

STATE OF FLORIDA  
AGENCY FOR HEALTH CARE ADMINISTRATION  
BOARD OF MEDICINE Final Order No. AHCA-95-01140 Date 8-18-95

FILED

Agency for Health Care Administration  
AGENCY CLERK

R.S. Powey, Agency Clerk

By: Brandon L. Moore  
Deputy Agency Clerk

IN RE: THE PETITION FOR DECLARATORY  
STATEMENT OF NANCY Y. BRYANT, M.D.

FINAL ORDER

This cause came before the Board of Medicine (hereinafter Board) pursuant to Section 120.565, Florida Statutes, and Chapter 28-4, Florida Administrative Code, on August , 1995, for the purpose of considering the Petition for Declaratory Statement filed on behalf of Nancy Y. Bryant, M.D. (hereinafter

~~Petitioner). The Agency for Health Care Administration~~

~~(hereinafter AHCA) has petitioned to intervene in this matter.~~

Having considered the petition, the arguments of 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 Nancy Y. Bryant, M.D. is licensed to practice medicine in the State of Florida pursuant to Chapter 458, Florida Statutes..

2. The facts asserted by Petitioner are as follows:

Petitioner is a board certified ophthalmologist currently involved in a solo practice. Petitioner is interested in entering into an employment arrangement with Suncoast Medical Clinic, P.A., (hereinafter Suncoast) which is in the midst of

converting to a partnership. Suncoast is a "group practice" pursuant Section 455.236(3)(g), Florida Statutes. Suncoast is a multi-specialty medical clinic which employs approximately forty physicians who render services from one central site and approximately five satellite sites. Petitioner has established an optical shop for the convenience of her patients which provides services solely to the patients of her ophthalmic practice. The optical shop is located within the medical office space leased by Petitioner as her primary place of business. The optician who works in the optical shop is employed by Petitioner. Patients may choose to purchase products from Petitioner's optical shop or elsewhere. The proposed arrangement would result in Petitioner working as an employee of Suncoast and being the sole shareholder in the corporation which owns the optical shop.

~~The optical shop would continue to render services only to~~ patients of Petitioner. Although all patients of Petitioner would also be patients of Suncoast, the optical shop would provide services only for those patients that are specifically ophthalmic patients of Petitioner. Suncoast also owns an optical shop and it is therefore not expected that Suncoast will send patients to Petitioner just for optical services. Petitioner's current office site would become a satellite of Suncoast and all of Petitioner's current employees would become employees of Suncoast. All fees, compensation, monies and other things of value received as a result of Petitioner's provision of ophthalmic services would be billed by and belong to Suncoast. Any fees, compensation, monies or other things of value received

by Petitioner for the rendering of optical goods or services would be retained by Petitioner through the corporation which owns Petitioner's optical shop. The proposed employment contract calls for Petitioner to receive as annual compensation an amount equal to the gross receipts to Suncoast attributed to Petitioner's provision of ophthalmic services less patient refunds, a service fee, an administrative fee, and applicable variable charges and expenses. (Service and administrative fees are set forth in the employment contract as covering designated overhead costs.) Pursuant to paragraphs 2 and 7 of Petitioner's proposed contract with Suncoast, Petitioner would be providing a full range of professional medical services on a full time basis.

AHCA is the state agency tasked by Section 20.42 and Chapters 395 and 455, Florida Statutes, with the licensing and regulation of health care facilities and specifically, with the investigation and prosecution of alleged violations of the laws and rules regulating licensees of the Board of Medicine. The Board's determination of the question proposed in this action for declaratory statement would substantially affect the interests of AHCA in the uniform enforcement of regulations pertaining to the approximately 29,000 licensees practicing in Florida. AHCA does not dispute the facts set forth in the petition in this cause.

3. Petitioner requests the Board to review the above stated facts and to state whether Petitioner would violate Section 455.236, Florida Statutes, if she continues to send ophthalmic patients treated by her while she is under an employment agreement with Suncoast to receive optical services from an optical shop owned separately by Petitioner.

4. Neither Petitioner nor AHCA have requested a proceeding under Section 120.57, Florida Statutes.

5. This Petition was noticed by the Board in Vol. 21, No. 22, dated June 2, 1995, Florida Administrative Weekly (p. 3715).

#### CONCLUSIONS OF LAW

1. The Board of Medicine has jurisdiction over this matter pursuant to Section 120.565, Florida Statutes, and Rule Chapter 28-4, Florida Administrative Code. The Board is aware of the prohibition against using a declaratory statement as a vehicle for the adoption of broad agency policies as discussed in Florida Optometric Association v. DPR, Board of Opticianry, 567 So. 2d 928 (Fla. 1st DCA 1990). However, the Board is unable to readily envision a set of circumstances under the statute at issue in ~~this cause that would be so unique as to not apply to any other~~ licensee or group of licensees. Furthermore, the statute clearly directs the Board to encourage and answer declaratory statement petitions precisely like that pending in this matter for the purpose of clarifying the application of this statute. The Board therefore finds itself compelled by the specific mandate in Section 455.236(4)(b)4., Florida Statutes, to accept and answer the petition in this matter.

