

**FILED**

SID J. WHITE

IN THE SUPREME COURT OF THE  
STATE OF FLORIDA

MAY 1 1989

BELARMINA ALVAREZ, et al.,

CLERK, SUPREME COURT  
BY *[Signature]*  
Deputy Clerk

Petitioner,

v.

CASE NO. 74,016

DEPARTMENT OF PROFESSIONAL  
REGULATION, STATE OF FLORIDA,

Respondent.

RESPONDENT'S RESPONSE TO PETITION FOR WRIT OF MANDAMUS

I. STATEMENT OF THE COURT'S JURISDICTION

The Respondent, Department of Professional Regulation, by and through its undersigned counsel, responds to the Petition for Writ of Mandamus as ordered by this Court on April 20, 1989, as follows;

Petitioners seek to invoke the jurisdiction of this Court pursuant to Rule 9.030(a)(3), Florida Rules of Appellate Procedure and Article V. section 3(b)(8), Florida Constitution.

The Department requests that this Court decline to issue the writ of mandamus requested inasmuch as petitioners do in fact have an adequate remedy at law and the Department does not have a clear duty to issue the licenses sought without supervision. Rather, the Department is prohibited from acting in the manner sought by Petitioners.

II. FACTS UPON WHICH RESPONDENT RELIES

The petitioners have supplied the Court with an exhaustive chronology of the events leading up to their petition for writ of mandamus. The Department seeks in its statement of the facts only to clarify what actions are attributable to the Department in the implementation of the Foreign-Trained Exiled Professional Act ("FTEPA"). It should become apparent that the delays in the licensure process for the petitioners are not wholly attributable to the Department and that in fact, the Department has sought to assist petitioners to the extent legally permissible.

1. Section 455.218(1)(g), Florida Statutes (1987) requires that those desiring to be licensed under the FTEPA successfully complete a continuing education program which will prepare them for the licensure examination. The Department is required to develop rules for the approval of such programs. The Association commissioned for the development of a course, which was not submitted to the Department for approval until January 13, 1988. The course received verbal approval in February and, as modified, received written approval April 29, 1988 (Petitioner's App. 16,22).

2. The petitioners did not file their applications for licensure until March 28, 1988 (Petitioner's App. 36). At that time, the applications were incomplete in that they contained no certification of completion of the Cuban American Dental Program, as required by Section 455.218(1)(f), Florida Statutes, and Rule 21-15.007(4), Florida Administrative Code. The applications also contained no certification of completion of the course approved by the Department, which at the time of application had not yet been approved by the Department or completed by the candidates (Petitioner's App. 37, 24).

3. Although the candidates submitted information relating to their attendance at the Cuban American Dental Program, Rule 21-15,007(4), Florida Administrative Code requires that applicants shall submit documentation of successful completion of the course in the form of a copy of the certificate of completion or a letter from the course provider stating the name of the course, the dates the course was given and the date of successful completion. Counsel for petitioners was promptly notified of the deficiency by letter dated March 31, 1988. On April 29, 1988, the petitioners submitted certification from the University of Florida that they had in fact completed the 1975-1976 course. On May 27, 1988, the petitioners submitted copies of the Certificates of Completion of the Continuing Education course required by section 455.218(1)(g)(Petitioner's App. 41, 24-31).

4. Subsections 455.218(4) & (6) of the FTEPA require that the fees charged for the examination be sufficient to develop or to contract for development of the examination and its administration, grading and grade reviews, and that the examination may be given in the applicants' native language provided the applicants bear the translation costs. Before the Department could proceed with the development of the examination, the project has to be funded by the eligible applicants. Therefore, development of the examination could not commence until an eligible pool of candidates was identified. (Respondent's App.2).

5. Although the Department sought to utilize the Part II of the National Board of Dental Examiners, the Joint Commission on National Dental Affairs refused to allow Part II of the National examination to be used for this purpose. The Association requested the Board of Dentistry to certify that the petitioners had completed their dental education program; to request that Part I of the National examination be waived for the petitioners; and that the Department be assigned the right to receive the scores from Part I of the examination for licensure pursuant to section 455.218. (Petitioner's App. 47-48).

