

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD)
OF MEDICINE,)
)
Petitioner,)
)
vs.) Case No. 00-0280
)
LIONEL RESNICK, M.D.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on October 3, 2000, at Miami, Florida, before Administrative Law Judge Michael M. Parrish of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Britt L. Thomas, Esquire
Agency for Health Care Administration
Post Office Box 14229
Tallahassee, Florida 32317-4229

For Respondent: Mark L. Pomeranz, Esquire
Law Offices of Pomeranz & Landsman
12955 Biscayne Boulevard, Suite 202
North Miami, Florida 33181

STATEMENT OF THE ISSUE

This is a license discipline case in which the Petitioner, by means of a one-count Administrative Complaint, seeks to take

disciplinary action against the Respondent on the basis of his alleged violation of Section 458.331(1)(c), Florida Statutes.

PRELIMINARY STATEMENT

At the final hearing on October 3, 2000, the Petitioner presented the testimony of two witnesses and offered eight exhibits. Petitioner's Exhibit 8 was rejected.¹ Petitioner's Exhibit 7 was rejected as an exhibit, but official recognition was taken of the contents of the exhibit.² Petitioner's Exhibits 1 through 6 were received in evidence. The Respondent presented the testimony of nine witnesses. The Respondent had twelve exhibits marked for identification. Respondent's Exhibit 2 was never offered in evidence. Respondent's Exhibit 12 was rejected.³ Respondent's Exhibits 1 and 3 through 11 were received in evidence.

At the conclusion of the final hearing, the parties were allowed ten days from the filing of the transcript within which to file their proposed recommended orders. The Transcript was filed with the Division of Administrative Hearings on October 20, 2000. Thereafter, both parties filed timely Proposed Recommended Orders containing proposed findings of fact and conclusions of law.⁴ The parties' proposals have been carefully considered during the preparation of this Recommended Order.⁵

FINDINGS OF FACT

1. The Respondent, Lionel Resnick, M.D., is a physician licensed to practice medicine in the State of Florida. He has been so licensed at all times material to this case. His license number is ME 0037412.

2. At all times material to this case, the Respondent was the Director of the retrovirology laboratory at Mount Sinai Medical Center. The minimum qualifications for that position required that the Director possess either an M.D. degree or a Ph.D. degree.

3. The Respondent's responsibilities as Director of the retrovirology laboratory were to direct research efforts, to obtain funding for research, serve as principal investigator on research projects, manage personnel, supervise science projects, and organize, analyze, and report scientific findings resulting from research efforts. The Respondent held this position as an employee for the annual salary of \$30,000.

4. Mount Sinai Medical Center provided the laboratory site, the laboratory equipment, and the laboratory staff for the retrovirology laboratory.

5. Mount Sinai Medical Center retrovirology laboratory had a contract with the University of Miami Hospital in which Mount Sinai retrovirology laboratory provided the service of testing patient samples for Acquired Immune Deficiency Syndrome ("AIDS")

related research protocols. The University of Miami Hospital paid Mount Sinai retrovirology laboratory for this service.

6. All Children's Medical Center had a contract, similar to that of the University of Miami Hospital, with Mount Sinai retrovirology lab to conduct testing of patient samples for AIDS-related research. All Children's Medical Center paid Mount Sinai retrovirology laboratory for the testing.

7. In or about July of 1989, while Director of Mount Sinai's retrovirology laboratory, the Respondent incorporated Vironc, Inc., using the Respondent's residential address as the corporate address. Vironc, Inc., was not a laboratory, it was a dummy corporation with no facilities or employees.

8. Without the knowledge of Mount Sinai Medical Center, the Respondent notified All Children's Hospital and University of Miami Hospital that the services provided by Mount Sinai retrovirology laboratory, i.e., the testing of patient samples for AIDS research, would be conducted at Vironc, Inc., instead of Mount Sinai retrovirology laboratory.

9. Contrary to the Respondent's representations, the specimens sent by the University of Miami Hospital and All Children's Medical Center continued to be tested at Mount Sinai retrovirology laboratory using the facilities and employees of the Mount Sinai retrovirology laboratory. None of the specimens were tested by Vironc, Inc.

10. The Respondent sent invoices to All Children's Medical Center and to the University of Miami Hospital instructing them to send payments for these services directly to Vironc at the Respondent's address and in care of the Respondent.

11. Using this mail fraud scheme, the Respondent diverted funds owed to Mount Sinai retrovirology laboratory in excess of \$570,000 for his own personal use. These funds were intended as payment for the services of testing patient samples for AIDS research, which testing was done at the Mount Sinai retrovirology laboratory.

12. On or about August 21, 1996, the Respondent was indicted for forty-nine counts of mail fraud and for two counts of money laundering in violation of 18 U.S.C. 1341 and 1342.

13. On February 22, 1999, the Respondent pled guilty to eighteen counts of mail fraud. Specifically, the Respondent pled guilty to diverting more than \$570,000 in funds tendered as payment for services provided by Mount Sinai retrovirology laboratory beginning in or about July 1989 and continuing through in or about September 1994.

14. The purpose of the retrovirology laboratory at Mount Sinai Medical Center was to conduct research which would assist in the treatment of patients with AIDS. Specifically, the laboratory conducted research regarding compounds that would

inhibit or stop the AIDS virus as part of the development of drugs that might be useful in the treatment of AIDS.

15. During his tenure with the Mount Sinai retrovirology laboratory, the Respondent also proposed clinical research protocols requiring approval through a hospital Institutional Review Board to insure that patient rights were protected in the medical research being conducted.

16. The Mount Sinai retrovirology laboratory also provided the service of testing patient samples for the University of Miami Hospital and All Children's Hospital. For example, the retrovirology laboratory tested patient blood samples to determine whether cell counts were being maintained and to determine the presence of virus fighters, factors in determining proper methods of treatment.

17. The physicians at the University of Miami Hospital and at the All Children's Hospital sent patient blood samples for testing at the Mount Sinai retrovirology lab in order to obtain test results that could be used for the purpose of making treatment decisions regarding the patients from whom the samples were taken.

18. Characteristics important to a physician's ability to practice medicine include reliability, honesty, and good moral character. Absent these qualities, it is difficult, if not impossible, for a person to fulfill the obligations and

responsibilities entrusted to those who are licensed as physicians. The Respondent's pattern of conduct by means of which he converted to himself at least \$570,000 that belonged to his employer, demonstrates that he is not reliable, is not honest, and that he lacks good moral character.

CONCLUSIONS OF LAW

19. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to Sections 120.57(1) and 455.621, Florida Statutes.

20. Pursuant to Section 458.331(2), Florida Statutes, the Board of Medicine is empowered to revoke, suspend, or otherwise discipline the license to practice medicine of any physician found guilty of the acts enumerated in Section 458.331(1), Florida Statutes.

21. In a disciplinary action of this type, the burden is on the Petitioner to establish the facts upon which its allegations of misconduct are based. The Petitioner must prove its allegations by clear and convincing evidence.

22. The clear and convincing evidence standard requires that the evidence be found to be credible; the facts to which 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

produce in the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

23. In this case, the Petitioner has proved by clear and convincing evidence that the Respondent pled guilty to, and was convicted of, crimes that arose out of the Respondent's activities as Director of the Mount Sinai retrovirology laboratory. The Petitioner has also proved by clear and convincing evidence that Respondent's activities as Director of the Mount Sinai retrovirology laboratory were "directly related to the practice of medicine." Therefore, it follows inescapably that the crimes the Respondent pled guilty to and was convicted of were "crimes directly related to the practice of medicine." In reaching this conclusion, the Respondent's many arguments to the contrary have not been overlooked.⁶

24. The Respondent argues that his activities as Director of the retrovirology laboratory were not directly related to the practice of medicine because the laboratory had no patients of its own and the Respondent never saw any of his private practice patients at the laboratory. But this argument ignores the purposes for which the University of Miami Hospital and All Children's Hospital were paying to have patient samples tested at the Mount Sinai retrovirology laboratory. The primary activity of those hospitals is the treatment of sick and injured

patients. The primary treatment of the hospitalized patients is provided by physicians. The obvious purpose of the lab tests requested by the hospitals was to obtain scientific information that would be useful to the physicians at the hospitals in making treatment decisions for their hospitalized patients. The physicians at the University of Miami Hospital and at All Children's Hospital who ultimately received the results of the testing done at the Mount Sinai retrovirology laboratory were clearly practicing medicine. Therefore, the performance of the tests and the furnishing of the results were directly related to the practice of medicine by the physicians at University of Miami Hospital and at All Children's Hospital. That is enough to meet the requirements of Section 458.331(1)(c), Florida Statutes.⁷