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



3. The Patient Self-Referral Act of 1992, Section

455.236(2), Florida Statutes, provides:

LEGISLATIVE INTENT.-It is recognized by the Legislature that the referral of a patient by a health care provider to a provider of health care services in which the referring health care provider has an investment interest represents a potential conflict of interest. The Legislature finds these referral practices may limit or eliminate competitive alternatives in the health care services market, may result in overutilization of health care services, may increase costs to the health care system, and may adversely affect the quality of health care. The Legislature also recognizes, however, that it may be appropriate for providers to own entities providing health care services, and to refer patients to such entities, as long as certain safe guards are present in the arrangement. It is the intent of the Legislature to provide guidance to health care providers regarding prohibited patient referrals between health care providers and entities providing health care services and to protect the citizens of Florida from unnecessary and costly health care expenditures.

~~4. Section 455.236(4), Florida Statutes, prohibits health~~

~~care providers from making a referral of a patient for the provision of "any other health care item or service" to an entity in which the health care provider is an investor except under specific circumstances not relevant to the resolution of this petition.~~

5. Section 455.236(3)(m)3.f., Florida Statutes, exempts from the definition of a "referral" and therefore from the prohibition against referrals of patients for "any other health care item or service" the referral:

By a health care provider who is the sole provider or member of a group practice for ... other health care items or services that are prescribed or provided solely for such referring health care provider's or group practice's own patients and that are provided

or performed by or under direct supervision of such referring health care provider or group practice.

6. Section 455.236(3)(g), Florida Statutes, defines "group"

\* for purposes of exemption from the general prohibition on self-referral as follows:

"Group practice" means a group of two or more health care providers legally organized as a partnership, professional corporation, or similar association:

(1) in which each health care provider who is a member of the group provides substantially the full range of services which the health care provider routinely provides, including medical care, consultation, diagnosis, or treatment, through the joint use of shared office space, facilities, equipment, and personnel;

(2) for which substantially all of the services of the health care providers who are members of the group and are billed in the name of the group an amount so received are treated as receipts of the group; and

(3) in which the overhead expenses of and the income from the practice are distributed in accordance with the methods previously determined by the members of the group.

(7) As an employee of Suncoast, Petitioner would qualify as a "member" of a group practice and as a member of a group practice Petitioner would fall under the exemption set forth in Section 455.236(3)(m)3.f., Florida Statutes.

WHEREFORE, the Board of Medicine hereby determines that the Petitioner as an employee, who is reimbursed for professional fees in an appropriate arm's length manner by Suncoast, which is the employing group practice, comes under the exemption set forth in Section 455.236(3)(m)3.f., Florida Statutes, and may refer patients to the optical shop she owns, as long as the optical shop continues to provide optical services only to patients of Suncoast.

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

DONE AND ORDERED this 16<sup>th</sup> day of August, 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 MAY BE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE CLERK OF THE AGENCY FOR HEALTH CARE ADMINISTRATION AND A SECOND COPY, ACCOMPANIED BY THE FILING FEES REQUIRED 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 Nancy Y. Bryant, M.D. c/o Cynthia A. Mikos, Attorney at Law, 13577 Feather Sound Drive, Suite 300, Clearwater, Florida 33701, and by interoffice delivery to Larry G. McPherson, Jr., Chief Medical Attorney, Agency for Health Care Administration, 1940 North Monroe Street, Suite 60, Tallahassee, Florida 32399-0792, this \_\_\_\_\_ day of \_\_\_\_\_, 1995.

AMENDED CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been provided by certified mail to Nancy Y. Bryant, M.D., 2150 49th Street N #C, St Petersburg, Florida 33710-5240, Cynthia Mikos, Esquire, 13577 Feather Sound Dr, Ste 300, Clearwater, Florida 33701, 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 18<sup>th</sup> day of August, 1995.

Mam Harris

PETITION FOR DECLARATORY STATEMENT

NAME OF PETITIONER: Nancy Yates Bryant, M.D.  
ADDRESS OF PETITIONER: Sheffield Medical Center  
2150 49th Street North  
Suite C  
St. Petersburg, FL 33710  
NAME OF AGENCY: Agency for Health Care  
Administration  
Board of Medicine  
STATUTORY PROVISION ON WHICH  
DECLARATORY STATEMENT IS SOUGHT: Florida Statutes §455.236

DESCRIPTION:

Petitioner, Nancy Yates Bryant, M.D., hereinafter "Dr. Bryant," hereby files this Petition for Declaratory Statement, hereinafter "Petition," pursuant to Florida Statutes, §120.565, and §59R-1.003; Florida Administrative Code, and states:

FACTS

1. Dr. Bryant is a board certified ophthalmologist duly licensed by the State of Florida to practice medicine. Dr. Bryant is a sole practitioner interested in entering into an employment arrangement with Suncoast Medical Clinic, P.A., hereinafter "Clinic," a professional service corporation which is in the midst of converting to a limited partnership. The Clinic meets the definition of "group practice" as set out in F.S. §455.236(3)(g).

