

IN THE DISTRICT COURT OF APPEAL  
FIFTH DISTRICT, STATE OF FLORIDA

C. ROBERT CROW, M.D.,

Appellant,

v.

Case No. 95-918

AGENCY FOR HEALTH CARE  
ADMINISTRATION, etc.,

Appellee.

Opinion filed March 22, 1996.

Administrative Appeal from the Agency for Health Care Administration.

Counsel: James Edward Cheek, III, of Winderweedle, Haines, Ward & Woodman, P.A., Orlando, for Appellant. Raoul G. Cantero, III, of Adorno & Zeder, P.A., Miami, for Amicus Curiae, Florida Medical Ass'n. and Dade County Medical Ass'n. Robert A. Butterworth, Attorney General, Tallahassee, and Allen R. Grossman, Assistant Attorney General, Tallahassee, for Appellee.

HARRIS, J.

Appellant, C. Robert Crow, M.D., timely appeals from a final administrative order of appellee, State of Florida, Agency for Health Care Administration, Board of Medicine, rendered March 16, 1995. The final order is a declaratory statement issued pursuant to section 120.565, Florida Statutes and constitutes a final agency action reviewable on appeal.

Crow is a physician licensed to practice medicine in Florida. He sold his practice located in Leesburg, Florida to Integrated Home Health Care, Inc. (IHHC). Pursuant to Crow and IHHC's agreement, IHHC hired Crow as a physician/employee. Crow owns no interest in IHHC. His patients are clients of IHHC and all fees are paid to IHHC. In turn, IHHC pays Crow a flat salary for his services. Pursuant to the agreement, Crow informed each patient of his relationship with IHHC, but he maintains exclusive control over the medical diagnosis and treatment of patients, and IHHC has no authority to exercise control over Crow's professional judgment or the manner in which he renders medical care to patients.

Crow filed a petition for declaratory statement before the Board of Medicine which suggested a proposed agreement concerning payment of fees and sought a determination that the proposal would not violate section 458.331(1)(i), Florida Statutes. The petition explained:

Petitioner desires to amend his employment agreement with

IHHC to provide for IHHC to pay to Petitioner a salary based upon the prior fiscal year's total practice revenues from physician services (medical diagnosis and treatment of patients) personally performed by or under the direct supervision of Petitioner (hereinafter referred to as "practice revenues"). Pursuant to the proposed amendment, Petitioner's base salary for each subsequent year will be equal to 35% of the practice revenues for the prior year. The proposed amendment further provides for the payment of a year-end bonus equal to 40% of practice revenues over a pre-set target level. The target level for each year will be determined by dividing the prior year's salary base by 35%. Petitioner anticipates that this employment arrangement with IHHC will allow him to engage exclusively in the practice of medicine and will relieve him of the business management responsibilities of practice.

Petitioner requests that the Board of Medicine interpret Section 458.331(1)(i), Florida Statutes, in light of the proposed amendment to his employment agreement with IHHC and state whether the proposed compensation arrangement would constitute a "fee-splitting arrangement" in violation of the referenced statutory provision.

The Board of Medicine made the following findings:

3. Section 458.331(1)(i), Florida Statutes, prohibits certain financial arrangements by physicians. Specifically: Paying or receiving any commission, bonus, kick-back, or rebate, or engaging in any split-fee arrangement in any form whatsoever with a physician, organization, agency, or person, either directly or indirectly, for patients referred to providers of health care goods and services...

\* \* \*

5. As applied to the situation described in this petition, the Board concludes that a salary based on a percentage of the previous year's revenues and a year-end bonus based on current year revenues would each be in violation of the prohibition set forth in Subsection 458.331(1)(i), Florida Statutes. However, the Board further concludes that an arrangement limited only to those fees generated for the professional services of the physician and those under the physician's direct supervision, (such as an ARNP or PA) without reliance on fees generated for any

ancillary services (e.g., laboratory, radiology, diagnostic testing, or out-patient surgery, whether provided at the physician's practice location or elsewhere) or equipment as a result of the physician's referral of patients for such services or equipment, would be acceptable.

WHEREFORE IT IS HEREBY ORDERED AND ADJUDGED:

To the extent that the arrangement proposed by Petitioner would provide for either a salary or a year-end bonus based upon total revenues generated by Petitioner for IHHC, such an arrangement would be in violation of the prohibition set forth in Subsection 458.331(1)(i), Florida Statutes. However, to the extent that such arrangements are based solely on the fees generated for IHHC by Petitioner's professional services actually rendered and those rendered by PA's or ARNPs under Petitioner's direct supervision, they are permitted by law.

This appeal followed.

Crow argues that section 458.331(1)(i) prohibits only payment or receipt of commissions, bonuses, kickbacks, or rebates, or a split-fee arrangement in exchange for referral of patients. He submits that his proposal sought compensation in the form of an annual salary calculated on the amount of services rendered to IHHC's patients based on a percentage of the volume of his prior year's services to be increased in the event his volume exceeded the projected estimate. His position is that since all services which form the basis for his compensation will be performed "in house" by IHHC, no "referral of patients" will take place.

We agree with the Board of Medicine that this interpretation is too narrow. The statute is clear that bonuses may not be paid for patient referrals. Although Crow and the Florida Medical Association and Dade County Medical Association (Amicus herein) are concerned that the Board's declaratory statement exceeds the question raised in Crow's petition, the Board's finding is appropriately connected with the question. The Board explains in its statement that a salary or year-end bonus is inappropriate in a circumstance that would constitute a referral; i.e., where ancillary services are ordered and IHHC bills for those services. Crow asserts that since he did not mention billing for ancillary services in his petition, the Board should not have addressed that issue. Crow is correct in stating that his proposal is based on a salary which is a percentage of "physician services (medical diagnosis and treatment of patients) personally performed by or under the direct supervision of Petitioner (hereinafter referred to as 'practice revenues.\*\*) But the situation addressed by the Board could easily arise in his proposed arrangement with IHHC, and the Board is justified in pointing out pitfalls that it sees. In this case, the Board is making it clear that selling one's practice to an HMO is not a loophole to section 458.331(1)(i).

It is also clear that the Board was concerned with the possibility that an employee physician's medical judgment might be skewed where that physician benefits financially from overutilization of ancillary tests and services even if performed by IHHC.

We believe that the Board answered Crow's inquiry and answered his inquiry

correctly.

AFFIRMED.

SHARP, W., and ANTOON, JJ., concur.

STATE OF FLORIDA  
AGENCY FOR HEALTH CARE ADMINISTRATION  
BOARD OF MEDICINE Final Order No. AHCA-95-00405 Date 3-16-95

FILED

Agency for Health Care Administration  
AGENCY CLERK

By: R.S. Power, Agency Clerk  
Brenda Simone  
Deputy Agency Clerk

Index No. 95-DS-001

IN RE: THE PETITION FOR DECLARATORY  
STATEMENT OF C. ROBERT CROW, M.D.

FINAL ORDER

This cause came before the Board of Medicine (hereinafter Board) pursuant to Section 120.565, Florida Statutes, and Rule Chapter 28-4, Florida Administrative Code, on February 10, 1995, for the purpose of considering the Petition for Declaratory Statement filed on behalf of C. Robert Crow, M.D. (hereinafter Petitioner). No person or entity has sought to intervene as a party. Having considered the petition, the arguments submitted by counsel, the applicable law, and being otherwise fully advised in the premises, the Board makes the following findings and conclusions.

FINDINGS OF FACT

1. Petitioner is licensed to practice medicine in the State of Florida pursuant to Chapter 458, Florida Statutes, and has recently sold his medical practice located in Leesburg, Florida, to Integrated Home Health Care, Inc. (hereinafter IHHC) a Florida corporation.

2. The facts asserted by Petitioner are as follows:  
Pursuant to the practice acquisition agreement entered into between Petitioner and IHHC, Petitioner has been hired by IHHC as a physician/employee. The employment agreement between Petitioner and IHHC provides that IHHC will handle all business

management responsibilities, and that all patients are considered patients of IHHC and will pay all fees for medical services directly to IHHC. Petitioner has no ownership interest in IHHC and is presently compensated with a flat annual salary.

