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FILED

Department of Professional Regulation
BEFORE THE BOARD OF MEDICAL EXAMINERS

CLERK Jorge Thompson

DATE 6-19-85

DEPARTMENT OF PROFESSIONAL
REGULATION,

Petitioner,

EX: Legal
Board

vs.

EMILIO YERO, M.D.,

Respondent.

DPR Case No. 0067186
DOAH Case No. 84-3552
License No. ME 06-3230

FINAL ORDER OF THE
BOARD OF MEDICAL EXAMINERS

This cause came before the Board of Medical Examiners (Board) pursuant to Section 120.57(1)(b)(9), Florida Statutes, on April 13, 1985, in Krasimnee, Florida for the purpose of considering the hearing officer's Recommended Order (a copy of which is attached hereto) in the above-styled cause. Petitioner, Department of Professional Regulation, was represented by William M. Furlow, Esquire; Respondent, Emilio Yero, M.D., was present and represented by Peter R. Lopez, Esquire.

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

FINDINGS OF FACT

The Board accepts and adopts as its own the findings of fact set forth in the Recommended Order of the Hearing Officer with the exception of those set forth in paragraph 19. The Board finds that there is a lack of competent substantial evidence to support the finding rejected. In lieu of that sentence, the Board adopts the following finding:

However, the uncontroverted evidence is that I saw Dr. Yero at his office on December 14, 1982 and it was on that date that her case was marked "closed" by the Respondent. Thus, it is clear that

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Respondent's own records establish that the physician-patient relationship did not terminate until at least December 14, 1982. In light of Respondent's own admission to the existence of a sexual relationship with the patient prior to December 1982, the Board finds that there was sexual activity between the patient and Dr. Yero while the physician-patient relationship was in existence.

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 Board rejects the Conclusions of Law by the Hearing Officer as not being in accord with the facts as found by the Board.
3. The allegations in this case are that Respondent, Emilio Yero, M.D., violated Sections 458.329, 458.331(1)(k), 458.331(1)(r), and 458.331(1)(x), Fla.Stat. Section 458.329, Fla.Stat. provides:

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.

Section 458.331, Fla.Stat., provides in pertinent part:

(1) The following acts shall constitute grounds for which the disciplinary action specified in (2) may be taken.

* * *

(k) 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.

* * *

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(r) Gross or repeated malpractice or the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances. The board shall give great weight to the provisions of s. 768.45 when enforcing this paragraph.

* * *

(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 of the department.

4. At all times pertinent to the allegations, D [redacted] C [redacted] was a patient of Respondent. In light of that, the legal issue of whether sexual activity which occurs after the physician-patient relationship terminates need not be ruled upon in this case. When the sexual relationship occurs during the physician-patient relationship, it is clear that sexual misconduct in the practice of medicine as that term is used in Section 458.329, Florida Statutes, has occurred.

5. Similarly, when the sexual relationship occurs while there is a physician-patient relationship between the participants, it is clear that the physician has violated Section 458.331(2)(h), Florida Statutes, by exercising influence within the patient-physician relationship for purposes of engaging a patient in sexual activity. Given the legislature's clear provision that the patient is incapable of giving free, full, and informed consent to such sexual activity, the only reasonable interpretation of the statute is that if sexual activity occurs during the existence of a patient-physician relationship, the responsibility for that activity must rest squarely on the shoulders of the physician.

6. No violations were found as to Sections 458.331(1)(r) and 458.331(1)(x), Florida Statutes.

DISPOSITION

In light of the Board's Findings of Fact and Conclusions of Law, the Hearing Officer's recommendation that the Administrative Complaint against Respondent be dismissed with prejudice is rejected and a penalty appropriate to the findings and conclusions must be assessed.

THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED:

1. That Respondent shall be, and hereby is, REPRIMANDED.
2. Respondent's license to practice medicine shall be suspended for a period of three months.
3. Respondent's license shall be placed on probation for a period of two years subject to the following terms and conditions:
 - a. Respondent shall make semi-annual appearances before the Board.
 - b. Respondent waived confidentiality on the record with regard to investigative reports prepared by the Department during the probation period.

This Order takes effect upon filing.

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 17 day of June, 1981.

BOARD OF MEDICAL EXAMINERS


J. DARRELL SHEA, M.D.
Chairman

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by certified mail to EMILIO YERO, M.D., 110 Salamanca #307, Coral Gables, Florida 33134 and ESTER A. LOPEZ, Esquire, 28 West Flagler Street, Suite 202, Roberts Building, Miami, Florida 33130 and by regular United States mail to WILLIAM J. KENDRICK, Hearing Officer, Division of Administrative Hearings, Oakland Building, 2009 Apalachee Parkway, Tallahassee, Florida 32301; and by hand delivery to WILLIAM M. FURLOW, Esquire, Department of Professional Regulation, 130 North Monroe Street, Tallahassee, Florida 32301, at _____ this _____ day of _____, 1985.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF PROFESSIONAL
REGULATION, BOARD OF MEDICAL
EXAMINERS,

Petitioner,

CASE NO. 84-3552

vs.

EMILIO YERO, M.D.,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, William J. Kendrick, held a public hearing in the above-styled case on November 15, 1984, at Miami, Florida.

APPEARANCES

For Petitioner: Joseph L. Shields, Esq.
Department of Professional
Regulation
130 North Monroe Street
Tallahassee, Florida 32301

For Respondent: Peter R. Lopez, Esq.
28 West Flagler Street
Suite 202
Miami, Florida 33130

PRELIMINARY STATEMENT

By Administrative Complaint filed with the Division of Administrative Hearings October 10, 1983, Petitioner, Department of Professional Regulation, Board of Medical Examiners, alleges that Respondent, Emilio Yero, M.D., violated (1) Sections 458.329 and 458.331(x), Fla. Stat., by using the patient-physician relationship to induce his patient (D) G. to engage in

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sexual activity, (2) Section 458.331(1)(k), Fla.Stat., by exercising influence within the patient-physician relationship for the purpose of engaging a patient (D. [redacted]) in sexual activity, and (3) