

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
PODIATRIC MEDICINE,

Petitioner,

vs.

Case No. 18-3349PL

BRIAN J. ALTMAN, DPM,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this cause was held by video teleconference between sites in Fort Myers and Tallahassee, Florida, on October 4, 2018, before Linzie F. Bogan, Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Judson Searcy, Esquire
Adam David Gonzalez Wright, Esquire
Florida Department of Health
Prosecution Services Unit, Bin C-65
4052 Bald Cypress Way
Tallahassee, Florida 32399

For Respondent: Brian Jeffery Altman
18251 Merchants Avenue
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STATEMENT OF THE ISSUE

Whether Respondent's refusal to comply with modifications proposed by Professional Resource Network to his monitoring

contract violated section 456.072 (1) (hh), Florida Statutes (2017).^{1/}

PRELIMINARY STATEMENT

On or about May 2, 2018, the Florida Department of Health (Petitioner), filed a one-count Administrative Complaint against Respondent, Brian J. Altman, D.P.M. (Respondent). The Administrative Complaint charged Respondent with violating section 456.072(1) (hh) by being terminated from the Professionals Resource Network (PRN), for failing to comply, without good cause, with the requirements of his monitoring contract with PRN.

Respondent filed an election of rights on May 14, 2018, disputing issues of material fact contained in Petitioner's Administrative Complaint and requesting a disputed-fact hearing. On June 29, 2018, Petitioner forwarded the case to the Division of Administrative Hearings (DOAH) for assignment of an Administrative Law Judge. By notice issued July 10, 2018, the case was scheduled for hearing on August 31, 2018. Petitioner moved for a continuance and on August 8, 2018, the hearing was continued and rescheduled for October 4, 2018.

At the disputed fact hearing, Petitioner's Exhibits 1, 2, and 3 were admitted into evidence without objection. Respondent offered no exhibits into evidence. Petitioner called Respondent as a fact witness. Petitioner also presented the deposition testimony of Dr. Alexandria Polles in lieu of live testimony as

Petitioner's Exhibit 3. Respondent testified on his own behalf and called no other witnesses.

A Transcript of the disputed fact hearing was filed with DOAH on October 18, 2018. Each party filed a Proposed Recommended Order and the same have been considered.

FINDINGS OF FACT

1. Petitioner is the state agency charged with the licensing and regulation of the practice of podiatric medicine pursuant to section 20.43, and chapters 456 and 461, Florida Statutes.

2. At all times material to the allegations in the Administrative Complaint, Respondent was a licensed podiatric physician within the State of Florida, having been issued license PO 3818.

3. On or about March 24, 2015, Respondent submitted to the Florida Board of Podiatric Medicine (Board) an application for licensure as a podiatric physician. In his application Respondent disclosed prior criminal conduct, which prompted the Board to condition his licensure "upon a positive" evaluation from PRN, which is designated as the State of Florida's impaired practitioners program for physicians.

4. On or about November 24, 2015, Respondent entered into a monitoring contract with PRN. The PRN monitoring contract was for a term of five years.

5. According to the PRN participant manual, the following are the types of monitoring contract components provided to health care professionals:

1. Chemical dependency (CD);
2. Substance abuse;
3. Psychiatric;
4. Dual (CD/Psych);
5. Behavioral;
6. Physical impairment;
7. Concurrent (2 or more problems);
8. Boundary;
9. Specialized;
10. Chronic pain; and,
11. Diagnostic monitoring.

6. At its inception, Respondent's PRN monitoring contract was a "concurrent type," which offered "boundary and psychiatric" component monitoring services.

7. The PRN monitoring contract contains the following provisions:

The terms set forth in this Contract, including its duration, may be subject to change if PRN, in its sole clinical discretion, concludes that additional, higher, or otherwise different, types and levels of monitoring and other contract obligations are necessary to ensure the Participant is able to practice with skill and safety and otherwise progress through the program.

* * *

Once this Contract becomes effective, any modifications to this Contract are effective only when made in writing and signed or initialed by both the PRN Medical Director and Participant.

8. Related to the above contractual provisions, is the PRN Participant Manual, Participant Rights statement, which advises individuals that they have "the right [t]o refuse to participate in any or all of the components of PRN, [and that] to do so may result in a formal report to the Department of Health and [their] Board."

9. On or about March 31, 2016, the Board granted Respondent a license to practice as a podiatric physician in the State of Florida. Although Respondent was issued a license by the Board, there is no evidence that Respondent has ever engaged in the practice of podiatry in the State of Florida.

10. From its inception through November 2017, Respondent was in compliance with the terms of his PRN monitoring contract. However, events commencing around mid-July 2017 eventually culminated in Respondent opting out of the PRN program.

11. On the morning of July 11, 2017, Respondent contacted his compliance manager at PRN. Respondent, among other things, informed his compliance manager that he was not working as a podiatrist, was struggling financially, his girlfriend had undergone multiple major surgeries and was having a difficult recovery, and he was taking Cymbalta, Adderall and Xanax.