6. The Board of Dentistry did not feel that it could comply with the requests made by petitioners, so the Department developed an examination which was administered January 30-31, 1989, less than one year after the submission of their incomplete applications for licensure. (Petitioner's App. 55, 60).

7. As early as November 18, 1986, the Department's position was communicated that health care professionals licensed pursuant to section 458.218 were required to practice under supervision. A memorandum to that effect was sent to presidents of Health Care Professionals Associations In Exile on that date, advising that any applicants for licensure submitted after December 1, 1986 (which would include the petitioners) would be processed assuming that the applicant is aware of the supervision provision. The Department's position with respect to the

supervision requirement has been constant since that date. (Respondent's App. 1).

8. Petitioners state that several veterinarians were licensed pursuant to section 455.218 without supervision. That is incorrect. It is true that two veterinarians were licensed pursuant to the Act without supervision in place. However, counsel for the Board of Veterinary Medicine advised the Board soon after their licensure that section 455.218(2) prohibits the practice of health care professionals licensed pursuant to section 455.218 without supervision. Both licensees were required to submit the name of a supervising licensee and practice under supervision notwithstanding that they had practiced for a short time without such a restriction. (Respondent's App. 15-18).

9. On April 3, 1989, the Secretary of the Department wrote the petitioners and informed them that they had passed the required examination and that their licenses were subject to supervision. Petitioners were informed that the Board of Dentistry was scheduled to address the issue of supervision of their practice at its April 28, 1989 meeting and following the Board's decision their licenses to practice dentistry would be issued. (Petitioner's App. 1). A proposed rule 21G-2.025, (Supervision Requirements for Dentists Licensed Pursuant to Section 455.218, F.S.) was submitted for the Board's approval at its April 28-30 meeting. (Respondent's App.14). The Board approved the Rule as submitted and instructed counsel for the Board to notice the rule immediately.

### III RELIEF SOUGHT

The Department respectfully requests that this Court decline to issue the Writ of Mandamus sought by the Petitioners inasmuch as the Petitioners have not satisfied the requirements for the issuance of such a writ. Although the dentists have established their right to licensure, it is not clear that right is an unrestricted one. The Department does not have a specific and clear obligation to issue them a license not subject to

supervision, and the dentist have other remedies available to them through the Administrative Procedures Act.

#### IV ARGUMENT

A Writ of Mandamus may issue only where a petitioner has demonstrated a clear legal right on its part, an indisputable and ministerial duty on the part of the Respondent, and the absence of another adequate remedy. Fraternal Order of Police v. Odio, 491 So.2d 340 (Fla. 3rd DCA 1986); Department of Health Rehabilitative Services v. American Health Corp., 471 So.2d 1312, 1314 (Fla. 1st DCA 1985). In the case presently before the Court, the Petitioners have demonstrated that they have met the requirements for licensure pursuant to Chapter 86-90, Laws of Florida: however they have not demonstrated that the right to licensure is one without the restriction of supervision as required pursuant to section 455.2182, Florida Statutes. By the same token, the Department has no clear legal duty to issue a license without the restriction of supervision as provided therein. In addition, the Department contends that Petitioners have a number of remedies available to them through the Administrative Procedures Act if they wish to challenge the Department's position with respect to supervision of their practices.

Finally, it is the Department's intention to issue the licenses sought forthwith, subject to Rule 21-G-2.025, Florida Administrative Code, which was adopted by the Board of Dentistry April 30, 1989.

A. No Clear Legal Right to Practice Unsupervised  
Has Been Demonstrated By the Petitioner.

Section 455.218(5), Florida Statutes (1987), provides that:

The Department shall license any applicant who meets the requirements of Subsections (1) & (2).... all licenses so issued are subject to the administrative requirements of Chapter 455 and the respective act under which the license is issued. Each applicant so licensed is subject to all provisions of this chapter and the respective act under which his license was issued.

