

FILED

Department of Professional Regulation
AGENCY CLERK

DEPARTMENT OF PROFESSIONAL REGULATION
BOARD OF MEDICINE

CLERK _____

DATE _____

DEPARTMENT OF PROFESSIONAL
REGULATION,

Petitioner,

-vs-

SALVADOR S. GINORI, M.D.,

Respondent.

DPR CASE NUMBER: 90-00126
DOAH CASE NUMBER: 90-5110
LICENSE NUMBER: ME 0013979

FINAL ORDER

This cause came before the Board of Medicine (Board) pursuant to Section 120.57(1)(b)10, Florida Statutes, on February 7, 1992, in Fort Lauderdale, Florida, for the purpose of considering the Hearing Officer's Recommended Order (a copy of which is attached hereto as Exhibits A) in the above-styled cause. Petitioner, Department of Professional Regulation, was represented by Larry G. McPherson, Jr., Attorney at Law. Respondent was present and represented by Dennis E. La Rosa, Attorney at Law.

Upon review of the Recommended Order, the argument of the parties, and after a review of the complete record in this case, the Board makes the following findings and conclusions.

FINDINGS OF FACT

1. Findings of fact set forth in the Recommended Order are approved and adopted and incorporated herein. However, a technical correction was made on page 5 to reflect that the Petitioner, not Respondent, submitted a proposed recommended order.

2. There is competent substantial evidence to support the findings of fact.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter pursuant to Section 120.57(1), Florida Statutes, and Chapter 458, Florida Statutes.

2. The conclusions of law set forth in the Recommended Order are approved and adopted and incorporated herein.

3. There is competent substantial evidence to support the conclusions of law.

DISPOSITION

Upon a complete review of the record in this case, the Board determines that the disposition recommended by the Hearing Officer be ACCEPTED and ADOPTED.

WHEREFORE,


IT IS HEREBY ORDERED AND ADJUDGED that

The Amended Administrative Complaint is DISMISSED in its entirety.

This order takes effect upon filing with the Clerk of the Department of Professional Regulation.

DONE AND ORDERED this 25th day of February, 1992.

BOARD OF MEDICINE


ZACHARIAH P. ZACHARIAH, 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 DEPARTMENT OF PROFESSIONAL REGULATION AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been provided by certified mail to Salvador S. Ginori, M.D., 5582 West Flagler Street, Miami, Florida 33134 and Dennis E. La Rosa, Attorney at Law, 1901 Welby Way, Tallahassee, Florida 32308, by U.S. Mail to Stuart M. Lerner, Hearing Officer, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-1550; and by interoffice delivery to Larry G. McPherson, Jr., Chief Medical Attorney, Department of Professional Regulation, 1940 North Monroe Street, Tallahassee, Florida 32399-0792 at or before 5:00 P.M., this _____ day of _____, 1992

FebOrders/Ginoric

STATE OF FLORIDA
DEPARTMENT OF PROFESSIONAL REGULATION
BOARD OF MEDICINE

DEPARTMENT OF PROFESSIONAL
REGULATION,

POOR DOCUMENT

Petitioner,
v.

DPR CASE NO: 9000126

SALVADOR S. GINORI, M.D.,

Respondent.

ADMINISTRATIVE COMPLAINT

COMES NOW, the Petitioner, the Department of Professional Regulation, hereinafter referred to as "Petitioner," and files this Administrative Complaint before the Board of Medicine against Salvador S. Ginori, M.D., hereinafter referred to as "Respondent," and alleges:

1. Petitioner is the state agency charged with regulating the practice of medicine pursuant to Section 20.30, Florida Statutes, Chapter 455, Florida Statutes, and Chapter 458, Florida Statutes.
2. Respondent is and has been at all times material hereto a licensed physician in the State of Florida, having been issued license number ME 0013979. Respondent's last known address is 5582 W. Flagler Street, Miami, Florida 33134.
3. On or about November 27, 1989 and December 14, 1989 Respondent rendered medical care to Patient #1; the last visit concerned the leg pain of Patient #1.
4. Respondent removed Patient #1's shorts and requested that she remove her panty hose.

5. While examining patient #1's leg, Respondent moved patient #1's panties away from her thigh so as to expose patient #1's genitals.

6. Respondent stared at patient #1's genitals commenting that she was the most beautiful woman he had ever seen.

7. Patient #1 attempted to sit up, but Respondent placed his hand upon her chest, telling her to remain still.

8. Respondent then requested patient #1 to turn face down onto the examining table.

9. Upon patient #1's compliance with Respondent's request, Respondent once more attempted to expose her genitals.

10. Patient #1 resisted Respondent and put on her clothing in order to leave Respondent's office.

11. Respondent then took patient #1's face into his hands, told her he loved her, and blew patient #1 a kiss.

12. Section 458.329, Florida Statutes, provides that the physician-patient relationship is founded on mutual trust. Sexual misconduct in the practice means violation of the physician-patient relationship through which the physician uses said relationship to induce or attempt to induce the patient to engage, or to engage or attempt to engage the patient, in sexual activity outside the scope of the practice or the scope of generally accepted examination or treatment of the patient. Sexual misconduct in the practice of medicine is prohibited.

POOR DOCUMENT

COUNT ONE

13. Petitioner realleges and incorporates paragraphs one (1) through twelve (12) as if fully alleged herein this Count One.

14. Respondent violated a provision of Chapter 458, Florida Statutes in that Respondent violated Section 458.329, Florida Statutes.

15. Based upon the foregoing, Respondent is in violation of Section 458.331(1)(x), Florida Statutes by violating any provision of this chapter, a rule of the board or department, or a lawful order of the board of department previously entered in a disciplinary hearing or failing to comply with a lawfully issued subpoena of the department.

COUNT TWO

16. Petitioner realleges and incorporates paragraphs one (1) through twelve (12) and fourteen (14) as if fully set forth herein this Count Two.

17. Respondent exercised influence within a patient-physician relationship for purposes of engaging in sexual activity in that he attempted to expose patient #1's genitals during a physical examination and when Respondent took patient #1's face into his hands, told her he loved her, and blew patient #1 a kiss.

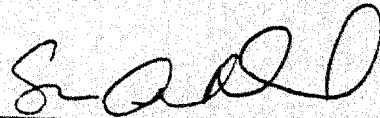
18. Based upon the foregoing, Respondent is in violation of Section 458.331(1)(j), Florida Statutes, by exercising influence within a patient-physician relationship for purposes of engaging a patient in sexual activity. A patient shall be

presumed to be incapable of giving free, full, and informed consent to sexual activity with his physician.

WHEREFORE, Petitioner respectfully requests the Board of Medicine enter an Order imposing one or more of the following penalties: revocation or suspension of the Respondent's license, restriction of the Respondent's practice, imposition of an administrative fine, issuance of a reprimand, placement of the Respondent on probation, and/or any other relief that the Board deems appropriate.

SIGNED this 3rd day of July, 1990.

Larry Gonzalez, Secretary



By: Stephanie A. Daniel
Chief Medical Attorney

COUNSEL FOR DEPARTMENT:

Larry G. McPherson
Senior Attorney
Florida Bar No. 788643
Dept. of Professional Regulation
1940 N. Monroe Street, Ste. 60
Tallahassee, Florida 32399-0792
(904) 488-0062

CJR/TV/ecs
d:ecs
6/27/90

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF PROFESSIONAL
REGULATION,

Petitioner,

v.

SALVADOR S. GINORI, M.D.,

Respondent.