3. Pursuant to the employment agreement, Petitioner informs each patient of Petitioner's relationship with IHHC. Petitioner maintains exclusive control over medical diagnosis and treatment of patients and IHHC does not exercise any control over the professional judgement of Petitioner or the manner in which he renders medical care to patients.

4. Petitioner desires to amend his employment agreement with IHHC to provide for IHHC to pay Petitioner a salary based upon the prior year's total practice revenues from physician services provided by or under the direct supervision of Petitioner. The proposed amendment to the employment agreement would provide for IHHC to pay Petitioner a base salary equal to 35% of the practice revenues generated by Petitioner or under Petitioner's direct supervision for the prior year. Furthermore, IHHC would pay Petitioner a year-end bonus equal to 40% of practice revenues generated by Petitioner or under Petitioner's direct supervision to the extent that such revenues exceed a pre-set target level for the current year.

5. Petitioner requests that the Board review the above stated facts and to state whether the proposed amendments to the employment agreement would violate the prohibitions set forth in Subsection 458.331(1)(i), Florida Statutes.

6. This Petition was noticed by the Board in Vol. 21,

CONCLUSIONS OF LAW

1. The Board has jurisdiction over this matter pursuant to Section 120.565, Florida Statutes and Rule Chapter 28-4, Florida Administrative Code.

2. The Petition for Declaratory Statement is in substantial compliance with the provisions of Section 120.565, Florida Statutes and Rule Chapter 28-4, Florida Administrative Code.

3. Section 458.331(1)(i), Florida Statutes, prohibits certain financial arrangements by physicians. Specifically:

Paying or receiving any commission, bonus, kick-back, or rebate, or engaging in any split-fee arrangement in any form whatsoever with a physician, organization, agency, or person, either directly or indirectly, for patients referred to providers of health care goods and services...

4. The Board interprets the above-stated provision as prohibiting an arrangement between a physician and an employing entity that would provide for remuneration paid to the physician on the basis of revenues generated by the physician. Furthermore, bonuses based upon fees generated from the referral by the physician for ancillary services is also prohibited.

5. As applied to the situation described in this petition, the Board concludes that a salary based on a percentage of the previous year's revenues and a year-end bonus based on current year revenues would each be in violation of the prohibition set forth in Subsection 458.331(1)(i), Florida Statutes. However, the Board further concludes that an arrangement limited only

to those fees generated for the professional services of the physician and those under the physician's direct supervision, (such as an ARNP or PA) without reliance on fees generated for any ancillary services (e.g. laboratory, radiology, diagnostic testing, or out-patient surgery, whether provided at the physician's practice location or elsewhere) or equipment as a result of the physician's referral of patients for such services or equipment, would be acceptable.

WHEREFORE IT IS HEREBY ORDERED AND ADJUDGED:

To the extent that the arrangement proposed by Petitioner would provide for either a salary or a year-end bonus based upon total revenues generated by Petitioner for IHHC, such an arrangement would be in violation of the prohibition set forth in Subsection 458.331(1)(i), Florida Statutes. However, to the extent that such arrangements are based solely on the fees generated for IHHC by Petitioner's professional services actually rendered and those rendered by PAs or ARNPs under Petitioner's direct supervision, they are permitted by law.

This Final Order takes effect upon filing with the Clerk of the Agency for Health Care Administration.

DONE AND ORDERED this 13 day of March,  
1995.

BOARD OF MEDICINE

Gary E. Winchester, M.D.  
GARY E. WINCHESTER, M.D.  
CHAIRMAN

NOTICE OF RIGHT TO JUDICIAL REVIEW



A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE AGENCY FOR HEALTH CARE ADMINISTRATION AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THIS FINAL ORDER.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by U.S. Mail to C. Robert Crow, M.D. c/o W. Graham White, Attorney at Law, Barnett Bank Building, 250 Park Avenue South, Post Office Box 880, Winter Park, Florida 32790-0880 this \_\_\_\_\_ day of \_\_\_\_\_, 1995.