Section 455.218 is the codification of Chapter 86-90, Laws of Florida.

Section 455.2182, Florida Statutes (1987), provides as well:

Nothing contained herein shall be construed to allow the unsupervised practice of any health care practitioner license pursuant to Chapter 86-90, Laws of Florida.

Section 455.2182, Florida Statutes, is the codification of section 25, Chapter 86-290, Laws of Florida. The Department contends that the language contained in section 455.2182 is abundantly clear; any health care practitioner licensed pursuant to Chapter 86-90, Laws of Florida, is not to practice unsupervised.

Petitioners contend that section 455.2182, which was enacted as part of the Osteopathic Practice Act, applies only to osteopathic physicians licensed pursuant to 86-90, Laws of Florida. They also state that "health care practitioners" is defined in Section 2 of Chapter 86-290, Laws of Florida, as only including osteopathic physicians and osteopathic physicians assistants. This is simply not the case. Section 2 of Chapter 86-290, Laws of Florida, amends Section 459.002, Florida Statutes, in pertinent part to read:

(1) the provisions of this chapter shall have no application to:  
(a) duly licensed health care practitioners, other than osteopathic physicians and osteopathic physicians assistants, acting within their scope of practice authorized by statute.

This provision in no way limits the term health care practitioners to osteopathic physicians and their physician assistants. The language of Section 455.2182 clearly applies to all health care practitioners, and any attempt to exclude dentists from the requirements of that section would be in contravention of the plain meaning of the statute. "If the intent of the Legislature is clear and unmistakable from the language used, it is the Court's duty to give effect to that intent. Rules of statutory construction should be used only in case of doubt and should never

be used to create doubt, only to remove it." Englewood Water District v. Tate, 334 So.2d 626, 628 (Fla. 2d DCA 1976).

Petitioners also contend that the language in section 455.2182 should not be applied to them inasmuch as its scope would then be broader what is contemplated by the title of Chapter 86-290, Laws of Florida. State v. Tindell, 88 So.2d 123(Fla. 1956). However, a reading of the title of Chapter 86-290 reveals that section 25 of that act was within the scope of the title expressed. That title reads in pertinent part, "providing that the act shall not be deemed to allow the unsupervised practice of certain health care practitioners." A reading of the Act as well as its title reveals that when the Legislature intended to effect only osteopathic physicians and osteopathic physicians assistants those terms were used, whereas in section 25 of the Act, health care practitioners, which is clearly a broader category of licensees, was specifically referenced.

The Statutory Revision Division has the authority to edit the laws of the state, remove inconsistencies and unnecessary repetitions, and to otherwise improve their clarity and facilitate their correct and proper interpretation. Section 11.242, Florida Statutes (1987). That is exactly what has been done in this case. In McCulley Ford, Inc. v. Kelvin, 308 So.2d 189 (Fla. 1st DCA 1984), the revision commission, in editing Chapter 70-424, Laws of Florida for placement in section 340.642, Florida Statutes (1971), made substantial and material changes by substituting the word "Department" whenever the word "Director" was used in the enrolled act. The result of this editorial change was to take the licensing power from the director of the Division of Motor Vehicles and give it to the Department Highway Safety Motor Vehicles. This obviously resulted in more than an editorial change, and altered the clear intent of the legislature. However in the section presently at issue in this case, not one word of section 25, Chapter 86-290, Laws of Florida was altered when it was placed at section 455.2182, Florida Statutes. It is clear that the revisioners' placement of this section within Chapter 455

does not alter the meaning intended by the Legislature in enacting this provision. It is altogether clear that, when reading sections 455.218 and 455.2182 together, the dentists petitioning this Court are entitled to be licensed: however that licensure is subject to the provision that they practice under supervision.