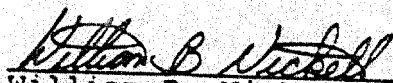
DOAH CASE NO: 90-5110
DPR CASE NO: 90-0126

NOTICE OF SCRIVENER'S ERROR

COMES NOW the undersigned and files this Notice of Scrivener's Error thereby substituting the attached first page of the Administrative complaint as the correct Administrative Complaint filed by the petitioner in the above-styled cause. The undersigned requests that the attached page of the Administrative Complaint be filed in this proceeding as the corrected Administrative Complaint's first page. This Notice corrects paragraph three (3).

Respondent's Counsel was contacted and does not oppose this amendment.

Respectfully submitted,



William B. Nickell
Senior Attorney
Dept. of Professional Regulation
1940 North Monroe Street
Tallahassee, FL 32399-0750
(904) 488-0062

STATE OF FLORIDA
DEPARTMENT OF PROFESSIONAL REGULATION
BOARD OF MEDICINE

DEPARTMENT OF PROFESSIONAL
REGULATION,

Petitioner,

v.

SALVADOR S. GINORI, M.D.,

DPR CASE NO: 9000126

Respondent.

ADMINISTRATIVE COMPLAINT

COMES NOW, the Petitioner, the Department of Professional Regulation, hereinafter referred to as "Petitioner," and files this Administrative Complaint before the Board of Medicine against Salvador S. Ginori, M.D., hereinafter referred to as "Respondent," and alleges:

1. Petitioner is the state agency charged with regulating the practice of medicine pursuant to Section 20.30, Florida Statutes, Chapter 455, Florida Statutes, and Chapter 458, Florida Statutes.
2. Respondent is and has been at all times material hereto a licensed physician in the State of Florida, having been issued license number ME 0013979. Respondent's last known address is 5582 W. Flagler Street, Miami, Florida 33134.
3. On or about November 27, 1989 and December 14, 1989 Respondent rendered medical care to Patient #1; the last visit concerned the leg pain of Patient #1.
4. Respondent removed Patient #1's shorts and requested that she remove her panty hose.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Scrivener's Error has been forwarded to Jerry Schreiber, Esquire, Suite 207 Biscayne Bldg., 19 West Flagler St., Miami, FL 33130 and Dennis La Rosa, Esquire, 1901 Welby Way, Tallahassee, FL 32308 by U.S. Mail this 19th day of August, 1991.



William B. Nickell
Senior Attorney

WBN/pmc

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF PROFESSIONAL)
REGULATION, BOARD OF MEDICINE,)
)
Petitioner,)
)
vs.) CASE NO. 90-5110
)
SALVADOR S. GINORI, M.D.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on August 21, 1991, in Miami, Florida, before Stuart M. Lerner, a duly designated Hearing Officer of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: William B. Nickell, Esquire
Senior Attorney
Department of Professional Regulation
1940 North Monroe Street, Suite 60
Tallahassee, Florida 32399-0792

For Respondent: Jerry B. Schreiber, Esquire
19 West Flagler Street
Suite 207
Miami, Florida 33130

Dennis E. LaRosa, Esquire
1901 Welby Way
Tallahassee, Florida 32308

STATEMENT OF THE ISSUES

1. Whether Respondent committed the offenses described in the Amended Administrative Complaint?
2. If so, what disciplinary action should be taken against him?

POOR DOCUMENT

PRELIMINARY STATEMENT

On July 3, 1990, the Department of Professional Regulation (Department) issued an Administrative Complaint, the body of which contained the following factual allegations:

2. Respondent is and has been at all times material hereto a licensed physician in the State of Florida, having been issued license number ME 0013979. Respondent's last known address is 5582 W. Flagler Street, Miami, Florida 33134.
3. On or about an unknown date in November of 1989, Respondent rendered medical care to patient #1 for, among other things, leg pain.
4. Respondent removed patient #1's shorts and requested that she remove her panty hose.
5. While examining patient #1's leg, Respondent moved patient #1's panties away from her thigh so as to expose patient #1's genitals.
6. Respondent stared at patient #1's genitals commenting that she was the most beautiful woman he had ever seen.
7. Patient #1 attempted to sit up, but Respondent placed his hand upon her chest, telling her to remain still.
8. Respondent then requested patient #1 to turn face down onto the examining table.
9. Upon patient #1's compliance with Respondent's request, Respondent once more attempted to expose her genitals.
10. Patient # 1 resisted Respondent and put on her clothing in order to leave Respondent's office.
11. Respondent then took patient #1's face into his hands, told her he loved her, and blew patient #1 a kiss.