25. The Petitioner has also proved by clear and convincing evidence that the crimes for which the Respondent pled guilty and was convicted are crimes that relate to the ability to practice medicine. The evidence in this case shows that qualities essential to the practice of medicine include reliability, honesty, and good moral character. The crimes for which the Respondent pled guilty and was convicted demonstrate that the Respondent lacks these essential qualities. By demonstrating that the Respondent lacks these essential qualities, the Respondent's crimes relate to his ability to

practice medicine by showing that he is not worthy to be entrusted with the privileges and authority vested in those who are licensed to practice medicine. See Department of Professional Regulation v. Long, DOAH Case No. 89-4430, Final Order issued April 7, 1990, affirmed 580 So. 2d 754 (Fla. 1st DCA 1991); Cohen v. Department of Professional Regulation, Board of Medicine, 590 So. 2d 477 (Fla. 1st DCA 1991); and cases cited in endnote 7 of this Recommended Order.

26. In view of the gravity and the number of crimes for which the Respondent was convicted, it appears that the only appropriate penalty is revocation of his license.

RECOMMENDATION

On the basis of all of the foregoing, it is RECOMMENDED that a final order be entered finding the Respondent guilty of violating Section 458.331(1)(c), Florida Statutes, and revoking his license to practice medicine.

DONE AND ENTERED this 21st day of November, 2000, in
Tallahassee, Leon County, Florida.

MICHAEL M. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 21st day of November, 2000.

ENDNOTES

- 1/ The Petitioner's Exhibit 8 is included in the record as a rejected exhibit.
- 2/ The Petitioner's Exhibit 7 consists of a collection of certified copies of documents from the official records of the Department of Health. The documents included are copies of final orders and related background papers in cases involving violation of Section 458.331(1)(c), Florida Statutes.
- 3/ The Respondent's Exhibit 12 is included in the record as a rejected exhibit. The exhibit consists of a copy of the transcript of the deposition of John Wayne Maddox, Jr., and a copy of the notice of taking that deposition.
- 4/ The Respondent's Proposed Recommended Order was accompanied by a new exhibit not offered at the final hearing. The new exhibit is marked as Respondent's Exhibit 13, and is included in the record as a rejected exhibit.
- 5/ The Petitioner's Proposed Recommended Order is to a large extent consistent with the views of this case reached by the undersigned. Substantial portions of the proposals submitted by the Petitioner have been incorporated into the Findings of Fact and Conclusions of Law in this Recommended Order.

6/ While all of the Respondent's arguments have been carefully considered, not all of them are discussed in this Recommended Order. Some of the arguments are so lacking in logical or factual foundation as not to warrant discussion. One example of such argument is the argument that the actions of the judge in the Respondent's criminal case precludes the Board of Medicine from concluding that the Respondent's crimes were related to the practice of medicine. That argument lacks both an evidentiary and a logical foundation.

7/ Similar conclusions have been reached in a number of other cases in a variety of factual circumstances. See Rush v. Department of Professional Regulation, Board of Podiatry, 448 So. 2d 26 (Fla. 1st DCA 1984); Ashe v. Department of Business and Professional Regulation, 467 So. 2d 814 (Fla. 5th DCA 1985); Greenwald v. Department of Professional Regulation, 501 So. 2d 740 (Fla. 3rd DCA 1987), rev. denied, 511 So. 2d 998, cert. denied, 484 U.S. 986 (1987); Agency for Health Care Administration, Board of Medicine v. Douglas Earl Nalls, M.D., DOAH Case Nos. 93-2704 and 94-1129, Recommended Order issued February 3, 1995; Department of Health, Board of Chiropractic v. Joseph Forlizzo, DOAH Case No. 98-4865, Recommended Order issued February 15, 2000.

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.