2. Dr. Bryant has established an optical shop for the convenience of her patients which provides services solely to the patients of her ophthalmic practice. The optical shop is located within the medical office space leased by Dr. Bryant as her primary

place of business. The optician who works in the optical shop is employed by Dr. Bryant. Patients may choose to purchase optical products from Dr. Bryant or elsewhere.

3. For business reasons, unrelated to this Petition, the Clinic and Dr. Bryant are considering an arrangement whereby Clinic would contract with Dr. Bryant individually, rather than as an entity which includes the optical shop.

4. The proposed arrangement, if finalized, would result in Dr. Bryant working as an employee of the Clinic and being the sole shareholder in a corporation which owns the optical shop. The optical shop would continue to render services only to patients of Dr. Bryant, not to the patients of other physicians practicing at the Clinic. Under the terms of the proposed agreement, patients currently treated by Dr. Bryant will become patients of the Clinic.

ISSUE

5. Whether Dr. Bryant violates the Patient Self-Referral Act of 1992, F.S. §455.236 ("Act"), if she continues to provide optical services to ophthalmology patients treated by her when she enters into an employment agreement with the Clinic and operates the optical shop in a separate corporate entity in which she is the sole shareholder.

LAW

6. Optical services are not designated health services under the Act. Designated health services are defined in F.S. §455.236(3)(d) to mean clinical laboratory services, physical

therapy services, comprehensive rehabilitative services, diagnostic imaging services and radiation therapy services.

7. Optical services might be classified as "health care items or services." Health care items or services are not defined in the Act.

8. Subsection (4) of the Act prohibits certain referrals for health care items or services. The relevant portion of the section is:

(b) A health care provider may not refer a patient for the provision of any other health care item or service to an entity in which the health care provider is an investor unless:

2. With respect to an entity other than a publicly held corporation described in subparagraph 1., and a referring provider's investment interest in such entity, each of the following requirements are met:

a. No more than 50 percent of the value of the investment interests are held by investors who are in a position to make referrals to the entity.

b. The terms under which an investment interest is offered to an investor who is in a position to make referrals to the entity are no different from the terms offered to investors who are not in a position to make such referrals.

c. The terms under which an investment interest is offered to an investor who is in a position to make referrals to the entity are not related to the previous or expected volume of referrals from that investor to the entity.

d. There is no requirement that an investor make referrals or be in a position to make referrals to the entity as a condition for becoming or remaining an investor.

9. The Act expressly limits the meaning of the word "referral." The relevant exception is found at F.S. 455.236(3)(m)3.f., hereinafter "the referral exception."

3. Except for the purposes of s. 455.239, the following orders, recommendations, or plans of care shall not constitute a referral by a health care provider:

f. By a health care provider who is the sole provider or member of a group practice for designated health services or other health care items or services that are prescribed or provided solely for such referring health care provider's or group practice's own patients, and that are provided or performed by or under the direct supervision of such referring health care provider or group practice.

#### ANALYSIS

10. As a sole practitioner, Dr. Bryant may own one hundred percent (100%) of the optical shop and provide optical services because she is prescribing health care items or services solely for her patients and the services are provided under her direct supervision. Thus, according to the Act, no "referral" occurs.

11. Under the proposed employment arrangement, the application of the referral exception alters, perhaps in form, but not in substance. Dr. Bryant will become an employee of a group practice. As an employee she will prescribe optical services for patients she sees on behalf of the group practice. The optical services will be directly supervised by Dr. Bryant individually, not by the group practice. Further, the optical services will be provided through a separate corporation wholly owned by Dr. Bryant.

12. Under the proposed arrangement, despite technical differences in structure, Dr. Bryant continues to provide and supervise optical services to those patients treated by her and to no others. Therefore, the referral exception, in our opinion, logically continues to apply.



CONCLUSION

13. Dr. Bryant is currently able to provide optical services to her clients under the referral exception to the Patient Self-Referral Act of 1992. Likewise, the referral exception allows members of a group practice to provide health items and services to patients of the group practice. Therefore, the referral exception should permit the continuance of Dr. Bryant's provision of optical services to the patients she treats despite the placement of the optical shop in a corporation wholly owned by her.

Respectfully submitted,



Nancy Yates Bryant, M.D.  
2150 49th Street North  
Suite C  
St. Petersburg, FL 33710

17 May 95  
Date