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It was further alleged in the Administrative Complaint that, by engaging in the foregoing conduct, Respondent violated Sections 458.329, 458.331(1)(j), and 458.331(1)(x), Florida Statutes. Respondent denied these allegations of wrongdoing and requested a formal hearing. On August 17, 1990, the matter was referred to the Division of Administrative Hearings for the assignment of a Hearing Officer to conduct the formal hearing Respondent had requested.

The hearing in this case was initially set for January 10, 1991. At the request of the parties, it was rescheduled for January 25, 1991. On January 23, 1991, the parties requested that the hearing be cancelled and that this matter be held in abeyance pending the Board of Medicine's consideration of a settlement agreement into which the parties had entered. The request was granted. On May 1, 1991, the Department filed a status report notifying the Hearing Officer that the dispute between the parties had not been amicably resolved and that a hearing was therefore necessary. Having received such notification, the Hearing Officer reset the instant matter for hearing for August 21, 1991.

Prior to hearing, the Department amended paragraph 3 of the Administrative Complaint to read as follows:

On or about November 27, 1989 and December 14, 1989 Respondent rendered medical care to Patient #1; the last visit concerned the leg pain of Patient #1.

The amendment was made without any opposition by Respondent. The Department also filed a prehearing motion requesting that the

Hearing Officer take official recognition of "(1) Rule 21M, Florida Administrative Code, specifically Rule 21M-20, Disciplinary Guidelines and (2) Respondent's prior disciplinary case." By order issued June 20, 1991, the motion was granted.

At the August 21, 1991, hearing held in this matter, the Department presented the testimony of four witnesses: Thomas Daniels, an investigator with the Department; Dr. Lynn P. Carmichael, a family medicine practitioner and Chairman of the University of Miami's Department of Family Medicine and Community Health, who gave expert testimony; F.E., the patient referenced in the Amended Administrative Complaint; Isaida Gomez, a former employee of Respondent, who was employed by him on December 14, 1989, the date of the incident alleged in the Amended Administrative Complaint; and Sandra Moss, a supervisor in HRS's EPSDT Medicaid program in Dade County, who spoke with F.E. after her visit to Respondent's office on December 14, 1989. In addition to the testimony of these four witnesses, the Department offered six exhibits into evidence, all of which were received by the Hearing Officer.

Respondent took the stand and testified on his own behalf. He also presented the testimony of his wife, who assists Respondent in his practice and was present in his office during F.E.'s visit on December 14, 1989. Additionally, he offered six exhibits into evidence, all of which were received by the Hearing Officer. At the conclusion of the evidentiary portion of the hearing, the Hearing Officer advised the parties on the record that proposed recommended orders had to be filed no later than 35

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days following the Hearing Officer's receipt of the transcript of the hearing.

On September 3, 1991, Respondent filed a written motion requesting that the Hearing Officer recommend dismissal of the Amended Administrative Complaint on the ground that the probable cause panel which authorized its filing was not properly constituted and, in considering Respondent's case, did not act in the manner prescribed by law. The Department filed a response in opposition to this motion on September 13, 1991. On September 26, 1991, Respondent filed a reply to the Department's response.

On October 16, 1991, Respondent timely filed a proposed recommended order. The proposed findings of fact set forth in this proposed recommended order have been carefully considered and are specifically addressed in the Appendix to this Recommended Order.

