

**STATE OF FLORIDA
DEPARTMENT OF HEALTH**

Final Order No. DOH-07-1157-~~FSC~~MOA

FILED DATE - 10-15-07

Department of Health

By:

Racquel Deen
Deputy Agency Clerk

IN RE: The Emergency Suspension of the License of
James S. Pendergraft, IV, M.D.
License Number: 59702
Case Numbers 2005-67224

SUBSTITUTE ORDER OF EMERGENCY SUSPENSION OF LICENSE

On August 11, 2006, the Secretary of the Department of Health ordered the emergency suspension of the license of James S. Pendergraft, IV, M.D., ("Dr. Pendergraft") to practice as a physician in the State of Florida (Prior Order). Ana M. Viamonte Ros, M.D., M.P.H., Secretary of the Department of Health, hereby issues this Substitute Order of Emergency Suspension of License and simultaneously rescinds and revokes said prior order.

Dr. Pendergraft holds license number 59702. His last known address is 1103 Lucerne Terrace, Orlando, Florida 32806. The following Findings of Fact and Conclusions of Law support the emergency suspension of Dr. Pendergraft's license to practice as a physician in the State of Florida.

FINDINGS OF FACT

1. The Department of Health ("Department") is the state department charged with regulating the practice of physicians pursuant to Chapters 20, 456, and 458, Florida Statutes. Section 456.073(8), Florida Statutes, empowers the Secretary of

the Department to summarily suspend Dr. Pendergraft's license to practice as a physician in the State of Florida in accordance with Section 120.60(6), Florida Statutes.

2. At all times material to this order, Dr. Pendergraft was licensed to practice as a physician in the State of Florida, pursuant to Chapter 458, Florida Statutes.

3. Dr. Pendergraft is board certified in Obstetrics and Gynecology.

Relevant Statutory Provisions

4. Section 797.03, Florida Statutes, provides in pertinent part that:

(3) It is unlawful for any person to perform or assist in performing an abortion on a person in the third trimester other than in a hospital."

5. Section 390.0111, Florida Statutes (2005), provides in pertinent part:

(1) TERMINATION IN THIRD TRIMESTER: WHEN ALLOWED - No termination of pregnancy shall be performed on any human being in the third trimester of pregnancy unless:

(a) Two physicians certify in writing to the fact that, to a reasonable degree of medical probability, the termination of pregnancy is necessary to save the life or preserve the health of the pregnant woman; or

(b) The physician certifies in writing to the medical necessity for legitimate emergency medical procedures for termination of pregnancy in the third trimester, and another physician is not available for consultation.

6. Section 456.072, Florida Statutes (2005), 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:

* * *

(k) Failing to perform any statutory or legal obligation placed upon a licensee....

* * *

(2) When the board... finds any person guilty of the grounds set forth in subsection (1) or of any grounds set forth in the applicable practice act, ... it may enter an order imposing one or more of the following penalties:

- * * *
- (b) Suspension or permanent revocation of a license.
 - (c) Restriction of practice or license....

7. Section 458.331, Florida Statutes (2005), provides in pertinent part:

458.331 Grounds for disciplinary action; action by the board and department.-

(1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):

* * *

(g) Failing to perform any statutory or legal obligation placed upon a licensed physician.

* * *

(m) Failing to keep legible... medical records that... justify the course of treatment of the patient, including, but not limited to, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; and reports of consultations and hospitalizations.

* * *

(t) Notwithstanding s. 456.072(2) but as specified in s. 456.50(2):

1. Committing medical malpractice as defined in s. 456.50. The Board shall give great weight to the provisions of s. 766.102 when enforcing this paragraph.

The term, "medical malpractice" as used in Section 458.331(1)(t), is defined in Section 456.50, Florida Statutes, to mean the failure to practice medicine in accordance with the level of care, skill, and treatment recognized in general law related to health care licensure. Section 766.102, Florida Statutes, provides that the prevailing professional standard of care for a given health care provider shall be that level of care, skill, and treatment which, in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers.

8. At all times material to this case, Dr. Pendergraft, alone or with one or more partners, owned and operated Orlando Women's Center (OWC), Inc., a clinic specializing in abortions.

Facts Relating to the Abortion Procedure

9. The records are clear; on or about July 5, 2005, when Patient R.W. presented to OWC, her pregnancy, at about 27 to 28 weeks, was in the third trimester.

10. Dr. Pendergraft did not certify in writing that to a reasonable degree of medical probability, the termination of Patient R.W.'s pregnancy was necessary to save the life or preserve the health of the pregnant woman. Dr. Pendergraft did not obtain a concurring written certification from a second physician. This was not a medical emergency situation that would justify proceeding without the concurring opinion of a second physician. Moreover, Dr. Pendergraft did not certify in writing that any such emergency existed.

