

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,
BOARD OF MEDICINE,

Petitioner,

vs.

Case No. 15-0429PL

CHRISTINA B. PAYLAN, M.D.,

Respondent.

RECOMMENDED ORDER

On September 1 and 2, 2015, a disputed fact hearing was held in this case by video teleconferencing, with sites in Tampa and Tallahassee, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

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For Respondent: Christina Paylan, M.D., pro se
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STATEMENT OF THE ISSUE

The issue in this case is whether the Respondent's medical license should be revoked or otherwise disciplined under section

456.072(1)(c), Florida Statutes, based on criminal convictions related to the practice of medicine or the Respondent's ability to practice medicine—namely, convictions for obtaining a controlled substance by fraud, a third degree felony under section 893.13(7)(a)9., and for fraudulently using, or possessing with intent to fraudulently use, personal identification information, a third degree felony under section 817.568(2)(a).^{1/} The Respondent disputes that the convictions are related to the practice of medicine or her ability to practice medicine and asserts various defenses.

PRELIMINARY STATEMENT

The Respondent requested a disputed fact hearing on the Administrative Complaint, which was referred to DOAH. An Amended Administrative Complaint filed on July 29, 2015, conformed the factual allegations to the statutory violations.

At the hearing, Joint Exhibits 1 through 3 were admitted in evidence. (Joint Exhibit 5 was to have been provided by the Respondent, but it was not provided.) The Department of Health (DOH) called one expert witness, Frank Stieg, M.D., and the Petitioner's Exhibits 1 through 9 were admitted in evidence. The Respondent testified and called three witnesses: John Mudri, Cynthia Demetrovich, and Melissa VanWagenen. The Respondent's Exhibits 11, 12, 32, 33, 34A, 53, 61, 67 and 68 were admitted in evidence. Ruling was reserved on objections to the Respondent's

Exhibits 7 and 59. The objections to Exhibit 7 (authenticity and relevance to the charges in the Amended Administrative Complaint) are sustained.^{2/} DOH's objections to the Respondent's Exhibit 59, the videotape and transcript of the Douglas Dedo deposition, were deferred for consideration after the Respondent filed the exhibit, but no exhibit was filed.^{3/} The Respondent's post-hearing request to add the transcript of Mark Logan's deposition to the evidence in the case, which DOH opposes, is denied.

A Transcript of the final hearing was filed on September 24, 2015. The parties filed proposed recommended orders that have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Respondent, Christina Paylan, M.D., holds a license, ME 82839, to practice as a medical doctor in the State of Florida, as regulated by DOH and the Board of Medicine.

2. On April 25, 2014, she was charged with obtaining or attempting to obtain a controlled substance, Pethidine/Meperidine (known by the brand name Demerol), by fraud, forgery, deception or subterfuge in violation of section 893.13(7)(a)9., Florida Statutes; and with fraudulently using the personal identification information of a patient, C.M., without first obtaining the patient's consent, in violation of section 817.568(2)(a), Florida Statutes. The charged conduct was alleged to have occurred in July 2011.

3. The Respondent was tried by jury in the circuit court in Hillsborough County on July 29 and 30, 2014, and was found guilty. On August 22, 2014, the Respondent was adjudicated guilty and sentenced to 364 days in the county jail. The Respondent appealed the convictions. The appeal is pending.

4. DOH filed an Administrative Complaint based on the criminal convictions and suspended the Respondent's license pending the resolution of the Administrative Complaint.

5. The Respondent's convictions related to her practice of medicine. She was convicted of fraudulently writing a prescription for Demerol for a patient, C.M., and using the patient's personal identification information (driver license and insurance card) without the patient's consent to present the prescription to a pharmacy to be filled on July 1, 2011. The Respondent's status as a medical doctor gave her the ability to obtain the patient's personal identification information and write the prescription. A medical license carries with it a high level of public trust and requires good judgment, integrity, and high morals. Licensure carries a duty to safeguard patients' personal information and use it only for legitimate purposes. The Respondent was convicted of crimes that violate the public trust, demonstrate warped judgment and a lack of integrity, involve misuse of patient information, and undermine public confidence in the Respondent's ability to practice medicine.

6. The Respondent maintained her innocence and essentially sought to re-try the criminal case. Various rulings denied the Respondent's efforts to do so, including rulings that sustained many of DOH's objections to the Respondent's proffered evidence.