On October 24, 1991, Respondent filed a motion requesting an extension of time to file his proposed recommended order. By order issued October 28, 1991, the motion was granted and Respondent was given until 20 days from the date of the order to file his proposed recommended order. To date, Respondent has not filed a proposed recommended order.

FINDINGS OF FACT

Based upon the record evidence, the following Findings of Fact are made:

1. Respondent is now, and was at all times material hereto, a physician authorized to practice medicine in the State of Florida under license number ME 0013979.

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2. F.E. and her young daughter are former patients of Respondent.

3. They visited Respondent's office on November 27, 1989, and again on December 14, 1989.

4. The November 27, 1989, visit was uneventful.

5. During her December 14, 1989, visit, F.E. complained that she had been experiencing pain on the right side of her body behind her knee and in the groin area.

6. Respondent requested that F.E. lower her pantyhose and lie on her back on the examining table. F.E. complied with Respondent's request.

7. Respondent proceeded to examine F.E. He tracked, by both visual inspection and palpation, the saphenous vein on the right side of F.E.'s body. The saphenous vein runs from near the knee to around the groin area, where it meets the femoral vein.

8. F.E. still had on her panties. Respondent therefore had to lift up the leg of the panties in order to observe and feel the area around the upper terminus of her saphenous vein. F.E. tried to sit up when Respondent did this, but Respondent restrained her and told her that she needed to remain still inasmuch as the examination was not completed.

9. Thereafter, Respondent had F.E. turn over on her stomach and, from this different vantage point, proceeded to again track F.E.'s right saphenous vein employing the same technique he had used previously.

10. Following the completion of the examination, F.E. pulled up her panty hose and got off the examining table. She then engaged in conversation with Respondent, who was filling out her chart.

11. Respondent diagnosed Respondent's condition as a mild form of phlebitis in her right saphenous vein. He told her to wrap her leg and to take two Advil tablets four times a day to reduce the inflammation in the vein.

12. Following her exchange with Respondent, F.E. retrieved her daughter and left the office.

13. Respondent's examination of F.E. on December 14, 1989, itself was in accordance with generally accepted medical standards.¹

14. During the examination, however, when Respondent was inspecting the area around F.E.'s groin, he inappropriately remarked in Spanish to F.E., who is Spanish-speaking, that she was the prettiest woman in the world, or words to that effect. This made F.E. feel uncomfortable. She thought that Respondent wanted "some sort of romance." Respondent, though, said nothing else, nor did he engage in any conduct, during his encounter with F.E. that day to indicate that this was his intention.

15. Sometime after F.E.'s visit to Respondent's office on December 14, 1989, the Department received a complaint concerning Respondent's behavior toward F.E. that day.

¹ The Department's own expert so testified at hearing.

16. The Department investigated the complaint. Following the completion of the investigation, it prepared and submitted to a probable cause panel of the Board of Medicine a written investigative report.

17. The probable cause panel met on June 22, 1990, to consider whether there was probable cause to bring formal charges against Respondent. In attendance at the meeting were probable cause panel members Dr. Robert Katims, who chaired the meeting, and Dr. Marilyn Wells.

18. Prior to their vote, Katims and Wells took part in discussion regarding the case. They both indicated during the discussion that they had reviewed the investigative materials with which they had been provided by the Department.

19. Following the conclusion of the discussion, Katims and Wells both voted to find probable cause.

20. Thereafter, an Administrative Complaint was issued against Respondent.

CONCLUSIONS OF LAW

1. The Board of Medicine (Board) is statutorily empowered to take disciplinary action against a physician licensed to practice medicine in the State of Florida based upon any of the grounds enumerated in Section 458.331(1), Florida Statutes.

2. Where the disciplinary action sought is the revocation or suspension of the physician's license, the proof establishing the physician's guilt must be clear and convincing. See Section 458.331(3), Fla. Stat.; Ferris v. Turlington, 510

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So.2d 292 (Fla. 1987): Pascale v. Department of Insurance, 525 So.2d 922 (Fla. 3d DCA 1988). "The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." Slomowitz v. Walker, 429 So.2d 797, 800 (Fla. 4th DCA 1983).