11. Dr. Pendergraft charged Patient R.W. \$12,000 for the procedure.

12. Dr. Pendergraft did not transfer Patient R.W. to a hospital before performing the third trimester abortion in compliance with the criminal statute, Section 797.03(3), Florida Statutes. Further, Dr. Pendergraft's practitioner profile on file with the Department of Health indicates that he does not have hospital privileges in Florida.

Facts Relating to DEA Registration

13. In the course of the abortion procedure, Dr. Pendergraft prescribed, ordered or administered one or more drugs, including a controlled substance, by prescribing, ordering or administering Demerol and Phenergan.

14. Demerol, which contains meperidine hydrochloride, is a Schedule II controlled substance listed in Chapter 893, Florida Statutes, which is indicated for the treatment of moderate to severe pain. Demerol has a high potential for abuse and has a currently accepted, but severely restricted, medical use in treatment in the United States. Abuse of Demerol may lead to severe physical and psychological dependence.

15. Phenergan is the brand name for promethazine. Promethazine is a legend drug used in the treatment of motion sickness, prevention and control of nausea and vomiting associated with certain types of anesthesia and surgery, and as an adjunct to analgesics for the control of postoperative pain, preoperative, postoperative, and obstetric sedation.

16. On or about January 2, 2002, Dr. Pendergraft executed six DEA Voluntary Surrender of Controlled Substances Privileges (Form DEA-104) documents for himself and on behalf of each of the five abortion clinics that he owned or controlled. That surrender was part of an agreement with the U.S. Drug Enforcement Administration relating to an investigation into his alleged failure to comply with the Federal requirements pertaining to controlled substances.

17. The DEA investigation arose due to the death of one or more persons who were Dr. Pendergraft's employees and/or patients. M.W., a then 31 year-old female, was a patient of the Respondent and also an employee of OWC. However, M.W. was not a Florida licensed health care provider. M.W.'s duties included assisting in patient preparation, administering medications, cleaning equipment, ordering supplies, and remaining overnight with Patients to administer pain medications, such as Demerol,

a Schedule II controlled substance. Respondent authorized Patient M.W., an unlicensed practitioner, to administer narcotics to Patients without direct supervision.

18. In 1997, M.W.'s duties expanded to ordering controlled substances for OWC under Respondent's Drug Enforcement Administration (DEA) Registration Certificate, Number BP3000875. However, Respondent's medical records for "Patient" M.W. indicate that in or about November of 1998, M.W. informed Respondent that she wanted to become a wrestler or body builder and requested anabolic steroids for that purpose. There was no medical justification for prescribing anabolic steroids for M.W.

19. In or about November of 1998, Respondent allowed M.W. to use his DEA number to order anabolic steroids (specifically; Winstrol, Depo-testosterone, and Stanozolol) for her personal use. Under Section 893.03, Florida Statutes, an anabolic steroid is a Schedule III controlled substance and is any drug or hormonal substance chemically or pharmacologically related to testosterone that promotes muscle growth.

20. Respondent failed to order laboratory studies, such as liver function tests, to monitor the effects of the steroids he authorized for M.W. Respondent failed to document his monitoring of the effects of the steroids prescribed for M.W.

21. In or about March of 1999, M.W. was found unconscious on the floor at OWC. In speaking with Respondent regarding the incident, M.W. admitted that she had abused Cocaine and Heroin. Respondent did not adequately treat M.W.'s drug addiction or refer her to an addiction specialist.

22. In or about April of 1999, Patient M.W. was again found unconscious on the floor at OWC. On or about August 23, 1999, Respondent ordered a drug

profile for M.W. that was positive for Benzodiazepines (a chemically similar group of psychotropic drugs with potent hypnotic and sedative action used predominantly as anti-anxiety and sleep-inducing drugs), and Cocaine Metabolites (a Class II controlled substance and classified as a drug of abuse when used for non-medical purposes; but when used in medicine, to numb mucous membranes).

23. On or about September 22, 1999, M.W. expired from acute pulmonary edema and respiratory compromise due to acute bronchitis with persistent airway obstruction. According to the coroner, Patient M.W.'s death was due to natural causes.

24. Since 2002 and at all times relevant in this matter, Dr. Pendergraft did not have a current, valid DEA number to allow him, as a licensed physician, to prescribe, order or administer controlled substances. At the time of prescribing, ordering or administering these drugs, no physician with a valid DEA number was present and actively participating in the care and treatment of Patient R.W.

Facts Relating to Prior Criminal Conviction

25. On June 28, 2004, Dr. Pendergraft was convicted in the U.S. District Court, Middle District of Florida, Case Number 5:00-OR-21(S1)-OC-32GRJ, of "Accessory After the Fact" in a criminal case relating to a business partner. That conviction is relevant in that, together with this illegal third trimester abortion for Patient R.W. and the prescribing, ordering or administering of controlled substances without a current valid DEA number, Dr. Pendergraft clearly demonstrates his disregard for complying with the laws of Florida and the United States.

