

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
MEDICINE,

Petitioner,

vs.

Case No. 19-3020PL

FRED JOSEPH TURNER, JR., M.D.,

Respondent.

_____ /

RECOMMENDED ORDER

On July 16, 2019, Administrative Law Judge Lisa Shearer Nelson conducted a duly-noticed hearing pursuant to section 120.57(1), Florida Statutes (2019), in Tallahassee, Florida.

APPEARANCES

For Petitioner: William Edward Walker, Esquire
Major Ryan Thompson, Esquire
Department of Health
Bin C-65
4052 Bald Cypress Way
Tallahassee, Florida 32399

For Respondent: Fred Joseph Turner, Jr. M.D., pro se
#62779-018
Federal Prison Camp
110 Raby Avenue
Pensacola, Florida 32509

STATEMENT OF THE ISSUES

The issues to be determined are whether Respondent, Fred Joseph Turner, M.D., violated section 456.072(1)(c) and (x),

Florida Statutes (2017), as alleged in the Administrative Complaint, and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On April 23, 2018, Petitioner, Department of Health, Board of Medicine (Petitioner or DOH), filed a two-count Administrative Complaint against Respondent, alleging that he violated section 456.072(1)(c) and (x), by virtue of his conviction of a crime related to the practice or the ability to practice medicine, and his failure to report the conviction to the Board of Medicine within 30 days of the conviction. On December 3, 2018, Respondent notified DOH that he disputed the allegations in the Administrative Complaint and wanted a hearing. On June 5, 2019, the Department referred the case to the Division of Administrative Hearings for assignment of an administrative law judge.

The case was scheduled for hearing on July 26, 2019, and proceeded as scheduled. Because of his incarceration, arrangements were made for Respondent to participate by telephone.

Petitioner filed a Motion for Official Recognition, which was granted. It also filed a Motion to Deem Petitioner's Requests for Admissions as Admitted and to Relinquish Jurisdiction, which was denied. Petitioner presented the testimony of Kevin Chaitoff, M.D.; and Claudia Kemp, Executive

Director of the Board of Medicine, and Petitioner's Exhibits numbered 1 through 4 were admitted into evidence without objection. Respondent presented no witnesses or exhibits.

The one-volume Transcript of the proceedings was filed with the Division on August 7, 2019. Petitioner timely filed a Proposed Recommended Order that has been considered in the preparation of this Recommended Order. Respondent did not choose to file a proposed recommended order.

All references to Florida Statutes are to the 2017 codification, unless otherwise specified.

FINDINGS OF FACT

1. The Department of Health is the state agency charged with the licensing and regulation of medical doctors pursuant to section 20.43 and chapters 456 and 458, Florida Statutes.

2. Respondent is a medical doctor licensed by DOH since April 29, 1991. He holds license number ME59799.

3. On or about July 21, 2015, the Grand Jury for the United States District Court, Middle District of Florida, issued an indictment against Respondent and Rosetta Valerie Cannata in case number 8:15-cr-264-T-23AAS, charging violations of Title 8, United States Code sections 1324(a)(1)(A)(v)(1) and 1324(a)(1)(B)(i), and Title 21 United States Code sections 841(a)(1), 841(b)(1)(C), and 846. The indictment also sought

forfeiture of various items of value should Respondent be convicted.

4. At some point, there was a superseding indictment, but that indictment is not of record in this proceeding.

5. The case was tried by jury, and although it is unclear when the jury trial took place, an Order of Forfeiture entered October 13, 2017, states that a jury found Respondent guilty of six counts in the superseding indictment, and that the United States had established that Respondent had obtained \$232,020.02 from the offenses for which he was convicted.

6. The Judgment in Case Number 8:15-cr-264-T-23AAS was entered December 6, 2017. The Judgment indicates that a jury found Respondent guilty of counts one through six of the superseding indictment, as follows: Count I for conspiracy to distribute and dispense and cause the distribution and dispensing of oxycodone, hydromorphone, morphine, and hydrocodone, in violation of 21 U.S.C. sections 846 and 841(b)(1)(C); Counts II through V for distributing and dispensing and causing the distribution of hydrocodone (Count II), oxycodone (Count III), morphine (Count IV), and oxycodone and hydromorphone (Count V), in violation of 21 U.S.C. sections 841(a)(1) and 841(b)(1)(C); and Count VI for conspiracy to smuggle an alien into the United States, in violation of Title 8

U.S.C. section 1324(a). Count VI is irrelevant to the charges in this case.

7. The Judgment sentenced Respondent to 151 months in federal prison, followed by 36 months of supervised release. It also provided that Respondent forfeited the items named in the preliminary Orders of Forfeiture, i.e., property up to \$232,020.02.