\_\_\_\_\_  
EXECUTIVE DIRECTOR

AMENDED CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been provided by certified mail to Robert C. Crow, M.D., 504 North Grandview Street, Mount Dora, Florida 32757, Graham White, Esquire, Barnett Bank Building, 250 Park Avenue South, Post Office Box 880, Winter Park, Florida 32790-0880, and by interoffice delivery to Larry G. McPherson, Chief Medical Attorney, Department of Business and Professional Regulation, 1940 North Monroe Street, Tallahassee, Florida 32399-0792, at or before 5:00 p.m., this 16 day of March, 1995.

Mamm Harris

DEPARTMENT OF PROFESSIONAL REGULATION

BOARD OF MEDICINE

In Re: The Petition for Declaratory  
Statement of:

C. ROBERT CROW, M.D.,  
Petitioner.

---

PETITION

C. Robert Crow, M.D., 334 Donnelly Street, Mount Dora, Florida 32757 ("Petitioner") submits this Petition for Declaratory Statement pursuant to Section 120.565, Florida Statutes and Chapter 28-4, Florida Administrative Code. Petitioner is licensed to practice medicine in the State of Florida pursuant to Chapter 458, Florida Statutes. Petitioner recently sold his medical practice located in Leesburg, Florida to Integrated Home Health Care, Inc., a Florida corporation ("IHHC").

Under the terms of the practice acquisition agreement, IHHC purchased Petitioner's practice, and hired Petitioner as a physician-employee pursuant to an employment agreement. The employment agreement provides, among other things, that IHHC, as owner, will handle all business management responsibilities. All patients are clients of IHHC, and will pay fees for medical services directly to IHHC, subject to applicable laws and regulations.

Petitioner has no ownership or equity interest in IHHC, and is presently compensated at a flat annual salary. IHHC bills patients or their insurers directly for services and posts all collections to the appropriate accounts. IHHC deposits all monies into the corporate account and disburses all supplier and payroll funds. IHHC will be responsible for all bad debts and uncollectible accounts.

As a physician employed by IHHC, Petitioner will disclose his relationship with the corporation to all of IHHC's patients. Petitioner will be exclusively involved in the medical diagnosis and treatment of patients. IHHC will not exercise any control over the professional judgment of the Petitioner or the manner in which he renders medical services to patients.

Petitioner desires to amend his employment agreement with IHHC to provide for IHHC to pay to Petitioner a salary based upon the prior fiscal year's total practice revenues from physician services (medical diagnosis and treatment of patients) personally performed by or under the direct supervision of Petitioner (hereinafter referred to as "practice revenues"). Pursuant to the proposed amendment, Petitioner's base salary for each subsequent year will be equal to 35% of the practice revenues for the prior year. The proposed amendment further provides for the payment of a year-end bonus equal to 40% of practice revenues over a pre-set target level. The target level for each year will be determined by dividing the prior year's base salary by 35%. Petitioner anticipates that this employment arrangement with IHHC will allow

him to engage exclusively in the practice of medicine and will relieve him of the business management responsibilities of practice.

Petitioner requests that the Board of Medicine interpret Section 458.331(1)(i), Florida Statutes, in light of the proposed amendment to his employment agreement with IHHC and state whether the proposed compensation arrangement would constitute a "fee-splitting arrangement" in violation of the referenced statutory provision.

Based on past Declaratory Statements issued by the Board, Petitioner maintains that the proposed arrangement would not constitute a violation of the referenced statute. See Order on the Petition for Declaratory Statement of Alan Graff, M.D., Case Number 87-BOM-3; Order on the Petition for Declaratory Statement of Melbourne Health Associates, Inc. d/b/a John Lozito, M.D., 9 FALR 6295.

Section 458.331(1)(i) prohibits "fee-splitting" for patient referrals. Specifically,

"Paying or receiving any commission, bonus, kick-back, or rebate, or engaging in any split-fee arrangement in any form whatsoever with a physician, organization, agency, or person, either directly or indirectly, for patients referred to providers of health care goods and services, . . ."

Neither the employment agreement between Petitioner and IHHC nor the proposed amendment thereto makes reference to patient referrals and neither provides for payment to be made for such referrals.