B. The Department is Required to Issue the Licenses Subject to Supervision.

The Department contends that there is a clear legal duty to issue the licenses sought by the Petitioners subject to some form of supervision of their practice. Section 455.218(5) specifically states that each applicant licensed pursuant to the FTEPA is subject to all provisions of Chapter 455 and the respective practice act under which his license was issued. If the licenses sought by the dentists in this case are issued pursuant to Chapter 466, Florida Statutes, then the Board of Dentistry is the administrative body charged with providing the means for supervision of the dentistry practices of the Petitioners. Section 466.004(4) authorizes the Board of Dentistry to adopt all rules necessary to carry out the provisions of Chapter 466 and Chapter 455. It is clear, then, that the Board is authorized to adopt the rules which will provide for the supervision of the dentist licensed pursuant to Section 455.218, Florida Statutes.

C. Petitioners have an Adequate Remedy at Law.

Finally, the Department asserts that Petitioners have several remedies available to them through the Administrative Procedures Act. Based upon their interpretation of Secretary Gonzalez's, letter of April 3, 1989 as a refusal to license them until a further event occurs, the Petitioners would have the right to petition for a 120.57 hearing in that the decision by the Department is one which would effect the substantial interests of the Petitioners. Section 120.60, Florida Statutes (1987), specifically states that licensing is subject to the provisions of Section 120.57, Florida Statutes. Parenthetically, the Department recognizes that the April 3, 1989 letter of the Secretary does not advise the Petitioners of the right of review of a denial of



licensure, inasmuch as the Department does not interpret that letter as being a notice of an intent to deny licensure. It should be clear to all parties that the Department has always intended to license these individuals as soon as the rules governing the supervision of their practice was approved.

Second, the Petitioners may file a petition for declaratory statement pursuant to section 120.565, Florida Statutes (1987). A declaratory statement must set out the agency's opinion as to the applicability of a specified statute or a provision, in this case Section 455.2182, Florida Statutes or of any rule or order of the agency as it applies to the Petitioner in his particular set of circumstances only. Section 120.565 specifically states that agency disposition of petitions for declaratory statement shall be final agency action, and as such would be judicially reviewable pursuant to Section 120.68, Florida Statutes (1987).


Third, the Petitioners may challenge any rule to be promulgated by the Board pursuant to Section 120.54, Florida Statutes (1987), and any emergency rule promulgated pursuant to section 120.54(9)(a), Florida Statutes is judicially reviewable. In a situation such as the one presented to this Court, mandamus is not appropriate where the Petitioners have not sought relief through the administrative procedures available to them. This is especially true where Petitioners were on notice as early as November of 1986 that the Department interpreted section 455.2182 as requiring supervision for all health care practitioners licensed pursuant to Section 455.218, Florida Statutes. Any challenge to that interpretation could have been brought by way of a section 120.565 petition long ago.

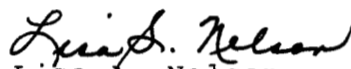
#### IV CONCLUSION

The language of sections 455.218 and 455.2182 are clear: when read together it is apparent that the Department of Professional Regulation is not authorized to issue a license pursuant to section 455.218 without providing some vehicle for the supervision of the practice of those professionals licensed therein.

The Department intends to issue the licenses requested forthwith, subject to the application of Board of Dentistry Rule 21G-2.025, Florida Administrative Code, which was approved April 30, 1989, and is to be noticed immediately. In light of the foregoing, the Department respectfully request that the Court decline to issue the requested Writ of Mandamus.

Respectfully submitted,

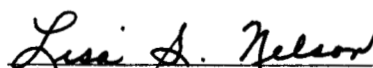
  
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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true and correct copy hereof has mailed to OLGA RAMIREZ-SEIJAS, Esquire, Valdes-Fauli, Cobb, Petrey & Bischoff, P.A., Suite 3400, One Biscayne Tower, 2 South Biscayne Boulevard, Miami, Florida 33131 on this 1st day of May, 1989.

  
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Lisa S. Nelson