12. The compliance manager immediately shared the new information received from Respondent with the PRN medical director who, after considering Respondent's history of DUIs, and

his psychological history, determined that Respondent should be referred for a multi-disciplinary evaluation.

13. At 10:34 a.m. on July 11, 2017, PRN advised Respondent via e-mail that he was being referred for a multidisciplinary evaluation and that the same must be completed before Respondent would be allowed to return to the practice of podiatry.

14. On September 12, 2017, Respondent complied, and offered himself for the multidisciplinary evaluation prescribed. The multidisciplinary evaluation team diagnosed Respondent with alcohol use disorder - moderate, evaluate for severe; sedative use, evaluate for use disorder; opioid use, evaluate for use disorder; stimulant use, evaluate for use disorder; persistent depressive disorder (dysthymia); narcissistic traits; paranoid and dependent features, likely borderline and avoidant features; and history of lumbar pain.

15. The multidisciplinary evaluation team opined that, prospectively, Respondent will not be able to practice as a podiatric physician in the State of Florida with reasonable skill and safety and recommended that Respondent enter a PRN approved residential treatment program. The evaluation team also recommended that Respondent be placed on a PRN monitoring contract, with a new contract start date, following completion of the residential program.

16. On or about October 6, 2017, PRN discussed the findings and recommendations of the multidisciplinary evaluation with Respondent.

17. On November 6, 2017, PRN offered Respondent four options for PRN approved treatment programs, and imposed a deadline of November 13, 2017, to enter treatment. PRN also requested that Respondent execute a voluntary withdrawal from practice form and return it to PRN the following day.

18. On November 6, 2017, Respondent notified PRN that he specifically was not going to enter treatment as recommended by the multidisciplinary team and that generally he was no longer going to participate in any PRN program.

19. Respondent has not returned an executed voluntary withdrawal from practice form as requested by PRN, nor has Respondent entered treatment as directed by PRN.

20. On January 16, 2018, PRN terminated Respondent's PRN monitoring contract and Respondent has not reentered the program. Respondent testified that if he were ordered by the Board to reenter PRN, he may be unwilling to comply, unless he finds the terms favorable.

CONCLUSIONS OF LAW

21. Section 456.072(1)(hh), Florida Statutes (2017), subjects a physician to discipline for being terminated from a treatment program for impaired practitioners, that is overseen by

an impaired practitioner consultant as described in section 456.076 for failure to comply, without good cause, with terms of the monitoring or treatment contract entered into by the physician, or for not successfully completing any drug treatment or alcohol treatment program.

22. Because it seeks to impose license discipline, the Petitioner has the burden to prove its allegations by clear and convincing evidence. See Dep't of Banking & Fin. v. Osborne Stern & Co., Inc., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). This "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). See also Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). "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., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

23. Respondent admits that he ceased complying with his PRN monitoring contract but contends that good cause for doing so exists because PRN attempted, without contractual authority, to unilaterally change the terms of the monitoring contract from "Boundry/Mental Health to Mental Health/Substance Abuse."

24. Petitioner met its burden of proof as to the allegations set forth in the Administrative Complaint. Contrary to Respondent's assertion, the PRN monitoring contract expressly allows PRN "in its sole clinical discretion" to modify the types of monitoring contract components that it deems necessary to ensure that Respondent is able to practice with the requisite level of skill and safety. Respondent failed to demonstrate good cause for not complying with his PRN monitoring contract.

25. Pursuant to section 456.079 the Board adopted Florida Administrative Code Rule 64B18-14.002, which provides notice of the range of disciplinary penalties that could result from a violation of section 456.072.

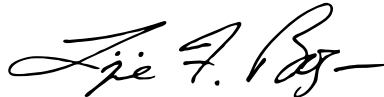
26. Rule 64B18-14.001(51) provides that the Board shall, when it finds a licensee has violated section 456.072(1)(hh) for the first time, impose a penalty of suspension until the licensee proves the ability to practice with reasonable skill and safety.

27. Rule 64B18-14.003 sets out aggravating and mitigating circumstances for determining whether to deviate from the penalty guidelines. It is unnecessary to make any findings on aggravating or mitigating circumstances because consideration of the same would not alter the penalty.

RECOMMENDATIONS

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Podiatric Medicine enter a final order: finding that the Respondent violated section 456.072(1)(hh); and suspending his license until such time as he demonstrates his ability to practice with reasonable skill and safety as evidenced by Respondent entering into and complying with a PRN monitoring contact.

DONE AND ENTERED this 15th day of November, 2018, in Tallahassee, Leon County, Florida.



LINZIE F. BOGAN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of November, 2018.

ENDNOTE

^{1/} All subsequent references to Florida Statutes will be to 2017, unless otherwise indicated.

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.