

IN RE: The Petition for
Declaratory Statement of:

MELBOURNE HEALTH ASSOCIATES, INC.,
and JOHN LOZITO, M.D.,

Petitioners.

FILE
Department of Pro
AGENC

CLERK *[Signature]*

DATE 12/11/87

Case No. 87

FINAL ORDER

THIS CAUSE came before the Board of Medicine pursuant to Section 120.565, F.S., and Chapter 28-4, Florida Administrative Code, on February 8, 1987, in Tampa, Florida, for the purpose of considering the Amended Petition for Declaratory Statement by Melbourne Health Associates, Inc., and John Lozito, M.D. (hereinafter Petitioners). No person or entity sought to intervene as a party.

Having considered the amended petition and supporting documentation, the other evidence of record, and being fully advised in the premises, the Board makes the following findings and conclusions:

FINDINGS OF FACT

1. Petitioner John Lozito, M.D., is a licensed physician authorized to practice medicine in Florida. He asserts that as a prospective limited partner in the arrangement to be described herein, his interest will be greatly affected by the decision of the Board in determining whether or not the fee arrangement described in the Petition for Declaratory Statement is in violation of Florida Statutes 458.331(1)(1), or any rules promulgated thereunder.

2. Melbourne Health Associates, Inc., is a limited partnership which has been formed for the purpose of operating and leasing a rehabilitation center. The partnership is of...

001100

limited partnership units through a private placement which is being conducted under applicable exemptions from registration under state and federal securities laws. It is expected that most, if not all, of the limited partners will be physicians. The general partner, however, is not a physician.

3. Under the facts proposed in the Petition for Declaratory Statement, the limited partnership will own the rehabilitation center and will lease it to an experienced operator on terms which will provide for a fixed rent plus a percentage rent. The percentage rent will equal five per cent of the center's presumed profitability. For these purposes, the presumption is that all revenues received in excess of seventeen thousand five hundred dollars per quarter per bed (and less certain allowances) are profits. The general and unlimited partners will participate in the profits of the partnership and, thus, through such interests and profits they will participate in the percentage rate.

4. In the Petition for Declaratory Statement, Petitioners specifically requested an opinion as to whether the proposed arrangement would constitute a violation of Section 458.231(1)(1), F.S. (1986 Supp.).

5. The petition was noticed by the Board in the January 23, 1987, issue of the Florida Administrative Weekly (Vol. 13, No. 4, Pg. 310).

CONCLUSIONS OF LAW

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

2. The petition filed by Petitioner is in substantial compliance with the provisions of Section 120.565, F.S., and Chapter 28-4, Florida Administrative Code.

3. The Board specifically finds that John Lozito, M.D., has a substantial interest in this proceeding. It makes no

00110

finding on whether Melbourne Health Associates, Inc., itself has standing to maintain this proceeding, but would point out that under the facts as outlined in the Petition for Declaratory Statement, there are no specific details as to how many of the persons involved in this proposal would be licensed medical doctors in the State of Florida and, therefore, subject to the jurisdiction of the Board of Medicine.

4. Subsection 458.331(1)(1), F.S., provides as follows:

(1) The following acts shall constitute the grounds for . . . disciplinary actions:

(i) Paying or receiving any commission, bonus, kickback, 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, including, but not limited to, hospitals, nursing homes, clinical laboratories, ambulatory surgical centers, or pharmacies. The provisions of this paragraph shall not be construed to prevent a physician from receiving a fee for professional consultation services.

5. Based on the specific facts asserted by Petitioners, it does not appear that the proposed arrangement would violate the provision of the Medical Practice Act quoted above.

Specifically, under the proposal the return on the investment by the limited partners will be solely through participation in the profits of the partnership based solely on the number of partnership units owned by that investor. The return on the investment will not depend in any way on the number of referrals made by the investor to the entity. In addition, the return on the investment to non-physician limited or general partners is not based on referrals to the healthcare facility, but is based on the individual's investment in the entity. Since the return 00 | 102 deferred to the limited partners is based on the investment and not in any way based on referrals to or from the facility, the Board finds that this arrangement is not in violation of Section 458.331(1)(1), F.S.

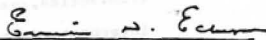
6. The Board would point out that there might be a violation of Section 458.331(1)(i), F.S., if the ability of an individual physician to participate in this investment opportunity were tied in any way to his ability or willingness to make referrals to the facility or the likelihood that he would do so. Since there are no facts asserting that such is the arrangement herein, the Board does not presume that such a limitation exists.

7. This Declaratory Statement responds only to the questions asked and interprets only the statutory provisions cited by the parties. The conclusion by the Board that the proposal does not constitute a violation of Section 458.331(1)(i), F.S., is not a comment on whether or not the proposal may violate other provisions of Chapter 458, F.S., or other related obligations of physicians.

Pursuant to Section 120.59, Florida Statutes, the parties are hereby notified that they may appeal this final order by filing one copy of a notice of appeal with the clerk of the agency and by filing the filing fee and one copy of a notice of appeal with the District Court of Appeal within thirty days of the date this order is filed, as provided in Chapter 120, Florida Statutes, and the Florida Rules of Appellate Procedure.

DONE AND ORDERED this 22 day of November, 1987.

BOARD OF MEDICINE


EMILIO D. ECHEVARRIA
Chairman

001103