3. Furthermore, the disciplinary action taken may be based only upon the offenses specifically alleged in the administrative complaint. See Kinney v. Department of State, 501 So.2d 129, 133 (Fla. 5th DCA 1987); Hunter v. Department of Professional Regulation, 458 So.2d 842, 844 (Fla. 2d DCA 1984).

4. In addition, the administrative complaint must have been issued in accordance with the probable cause requirements prescribed by statute and rule. See Kibler v. Department of Regulation, 418 So.2d 1081 (Fla. 4th DCA 1982).

5. Section 455.225, Florida Statutes, requires that "[t]he determination as to whether probable cause exists shall be made by a majority vote of a probable cause panel of the board" and that the panel "shall be composed of board members, but not more than one of the panel members shall be a lay member."

6. Rule 21M-18.006, Florida Administrative Code, reiterates the "majority vote" requirement of Section 455.225, Florida Statutes. In addition, it provides, among other things, that "[e]ach probable cause panel shall be composed of three members, one of whom may be a past board member who is not currently appointed to the board and one of whom shall be a lay member of the board."

7. Under both Section 455.225, Florida Statutes, and Rule 21M-18.006, Florida Administrative Code, the probable cause panel must do more than simply "rubber stamp" the recommendation made by the Department. It is required to engage in an evaluative process and may find probable cause only if the evidence it has considered reasonably indicates that the violations alleged have actually occurred. See Kibler v. Department of Professional Regulation, 418 So.2d at 1084.

8. In his motion to dismiss, Respondent alleges that the probable cause panel in the instant case was not convened in accordance with Rule 21M-18.006, Florida Administrative Code, because it was comprised of two, not three, board members, neither of whom was a layperson. The argument is unpersuasive.

9. "Rule 21M-18.006(2) . . . does not say that a probable cause panel must meet as three members, but only that a panel be 'composed' of three members," one of whom must be a layperson. Department of Professional Regulation v. Schoen, 11 FALR 812, 827 (Board of Medicine 1988). The evidence is insufficient to establish that the probable cause panel in the instant case was not so composed. Respondent has merely shown that only two of the panel members attended the probable cause panel meeting. Inasmuch as they both voted to find probable cause, the absence of the third member of the panel was inconsequential, even if that panel member was a layperson. There simply must be a "majority vote of a probable cause panel" to find probable cause. A unanimous vote is not required. Moreover, there is no statutory or rule requirement that the lay

member of the panel participate in the probable cause panel meeting and cast a vote.

10. In view of the foregoing, the instant Amended Administrative Complaint should not be dismissed on the ground that the probable cause panel in this case was improperly convened.

11. The further allegation is made in Respondent's motion to dismiss that the two members of the probable cause panel who did attend the meeting failed to engage in the required evaluative process before finding probable cause. The evidence, however, demonstrates otherwise. It establishes that both panel members considered the investigative report and discussed its contents prior to determining that there was probable cause in the instant case.

12. In view of the foregoing, the instant Amended Administrative Complaint should not be dismissed on the ground that the probable cause panel in the instant case did not base its finding of probable cause upon an adequate consideration of evidence. See Kibler v. Department of Professional Regulation, 418 So.2d at 1084.

13. The instant Amended Administrative Complaint charges that disciplinary action should be taken against Respondent because, during F.E.'s visit to his office on December 14, 1989, he engaged in conduct that violated Section 458.329, Florida Statutes, and thus Section 458.331(1)(x), Florida Statutes, as well, in addition to Section 458.331(1)(j), Florida Statutes.

