms of their literal meaning, and words used by the Legislature may not be expanded to broaden their application. Latham v. Fla. Comm'n on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997); see also Beckett v. Dep't of Fin. Svcs., 982 So. 2d 94, 100 (Fla. 1st DCA 2008); Dyer v. Dep't of Ins. & Treas., 585 So. 2d 1009, 1013 (Fla. 1st DCA 1991).

16. Count I of the Administrative Complaint charges Respondent with violating section 458.331(1)(b), based upon the New Jersey Board taking action against his license on or about January 7, 2013, and January 17, 2013.

17. The January 7, 2013, Order is an Order of the Hearing Committee of the New Jersey Board, as opposed to an Order of the New Jersey Board itself. By its terms, it was subject to "review and ratification, by the full Board of Medical Examiners at its next meeting currently scheduled for January 9, 2013." Based upon a strict reading of section 458.331(1)(b), the undersigned cannot conclude that the January 7, 2013, Order, standing alone,

constitutes action "by the licensing authority of another jurisdiction."

18. Petitioner relies on the decision in Department of Health, Board of Medicine v. Drew Fenton, M.D., Case No. 12-3594 (DOAH July 29, 2013), for the premise that a temporary order constitutes action against a license by another jurisdiction. The issue presented in Fenton focused on the authority of the administrative law judge to issue a temporary suspension, and the statutory authority relevant to that proceeding made it clear that the ALJ had that authority. Here, the issue is not the temporary nature of the action, but the identity of the body taking it. While there may well be some authority for its position, the Department presented nothing to support the premise that action by a committee of the New Jersey Board, as opposed to action by the Board itself, fits within the phrase "action by the licensing authority of another jurisdiction."

19. However, when the New Jersey Board took action as memorialized by its Order January 17, 2013, it ratified and adopted, in its entirety, the Committee Order, and the Committee Order was incorporated into the January 17, 2013, Order of the New Jersey Board. Taken together, the Orders constitute action taken by the licensing authority of another jurisdiction.

20. Respondent contends that the Orders do not constitute action against his license because the plenary action in the

underlying case has not been completed. However, the Orders continue to prohibit Dr. Rivera's practice of medicine, pending resolution of the criminal matters currently pending against him.<sup>2/</sup> There is no question that suspension of Dr. Rivera's license is an action taken against it. Petitioner has proven Count I of the Administrative Complaint by clear and convincing evidence.

21. Count II charges Respondent with failing to notify the Florida Board of Medicine of the action taken by the New Jersey Board. Dr. Rivera admits that he did not notify the Florida Board, but states he did not do so because he has been in jail since before the New Jersey action and did not have access to anything that would be necessary to notify the Board. Petitioner asserts that Respondent has been able to respond in writing in these proceedings, and his incarceration does not excuse his failure to notify the Florida Board. As a practical matter, while Dr. Rivera was most likely able to notify the Board, there is no indication that he had access to the Board's address at the time he should have completed the notification. Given the other matters pending against him, it is likely that the requirement that he notify Florida licensing authorities of his suspension was relatively insignificant in his list of priorities. Nonetheless, it is undisputed that Dr. Rivera did not notify the Florida Board as required. The circumstances related to this

failure go to mitigation as opposed to providing an excuse for non-compliance. Petitioner has proven Count II by clear and convincing evidence.

22. The Board has adopted disciplinary guidelines which provide notice of a range of appropriate penalties for disciplinary violations. Florida Administrative Code Rule 64B8-8.001(2)(b) provides that, for action taken against a license in another jurisdiction, the penalty for a first offense ranges from imposition of discipline comparable to the discipline which would have been imposed if the substantive violation had occurred in Florida, to suspension or denial of the license until the license is unencumbered in the jurisdiction in which disciplinary action was originally taken, and a fine of \$1,000 to \$5,000.

23. For a violation of section 458.331(1)(kk) (failure to report action by another jurisdiction), the guideline penalty for a first offense is an administrative fine of \$1,000 to \$5,000, a reprimand, and 50 to 100 hours of community service, to denial or revocation of the license and payment of \$5,000.

24. Due consideration has been given to the aggravating and mitigating factors outlined in rule 64B8-8.001(3). As noted above, consideration has been given to Respondent's limited ability to see to his own affairs given his current incarceration. His incarceration also renders impractical any requirement for community service.

### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Board of Medicine enter a Final Order finding that Respondent has violated section 458.331(1)(b) and (kk), Florida Statutes (2012). It is further recommended that the Board suspend his Florida license to practice medicine until such time as his New Jersey license is unencumbered; and impose an administrative fine of \$1,500.

DONE AND ENTERED this 1st day of July, 2014, in Tallahassee, Leon County, Florida.



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LISA SHEARER NELSON  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 1st day of July, 2014.

### ENDNOTES

<sup>1/</sup> The course of action suggested by Respondent seemed in many respects to be a proposal for settlement of the current proceedings. In any event, it is a proposal which the undersigned has no authority to approve, as the Board of Medicine is the agency with final order authority in this case.

<sup>2/</sup> The basis for the New Jersey action is not before the Division and any statements contained within the New Jersey Orders with respect to that factual basis would be hearsay, and therefore cannot be used to support a finding of fact. § 120.57(1)(c), Fla. Stat. The same cannot be said with respect to whether the Orders, which are admissible to show that the action was taken by the New Jersey Board, the controlling issue in this proceeding. The undersigned makes no finding with respect to the basis for the New Jersey Board's action.

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.