7. The Respondent's convictions are on appeal. As discussed in the Conclusions of Law, if the convictions are overturned on appeal, there would be no basis for disciplining the Respondent's medical license based on the Amended Administrative Complaint.

8. The Respondent's Answer to the Amended Administrative Complaint denied that she (i.e., Christina Paylan, M.D.) was convicted because a "fictitious Christina Paylan was found guilty." By this, the Respondent meant the prosecutor in the criminal trial "fraudulently represented that Respondent is neither a doctor nor a licensed practitioner." In her Proposed Recommended Order, the Respondent refined her argument to be that her convictions were for crimes that apply only to laypersons, not to medical doctors. These are grounds of her appeal from the criminal convictions. These defenses are invalid, as discussed in the Conclusions of Law.

9. The Respondent asserted affirmative defenses of res judicata, collateral estoppel, laches, and unclean hands based on the actions taken by the Board of Medicine in this case and in prior investigations of her practice of medicine.

10. One of those prior investigations, designated by DOH file 11-0006, involved an investigation of whether the Respondent met the standard of care with respect to patient L.B. This investigation had nothing to do with the Respondent's conduct regarding the patient C.M., which was the subject of the criminal convictions giving rise to the Amended Administrative Complaint in this case.

11. Another investigation, designated by DOH file 11-18577, was opened to investigate allegations regarding the Respondent's drug prescriptions, specifically for Demerol, for patients J.E.A. and J.M.A. During the 11-0006 investigation, DOH obtained patient records for patient C.M., which were removed from that investigative file and added to investigation 11-18577. In May 2014, investigation 11-18577 was terminated when the Board of Medicine found no probable cause, dismissed the cases, and closed the investigation. A primary basis of this decision was DOH's inability to obtain the patient records of J.E.A. and J.M.A. and their unwillingness to cooperate with a prosecution of the Respondent. Although C.M.'s patient records were available, and C.M. may have been willing to cooperate with a prosecution of the Respondent, the probable cause decision, dismissal of the cases, and closure of the investigation included C.M. as well as J.E.A. and J.M.A.

12. There was no evidence to prove unclean hands on the part of DOH or the Board of Medicine. This affirmative defense was not mentioned in the Respondent's Proposed Recommended Order.

13. As explained in the Conclusions of Law, the Respondent's affirmative defenses are not valid.

14. In the Respondent's Proposed Recommended Order, the Respondent refined her defense of laches by arguing that she was prejudiced by the action taken by the Board of Medicine in May 2014 because it "eliminated" her option to plead nolo contendere. Clearly, the action of the Board of Medicine did not eliminate the Respondent's options or force her to go to trial on the criminal charges. Even if the Respondent's decision to go to trial had been influenced by the action of the Board of Medicine, her new defense of laches is also not valid, as discussed in the Conclusions of Law.

15. Regarding the appropriate penalty, the Respondent has been licensed and practicing medicine in Florida since June 2001. There was no evidence of any prior discipline being imposed against the Respondent's medical license. The Amended Administrative Complaint is based on criminal convictions arising out of a single, isolated incident. Except for the conviction for a single misuse of a patient's personal identification information, there was no evidence of any exposure of a patient or the public to any other injury or potential injury. The

Respondent's actions resulted in no pecuniary benefit or self-gain.

CONCLUSIONS OF LAW

16. The Amended Administrative Complaint seeks to discipline the Respondent under section 456.072(1)(c), Florida Statutes, based on criminal convictions related to the practice of medicine or the Respondent's ability to practice medicine—namely, convictions for obtaining a controlled substance by fraud, a third degree felony under section 893.13(7)(a)9., and for fraudulently using, or possessing with intent to fraudulently use, personal identification information, a third degree felony under section 817.568(2)(a).

17. Section 456.072(1)(c) provides that it is a ground for discipline for a medical doctor to be convicted or found guilty of, or enter 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.

18. DOH must prove the charges 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). The Supreme Court has stated:

[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 witness 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.

In re Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

19. The evidence was irrefutable that the Respondent was convicted of obtaining a controlled substance by fraud, a third degree felony under section 893.13(7)(a)9., and fraudulently using, or possessing with intent to fraudulently use, personal identification information, a third degree felony under section 817.568(2)(a).