14. Section 458.329, Florida Statutes, provides as follows:

The physician-patient relationship is founded on mutual trust. Sexual misconduct in the practice of medicine means violation of the physician-patient relationship through which the physician uses said relationship to induce or attempt to induce the patient to engage, or to engage or attempt to engage the patient, in sexual activity outside the scope of the practice or the scope of generally accepted examination or treatment of the patient. Sexual misconduct in the practice of medicine is prohibited.

15. Section 458.331(1)(j) and (x), Florida Statutes, provide as follows:

(1) The following acts shall constitute grounds for which disciplinary actions specified in subsection (2) may be taken:

* * *

(j) Exercising influence within a patient-physician relationship for purposes of engaging a patient in sexual activity. A patient shall be presumed to be incapable of giving free, full, and informed consent to sexual activity with his physician.

* * *

(x) Violating any provision of this chapter, a rule of the board or department, or a lawful order of the board or department previously entered in a disciplinary hearing or failing to comply with a lawfully issued subpoena.

16. The proof adduced at hearing is insufficient to establish that, in his dealings with F.E. on December 14, 1989, Respondent engaged in sexual misconduct in violation of the foregoing statutory provisions as alleged in the instant Amended Administrative Complaint.

17. The evidence reveals that Respondent's examination of F.E. was in accordance with generally accepted medical standards. While he did lift up the leg of F.E.'s panties and thereby did "expose [her] genitals," it was necessary for him to do so in order to complete his examination of F.E.

18. Furthermore, at no time during her visit to his office that day did Respondent "[take F.E.'s] face into his hands, [tell] her he loved her, and [blow her] a kiss" as charged in the instant Amended Administrative Complaint.

19. The only thing that Respondent did or said during the visit that was of questionable propriety was to remark, while inspecting the area around F.E.'s groin, something to the effect that she was the prettiest woman in the world. While this remark may have been ill-advised, the evidence does not demonstrate that it was made for the purpose of inducing F.E. to engage in sexual activity. Respondent neither did nor said anything else during the visit to suggest that such was his motive or intent. Accordingly, as thoughtless and insensitive as the remark may have been, it has not been shown that its utterance constituted a violation of either Section 458.329, Florida Statutes, (and therefore, derivatively, Section 458.331(1)(x), Florida Statutes) or Section 458.331(1)(j), Florida Statutes, given the Department's failure to establish that the remark was the product of an effort on Respondent's part to have F.E. participate in sexual activity.

20. In view of the foregoing, the instant Amended Administrative Complaint should be dismissed in its entirety on

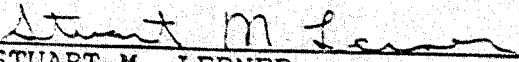
the ground that the proof is insufficient to establish that Respondent committed the offenses described therein.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby

RECOMMENDED that the Board of Medicine enter a final order dismissing the instant Amended Administrative Complaint in its entirety.

DONE AND ENTERED in Tallahassee, Leon County, Florida, this 5th day of December, 1991.


STUART M. LERNER
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this ____ day of December, 1991.

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS:
ALL PARTIES HAVE THE RIGHT TO SUBMIT
WRITTEN EXCEPTIONS TO THIS RECOMMENDED
ORDER. ALL AGENCIES ALLOW EACH PARTY AT
LEAST 10 DAYS IN WHICH TO SUBMIT WRITTEN
EXCEPTIONS. SOME AGENCIES ALLOW A
LARGER PERIOD OF TIME WITHIN WHICH TO
SUBMIT WRITTEN EXCEPTIONS. YOU SHOULD
CONTACT THE AGENCY THAT WILL ISSUE THE
FINAL ORDER IN THIS CASE CONCERNING
AGENCY RULES ON THE DEADLINE FOR FILING
EXCEPTIONS TO THIS RECOMMENDED ORDER.
ANY EXCEPTIONS TO THIS RECOMMENDED ORDER
SHOULD BE FILED WITH THE AGENCY THAT
WILL ISSUE THE FINAL ORDER IN THIS CASE.

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