

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
MEDICINE,

Petitioner,

vs.

Case No. 16-2662PL

BARRY M. SCHULTZ, M.D.,

Respondent.

_____ /

RECOMMENDED ORDER

On June 21, 2016, a hearing was held in Tallahassee, Florida, before F. Scott Boyd, an Administrative Law Judge assigned by the Division of Administrative Hearings (DOAH).

APPEARANCES

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

For Respondent: No Appearance

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent was found guilty of multiple counts of trafficking in oxycodone; whether those crimes relate to the practice of, or the ability to practice, medicine; and, if so, what is the appropriate sanction.

PRELIMINARY STATEMENT

On February 26, 2016, the Department of Health (Petitioner or Department) filed an Administrative Complaint against Barry M. Schultz, M.D. (Respondent or Dr. Schultz), on behalf of the Board of Medicine (Board). The complaint charged Respondent with being convicted or found guilty of a crime which relates to the practice of, or the ability to practice, medicine, in violation of section 456.072(1)(c), Florida Statutes (2015).^{1/} Respondent disputed material facts alleged in the complaint and requested an administrative hearing,^{2/} which was conducted on June 21, 2016.

At hearing, neither Respondent nor a person representing him appeared. Respondent had been served copies of the Administrative Complaint, as well as the Initial Order, Notice of Hearing, Order of Pre-hearing Instructions, and Order Allowing Testimony by Telephone both at Respondent's address of record and at the Palm Beach County Sheriff's Office Detention Center. After his initial request for hearing, Respondent did not file any pleadings or motions, request to testify by telephone, or otherwise participate in the proceedings. At hearing, Petitioner offered two exhibits, P-2 and P-3, which were admitted into evidence. Petitioner also offered the testimony of Dr. Kevin Chaitoff, M.D., an expert in anesthesiology and interventional pain medicine.

The final hearing Transcript was filed on June 28, 2016. Petitioner timely filed a Proposed Recommended Order, which was considered in preparation of this Recommended Order.

FINDINGS OF FACT

1. The Department is the state agency charged with regulating the practice of medicine in the state of Florida, pursuant to section 20.43 and chapters 456 and 458, Florida Statutes. The Board is charged with final agency action with respect to physicians licensed pursuant to chapter 458.

2. At all times material to this proceeding, Dr. Schultz was a licensed physician within the state, having been issued license number ME67047.

3. Dr. Schultz's address of record is 316 Capri G, Delray Beach, Florida 33484. At the time of hearing, Dr. Schultz was incarcerated in the Palm Beach County Sherriff's Office Detention Center, M-S-02-A-07-B, Post Office Box 24717, West Palm Beach, Florida 33416.

4. On November 13, 2015, Dr. Schultz was found guilty of 55 counts of trafficking in oxycodone in violation of section 893.135(1)(c), Florida Statutes (2009) or (2010), in the Circuit Court of the Fifteenth Judicial Circuit, Criminal Division, in and for Palm Beach County, Florida.

5. As Dr. Chaitoff testified, in order to prescribe controlled substances, a person must be a licensed physician and

then may do so only within the usual course of medical practice for a legitimate medical purpose.

6. As Dr. Chaitoff testified after reviewing relevant documents, the oxycodone prescribed by Dr. Schultz was not prescribed for legitimate medical purposes and was done other than within the course of professional practice.

7. As Dr. Chaitoff testified, Dr. Schultz's convictions relate to the practice of medicine.

CONCLUSIONS OF LAW

8. DOAH has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016).

9. A proceeding to suspend, revoke, or impose other discipline upon a professional license is penal in nature. State ex rel. Vining v. Fla. Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973). Petitioner must therefore prove the charges against Respondent by clear and convincing evidence. Fox v. Dep't of Health, 994 So. 2d 416, 418 (Fla. 1st DCA 2008) (citing Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996)).

10. The clear and convincing standard of proof has been described by the Florida Supreme Court:

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.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

11. Disciplinary statutes and rules "must always be construed strictly in favor of the one against whom the penalty would be imposed and are never to be extended by construction." Griffis v. Fish & Wildlife Conserv. Comm'n, 57 So. 3d 929, 931 (Fla. 1st DCA 2011); Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136 (Fla. 1st DCA 1992).

12. Petitioner charged Respondent with violation of section 456.072(1)(c), which provided, in relevant part:

(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.

13. Petitioner proved by clear and convincing evidence that Respondent was found guilty of the crime of trafficking in

oxycodone and that his convictions related to the practice of medicine, in violation of section 456.072(1)(c).

14. The Board imposes disciplinary action upon licensees in accordance with disciplinary guidelines set by rule. Florida Administrative Code Rule 64B8-8.001(2)(c) provided that the recommended penalty for the first offense of being found guilty of a crime directly related to the practice of medicine, or the ability to practice medicine, should range "from probation to revocation or denial of the license, an administrative fine ranging from \$1,000.00 to \$10,000.00."

15. Rule 64B8-8.001(3) provided that the following aggravating and mitigating circumstances should also be considered:

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. No aggravating or mitigating factors are present in the record to warrant deviation from the wide range of penalties already permissible under the rule.

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. Barry M. Schultz in violation of section 456.072(1)(c), Florida Statutes, and revoking his license to practice medicine.

DONE AND ENTERED this 20th day of July, 2016, in
Tallahassee, Leon County, Florida.

F. Scott Boyd

F. SCOTT BOYD
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 20th day of July, 2016.

ENDNOTES

^{1/} All references to the Florida Statutes or provisions of the Florida Administrative Code refer to versions in effect in November 2015, when the alleged convictions took place, except as otherwise indicated.

^{2/} It is not entirely clear from the Election of Rights which facts in the Administrative Complaint Respondent contested. At least in part, he sought to relitigate his conviction, which is not appropriate. See Spuzo v. Dep't of Health, 838 So. 2d 676 (Fla. 2d DCA 2003). Giving Respondent the benefit of doubt, Petitioner forwarded the request to DOAH.

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.