20. Merriam-Webster defines the term "relate" as "to show or make a connection between (two or more things)." There was a clear connection between the Respondent's practice of medicine and her conviction.

21. Section 456.074(1)(a) indicates a clear relation between the Respondent's convictions and the practice or ability to practice medicine. It provides for the emergency suspension of the license of certain health care practitioners, including medical doctors, if the licensee is convicted (regardless of adjudication) or found guilty of a felony under chapter 817 or 893.

22. The Respondent attempted to refute the relationship of her convictions to the practice or the ability to practice medicine by requiring DOH to prove her culpability as a medical doctor, versus as a layperson, which amounted to an attempt to re-try the criminal convictions. The premise for this argument is rejected. DOH only was required to prove the criminal convictions and their relation to the practice or ability to practice medicine.

23. Prior to the Respondent's Proposed Recommended Order, the Respondent argued that proof of culpability was required by the decision in Spuza v. Department of Health, 838 So. 2d 676 (Fla. 2d DCA 2003). To the contrary, the holding in that case was that the licensee was entitled to a hearing on the relation of criminal convictions to the practice or ability to practice medicine (as well as factual disputes relevant to the appropriate penalty.) Id. at 677-78. In Spuza, DOH denied the licensee a hearing; in this case, the Respondent had her hearing.

24. The Respondent also argued that section 456.072(1)(c) only applies to "medical crimes." She argues that section 893.13(7)(a)9. does not apply to medical doctors, but only to laypersons, because it begins with "[a] person may not," whereas section 893.13(7)(b) begins with "[a] health care practitioner . . . may not." The Respondent's argument is rejected. See Cilento v. State, 377 So. 2d 663, 666 (Fla. 1979); State v.

Schultz, 120 So. 3d 222, 225 (Fla. 4th DCA 2013). Even if her argument were correct, a crime need not be a "medical" crime to be related to the practice or ability to practice medicine.

25. The evidence was clear and convincing, and virtually irrefutable, that the Respondent's convictions related to the practice or ability to practice her profession. See Rush v. Dep't of Bus. & Prof'l Reg., Bd. of Podiatry, 448 So. 2d 26, 27-28 (Fla. 1st DCA 1984) (although not arising in an office setting, crime of conspiracy to possess and import marijuana was a breach of trust and related to the practice of podiatry, which included dispensing drugs); Doll v. Dep't of Health, 969 So. 2d 1103 (Fla. 1st DCA 2007) (a crime that demonstrated a "lack of honesty, integrity, and judgment" is related to the practice of chiropractic medicine); Dep't of Health, Bd. of Medicine v. Algirdas Krisciunas, M.D., Case No. 10-10229PL (Fla. DOAH June 27, 2011; Fla. DOH Amended FO, Aug. 17, 2011) (five counts of dispensing oxycodone and one count of conspiring to distribute oxycodone were related to the practice of medicine, in part, because the respondent's medical license was necessary to execute the crime); Dep't of Health, Bd. of Medicine v. Christopher Carter, M.D., Case No. 12-1575PL (Fla. DOAH Nov. 26, 2012) ("Whether or not a particular crime is related to a profession is not limited to its connection to the technical ability to practice the profession.").

26. The Respondent asserts affirmative defenses of res judicata and collateral estoppel based on actions taken by DOH and the Board of Medicine in investigation 11-18577. “[T]he principles of res judicata do not always neatly fit within the scope of administrative proceedings” and should be “applied with ‘great caution’.” Thomson v. Dep’t of Env’tl. Reg., 511 So. 2d 989, 991 (Fla. 1987). Res judicata precludes the litigation of the same claim between the same parties on the same cause of action. Costello v. The Curtis Bldg. P’ship., 864 So. 2d 1241, 1244 (Fla. 5th DCA 2004). For collateral estoppel to apply, the issues must be identical and must be actually litigated. Marquardt v. State, 156 So. 3d 464, 481 (Fla. 2015). Discipline in this case is based on criminal convictions. No previous administrative action was based on criminal convictions. For these reasons alone, neither res judicata nor collateral estoppel apply in this case.

27. The Respondent also asserts the affirmative defense of laches. Laches is inapplicable to administrative license discipline proceedings without specific legislative authority. See Farzad v. Dep’t of Prof’l Reg., Bd. of Med., 443 So. 2d 373, 375-76 (Fla. 1st DCA 1983). There is no such legislative authority in this case.