Immediate Serious Danger

26. Section 390.011(8), Florida Statutes, defines "third trimester" as the weeks of pregnancy after the 24th week of pregnancy. The Florida Legislature has recognized the inherent danger relating to third trimester abortions. Except under certain delineated circumstances, it is unlawful to do so and even within those exceptions, it is a crime to perform third trimester abortions outside of a hospital.

27. Dr. Pendergraft endangered this female patient by performing a third trimester abortion outside a hospital setting and without a concurring written certification from a second physician. By the third trimester, it becomes more dangerous for the mother to have an abortion, and hospitalization is required.

28. Section 120.60(6), Florida Statutes, authorizes the Department to suspend a physician's license if the Department finds that the physician presents an immediate and serious danger to the public health, safety, or welfare.

29. As a long term, Board-certified, Obstetrics/Gynecology practitioner with many years of experience in pregnancy termination, Dr. Pendergraft's actions demonstrate flagrant disregard for the laws of the State of Florida and willingness to endanger the lives and health of pregnant patients by performing third trimester abortions outside of a hospital and without obtaining concurring physician opinions.

30. Dr. Pendergraft's continued practice as a medical doctor presents an immediate and serious danger to the public health, safety, or welfare.

31. Restricting Dr. Pendergraft's license would not be sufficient protection for the public because Dr. Pendergraft has demonstrated a willingness to disregard

the lawful boundaries of his practice. He has disregarded the legal restrictions on third trimester abortions and he prescribed, ordered or administered controlled substances when he was not authorized by law to do so. The Department cannot devise a restriction with assurance that Dr. Pendergraft will practice within the boundaries of that restriction.

32. Dr. Pendergraft fell below the standard of care when he performed a third trimester abortion outside of a hospital for Patient R.W. and when he performed the third trimester abortion without a concurring written opinion from another physician.

33. Dr. Pendergraft fell below the standard of care when, knowing that he did not possess a current, valid DEA number, he nonetheless prescribed, ordered or administered controlled substances to Patient R.W.

34. Dr. Pendergraft failed to keep adequate medical records that justified the course of treatment for Patient R.W.

35. Dr. Pendergraft fell below the standard of care when he determined the fetus gestational age at 27 to 28 weeks, and then performed a third trimester abortion for Patient R.W. outside of a hospital setting.

CONCLUSIONS OF LAW

1. The Secretary of the Department of Health has jurisdiction over this matter pursuant to Section 456.073(8), Florida Statutes, and Section 20.43, Florida Statutes, as set forth above.

2. Based on the foregoing Findings of Fact, the Secretary concludes that Dr. Pendergraft endangered the life of a pregnant patient by performing a third trimester abortion outside of a hospital and without obtaining a concurring physician opinion and further, that he prescribes, orders and/or administers controlled substances without a valid DEA number.

3. Based on the foregoing Findings of Fact, the Secretary finds that Dr. Pendergraft has violated Section 797.03(3), Section 390.0111(1), Sections 456.072(1)(k), and Sections 458.331(1)(g), (m) and (t), Florida Statutes.

4. Based on the foregoing Findings of Fact, the Secretary finds that Dr. Pendergraft's continued practice as a physician constitutes an immediate serious danger to the health, safety, and welfare of the public and that this summary procedure is fair under the circumstances to adequately protect the public.

WHEREFORE, in accordance with Section 120.60(6), Florida Statutes, it is

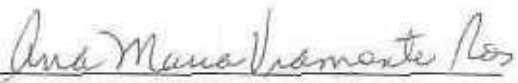
ORDERED THAT:

1. The license of James S. Pendergraft, IV, M.D., license number 59702, is immediately suspended.

2. A proceeding seeking formal suspension or discipline of the license of James S. Pendergraft, IV, M.D., to practice as a physician has already been

instituted and will be acted upon in compliance with Sections 120.569 and 120.60(6),
Florida Statutes.

DONE and ORDERED this 15 day of June, 2007.



Ana M. Viamonte Ros, M.D., M.P.H.
Secretary, Department of Health

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NOTICE OF RIGHT TO JUDICIAL REVIEW

Pursuant to Sections 120.60(6), and 120.68, Florida Statutes, the Department's findings of immediate danger, necessity, and procedural fairness shall be judicially reviewable. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing one copy of a Petition for Review, in accordance with Florida Rule of Appellate Procedure 9.100, with the Department of Health and a second copy of the petition accompanied by a filing fee prescribed by law with the District Court of Appeal within thirty (30) days of the date this Order is filed.