8. Respondent did not notify DOH or the Board of Medicine of his conviction.

9. Controlled substances can only be prescribed by specified licensed health care providers, such as medical doctors, who hold a current drug enforcement agency (DEA) registration. Without a medical license and a DEA registration, a person cannot dispense or prescribe controlled substances, and therefore, could not commit the crimes for which Respondent was found guilty.

10. Respondent responded at length to the charges in the Administrative Complaint. He vigorously disputes the basis for the conviction, but not the conviction itself. Respondent claims that the evidence against him is based upon alteration of records and test results by a DEA informant who worked in his office. However, from his statements, it is clear that the conviction was based upon activity occurring in his practice.

11. The convictions for which Respondent has been convicted relate to the practice of medicine or the ability to practice medicine.

CONCLUSIONS OF LAW

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

13. The Department seeks to revoke Respondent's license to practice medicine in this case. Therefore, the Department must prove the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 595 So. 2d 292 (Fla. 1987). As stated by the Supreme Court of Florida,

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 lacking in confusion as to the facts at issue. The evidence must be of such a 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)). This burden of proof may be met where the evidence is in conflict; however, "it seems to preclude evidence that is ambiguous."

Westinghouse Elec. Corp. v. Shuler Bros., 590 So. 2d 986, 988
(Fla. 1st DCA 1991).

14. The Administrative Complaint charges Respondent with violating section 456.072(1)(c). Section 456.072 provides in pertinent part:

456.072 Grounds for discipline; penalties; enforcement.--

(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 related to the practice of, or the ability to practice, a licensee's profession.

15. Whether or not a particular crime is related to a profession is not limited to its connection to the technical ability to practice a profession. As stated by the First District:

Several cases demonstrate that, although the statutory definition of a particular profession does not specifically refer to acts involved in the crime committed, the crime may nevertheless relate to the profession. In Greenwald v. Department of Professional Regulation, the court affirmed the revocation of a medical doctor's license after the doctor was convicted of solicitation to commit first-degree murder. 501 So. 2d 740 (Fla. 3d DCA 1987). The Fifth District Court of Appeal has held that although an accountant's fraudulent acts

involving gambling did not relate to his technical ability to practice public accounting, the acts did justify revocation of the accountant's license for being convicted of a crime that directly relates to the practice of public accounting. Ashe v. Dep't of Prof'l Regulation, Bd. of Accountancy, 467 So. 2d 814 (Fla. 5th DCA 1985). We held in Rush v. Department of Professional Regulation, Board of Podiatry, that a conviction for conspiracy to import marijuana is directly related to the practice or ability to practice podiatry. 448 So. 2d 26 (Fla. 1st DCA 1984). These cases demonstrate, in our view, that appellee did not err by concluding Doll's conviction was "related to" the practice of chiropractic medicine or the ability to practice chiropractic medicine.

Doll v. Dep't of Health, 969 So. 2d 1103, 1006 (Fla. 1st DCA 2007).

16. Here, the connection between the crime for which Respondent was convicted and the practice of medicine is direct. Petitioner has proven by clear and convincing evidence that Respondent violated section 456.072(1)(c). Moreover, the basis for discipline is the conviction itself, and the Board need not wait until the completion of the appellate process in the criminal proceeding. Kale v. Dep't of Health, 175 So. 3d 815 (Fla. 1st DCA 2015); Rife v. Dep't of Prof'l Reg., 638 So. 2d 542, 542 (Fla. 2d DCA 1994).

17. Count II of the Administrative Complaint charges Respondent with violating section 456.072(1)(x), which provides in pertinent part:

failing to report to the board, or the department if there is no board, in writing within 30 days after the licensee has been convicted or found guilty of, or entered a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction.

18. Petitioner established by clear and convincing evidence that Respondent did not notify the Board in writing of his conviction, as contemplated by section 456.072(1)(x).

19. The Board has established disciplinary guidelines as required by section 456.079, in order to provide notice to the public of the range of penalties that can be expected for violations of chapters 456, 458, and the rules of the Board of Medicine. For a violation of section 456.072(1)(c), the penalty range for a first offense ranges from probation to revocation or denial of the license, and an administrative fine from \$1,000 to \$10,000. For a violation of section 456.072(1)(x), the range of penalties for a first offense are an administrative fine from \$2,000 to \$5,000 and a reprimand or denial of license. Fla. Admin. Code R. 64B8-8.001(2)(c), (g)(4).

20. The Department has recommended revocation of Respondent's license to practice medicine, but no fine. Given Respondent's current incarceration and the Order of Forfeiture already entered in the criminal proceedings, imposition of a fine in this case would serve little or no purpose.

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 violated section 456.072(1)(c) and (x), and revoking his license to practice medicine.

DONE AND ENTERED this 28th day of August, 2019, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of August, 2019.

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.