28. A party asserting laches must prove prejudice. See Stephenson v. Stephenson, 52 So. 2d 684 (Fla. 1951); Dep’t of

Revenue By and on Behalf of Taylor v. David, 684 So. 2d 308 (Fla. 1st DCA 1996); Dep't of Health and Rehab. Servs. v. Lemaster, 596 So. 2d 1117 (Fla. 2d DCA 1992). The Respondent claims prejudice because the action taken by the Board of Medicine in May 2014 "eliminated" her option to plead nolo contendere and forced her to go to trial on the criminal charges. Clearly, it did not. In addition, since section 456.072(1)(c) is triggered by a nolo contendere plea, it would have made no difference in this case if the Respondent had pled nolo contendere to the criminal charges.

29. Section 456.072(2) authorizes discipline for violations. Florida Administrative Code Rule 64B8-8.001 sets out the applicable disciplinary guidelines. Section (2)(c) of the rule provides for a range of penalties from probation to revocation, with a fine of \$1,000 to \$10,000, and all penalties in between, including appropriate continuing medical education, for the violations proven in this case (assuming the Respondent's convictions are not overturned on appeal.)

30. Under rule 64B8-8.001(1), the purposes of discipline are to punish an applicant or licensee for violations and deter them from future violations; to offer opportunities for rehabilitation, when appropriate; and to deter other applicants or licensees from violations. Section (3) of the rule authorizes the Board to deviate from the routine range of penalties upon consideration of aggravating and mitigating factors listed (a)

through (i). Factor (a), the extent of exposure of a patient or the public to injury or potential injury, physical or otherwise, should be characterized as slight. Factor (b), the Respondent's legal status at the time of the offense (no restraints), is neutral or mitigating. Factor (c), the number of counts or separate offenses (two arising out of a single incident), is neutral or slightly mitigating. Factor (d), the number of previous identical offenses (none), is neutral or mitigating. Factor (e), the Respondent's disciplinary history (none since June 2001), is mitigating. Factor (f), pecuniary benefit or self-gain inuring to the Respondent (none), is neutral or mitigating. Factor (g), involvement of controlled substances, is aggravating. Factor (h), failure to keep and/or produce the medical records in a standard of care violation case, is inapplicable. Factor (i), any other relevant mitigating factors (none), is inapplicable. Taking all the aggravating and mitigating factors into consideration, the Board should not deviate from the routine range of discipline. However, a penalty in the middle of the range is appropriate. The maximum penalty of revocation and a \$10,000 fine, which is sought by DOH, is not warranted or justified in this case.

31. Under section 456.072(4), the Board shall assess costs related to the investigation and prosecution, in addition to other discipline imposed for violating the practice act.

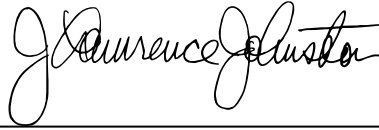
32. The Board of Medicine should retain jurisdiction to vacate all discipline if the Respondent's convictions are overturned on appeal. See Rife v. Dep't of Prof'l Reg., 638 So. 2d 542 (Fla. 2d DCA 1994).

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Board of Medicine enter a final order: finding the Respondent guilty as charged; fining her \$5,000; suspending her medical license for two years, with credit for the time under emergency suspension; placing her on probation for one year after suspension; requiring her to take appropriate continuing medical education; and assessing costs related to the investigation and prosecution. The final order should retain jurisdiction to vacate all discipline if the Respondent's convictions are overturned on appeal.

DONE AND ENTERED this 23rd day of October, 2015, in
Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of October, 2015.

ENDNOTES

^{1/} These criminal statutes are those in effect at the time of the conduct charged—i.e., July 2011. Other substantive statutes and rules cited are those in effect at the time of the Respondent's criminal convictions in August 2014. Procedural statutes and rules cited are those in effect currently.

^{2/} The ruling on the authenticity objection takes into account the Respondent's Notification of Authentication for Phone Records of Patient CM and Her Husband LM, filed on October 13, and DOH's response filed on October 19, 2015.

^{3/} Apparently, DOH has a copy of the Transcript, since it was cited in the Petitioner's Proposed Recommended Order. According to DOH, the only relevant portions of the Transcript would support DOH's case.

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.