The annual salary and bonus are based upon total practice revenues, regardless of the source of IHHC's patients.

The Board's decision in Graff, emphasized that the clear wording of the statute prohibits a fee for the referral itself [emphasis added]. The statute permits the payment of a fee for services rendered to patients referred to or by the physician. Therefore, because the statute specifically prohibits only fee-splitting "for patient referrals", the proposed arrangement would not constitute a violation of Section 458.331(1)(i), Florida Statutes. See also Order on the Petition for Declaratory Statement of Melbourne Health Associates, Inc. d/b/a John Lozito, M.D., 9 FALR 6297 (holding that Section 458.331(1)(i) prohibits the return on the investment depending on the number of referrals made to the entity). Similarly, Petitioner's annual salary and bonus will not depend on patient referrals made to IHHC, but solely upon the overall revenues of the practice.

The proposed compensation arrangement can be distinguished from arrangements which were found to involve fee-splitting, in violation Section 458.331(1)(i), Florida Statutes. The Board's decision in Order on the Petition for the Declaratory Statement of Paul B. Speiller, M.D., P.A., 14 FALR 3942 held that an arrangement would constitute fee splitting when an entity referred patients to a physician and then retained a portion of the physician's fee. In contrast, under the proposed arrangement, IHHC will bill for all medical services rendered and will retain the entire fee. Petitioner will be compensated by a salary based upon the

practice's overall annual revenues and will retain no portion of particular fees. See also Order on the Petition for the Declaratory Statement of Gary R. J. Johnson, 14 FALR 3935.

Petitioner's position is also supported by recent Florida court decisions which interpret the Illinois statute prohibiting fee-splitting arrangements. See Practice Management Associates, Inc. v. Orman, 614 So.2d 1135 (Fla. 2d DCA 1993); Practice Management Associates, Inc. v. William C. Blickensderfer, 18 FLW D2470 (Fla. 2d DCA 1993). Chapter 111, paragraph 4400-22(14), Illinois Rev. Statutes (1989) prohibits fee splitting "for any professional services not actually rendered." The language of the Illinois statute is broader than that of other states including Florida which specifically prohibit fee-splitting only for patient referrals.

In Orman, the contract between a chiropractor and PMA, Inc. provided that in exchange for a \$75 weekly payment or 10% gross weekly income (whichever was higher), PMA would provide marketing, advice, and education services. The court interpreted the Illinois statute to prohibit fee-splitting in the "traditional sense", and limited its application to patient referrals, consistent with the legislative intent of the statute.

Similarly, in the case of Practice Management Associates, Inc. v. Blickensderfer, 18 FLW D2470 (Fla. 2d DCA 1993), the court limited the broad language of the Illinois statute to patient referrals, in concurrence with its decision in Orman. The court concluded that if the arrangement were interpreted to constitute "fee-splitting" because of the division of the physician's fee, taken to its logical conclusion, all payments such as rent and

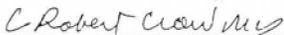
staff salary could be interpreted as fee-splitting. Blickensderfer, 18 FLW D2470, at 2470. Accordingly, the court held that the arrangement did not constitute a violation of the Illinois statute. Id.

In comparing the proposed compensation arrangement to the arrangements analyzed in the precedent cases, the precedent cases more directly involve a split of a physician's fees. However, because the Second District Court limited the application of the applicable statutes to patient referrals, the arrangements were found not to be in violation of the applicable statutes. Under the proposed compensation arrangement between Petitioner and IHHC, there is no provision relating to or encouraging patient referral or solicitation. IHHC will pay Petitioner an annual salary based on the overall practice revenues from physician services personally performed by or under the direct supervision of Petitioner, regardless of patient referrals.

Therefore, based upon this Board's prior decisions interpreting Section 458.331(1)(i) and recent Florida case decisions, Petitioner believes that the proposed compensation arrangement would not constitute fee-splitting in violation of the statute.

This petition is respectfully submitted for consideration by the Board of Medicine.

Dated this 12 day of September, 1994.

  
C. Robert Crow, M.D.  
Petitioner