

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
PHARMACY,

Petitioner,

vs.

Case No. 16-4366PL

DEVONE LEMAR FLUCKER, R.P.T.,

Respondent.

_____ /

RECOMMENDED ORDER

On October 18, 2016, Administrative Law Judge J. Lawrence Johnston held the final hearing in this case in Tallahassee.

APPEARANCES

For Petitioner: Nicole L. Jordan, Esquire
Marc Daniel Taupier, Esquire
Department of Health
Prosecution Services Unit
Bin C-65
4052 Bald Cypress Way
Tallahassee, Florida 32399

For Respondent: Patricia A. Montgomery, Esquire
Patricia A. Montgomery, P.A.
Post Office Box 607662
Orlando, Florida 32860

STATEMENT OF THE ISSUE

The issue is whether the Board of Pharmacy (board) should revoke or otherwise discipline the Respondent's license as a registered pharmacy technician (RPT) because his application for licensure failed to disclose a felony criminal conviction.

PRELIMINARY STATEMENT

In October 2015, the Respondent applied for licensure as an RPT. His application stated that he had not been convicted of a crime other than a minor traffic offense. License RPT 64709 was issued to the Respondent in January 2016. In March 2016, the Respondent received an Administrative Complaint charging him with a violation of section 465.016(1)(a), Florida Statutes (2015),^{1/} for obtaining his license by misrepresentation or fraud or through an error of the Department of Health (department) or the board. The Respondent disputed the charges and asked for a hearing.

At the final hearing, the Petitioner called two witnesses: Jennifer Wenhold, who is the board's interim director; and Charles Stuard, who is the associate director of education at the Florida Career College. The Petitioner's Exhibits 1 through 4 were admitted in evidence, and the Respondent's 1996 felony conviction for a lewd act upon a child was officially recognized. After the Petitioner rested, the Respondent testified.

After the evidence was presented, the parties were given ten days from the filing of the transcript of the hearing to file proposed recommended orders. The Transcript was filed on November 7. The Petitioner filed a Proposed Recommended Order on November 17, and it has been considered. The Respondent has not filed a proposed recommended order.

FINDINGS OF FACT

1. The Respondent was convicted of the crime of committing a lewd act upon a child in 1996.

2. In 2015, the Respondent took a course at Anthem College, now called Florida Career College, to qualify to be licensed as an RPT in Florida.

3. Towards the end of the course, an application for licensure was submitted to the department. The application required the Respondent to answer the question whether he had been convicted of a crime other than a minor traffic offense. The answer on the application said, "NO."

4. Based on the application, the department issued the Respondent license RPT 64709 in January 2016. Later, the Respondent's criminal conviction came to the attention of the department and board, and an Administrative Complaint was filed charging the Respondent with violating section 465.016(1)(a) for obtaining his license by misrepresentation or fraud or through an error of the department or board.

5. The Respondent explained at the hearing that he was not being dishonest and did not willfully obtain his license by fraud or intentional misrepresentation. He testified that he disclosed his criminal conviction to Beth Shelton, his instructor at Anthem, when he went online to create an account to apply for licensure and saw the application and the question regarding his

criminal conviction. He testified that she told him his conviction was not an absolute bar to licensure, but that he would have to write a letter explaining the conviction and his rehabilitation from it to submit to the department with his application, along with copies of the court records. The Respondent testified that he put his application on hold and logged out of his account. He testified that the answer on the application at the time he logged out was, "YES." He testified that he then wrote the letter suggested by his instructor, got the court records, and gave them to her. He testified that he assumed she took care of it for him. He was thrilled when he received his license in the mail in January 2016, and he was crestfallen and dismayed when he received the Administrative Complaint a few months later.

6. Charles Stuard, who was Ms. Shelton's supervisor at Anthem in 2015, and is now the associate director of education at Florida Career College, testified that it would have been against Anthem's policy for Ms. Shelton to help the Respondent answer questions on the application or offer to help the Respondent as he said she did. Neither party called Beth Shelton to testify.

7. Some of the Respondent's testimony could be interpreted as inconsistent, but those possible inconsistencies seemed to arise from misunderstandings and confusion. The essence of the Respondent's testimony is accepted as true—namely, he was not

being dishonest and did not willfully obtain his license by fraud or intentional misrepresentation.

8. The Petitioner did not prove by clear and convincing evidence that the Respondent was dishonest or willfully obtained his license by fraud or intentional misrepresentation, or that the Respondent's license was issued through an error of the department or board. However, it is clear that the Respondent's license was obtained by a misrepresentation of fact.

CONCLUSIONS OF LAW

9. Section 465.016(1)(a), (2015), provides that "[o]btaining a license by misrepresentation or fraud or through an error of the department or the board" is a ground for discipline of a pharmacy license, as specified in section 456.072(2), Florida Statutes.

10. In a penal proceeding, the prosecutor must prove the allegations and 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).

11. 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:

[E]ntails 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).

12. In this case, the Petitioner did not prove by clear and convincing evidence that the Respondent was dishonest or willfully obtained his license by fraud or intentional misrepresentation, or that the Respondent's license was issued through an error of the department or board. However, it is clear that the Respondent's license was obtained by a misrepresentation of fact.

13. For the Respondent's violation, the most appropriate penalty among the options listed in section 456.072(2) would be permanent revocation.

14. Florida Administrative Code Rule 64B16-30.001(1)-(3) (Rev. Feb. 5, 2014) sets out the applicable guidelines for penalties normally imposed for violations by a licensee. In addition to any other discipline imposed under these guidelines,

the board shall assess costs relating to the investigation and prosecution of the case. Guidelines for specific violations are set out in subsection (2). Subsection (3) provides that the board may deviate from the guidelines on a showing, by clear and convincing evidence, of aggravating or mitigating circumstances.

15. Subsection (2)(a)1. states that the range of appropriate penalties for negligent misrepresentation on an application are from a \$1,000 fine and a 12-hour Laws and Rules course or the Multistate Pharmacy Jurisprudence Exam, and a 3-hour ethics course, to a \$10,000 fine and revocation.

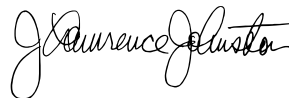
16. There are no aggravating circumstances in this case. There are mitigating circumstances, but they do not justify deviating from the guidelines in this case. Specifically, since the Respondent's violation eliminated the board's ability to consider a true application, the Respondent's license should be revoked.

17. Section 456.072(6) provides that all revocations are permanent and authorizes the board to "establish by rule requirements for reapplication by applicants whose licenses have been permanently revoked." The board does not have such a rule. In this case, the Respondent should be allowed to reapply so the board can consider the true facts regarding his criminal conviction.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Pharmacy enter a final order revoking his license RPT 64709, which was obtained by an honest and unintentional negligent misrepresentation, and allowing him to reapply so that the board can consider the true facts regarding his criminal conviction.

DONE AND ENTERED this 23rd day of November, 2016, in Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of November, 2016.

ENDNOTE

^{1/} All statutory references are to Florida Statutes (2015).

COPIES FURNISHED:

Nicole L. Jordan, Esquire
Department of Health
Prosecution Services Unit
Bin C-65
4052 Bald Cypress Way
Tallahassee, Florida 32399
(eServed)

Patricia A. Montgomery, Esquire
Patricia A. Montgomery, P.A.
Post Office Box 607662
Orlando, Florida 32860

Marc Daniel Taupier, Esquire
Department of Health
Prosecution Services Unit
Bin C-65
4052 Bald Cypress Way
Tallahassee, Florida 32399
(eServed)

Allison Dudley, Executive Director
Board of Pharmacy
Department of Health
Bin C-04
4052 Bald Cypress Way
Tallahassee, Florida 32399-3258
(eServed)

Nichole C. Geary, General Counsel
Department of Health
Bin A-02
4052 Bald Cypress Way
Tallahassee, Florida 32399-1701
(eServed)

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.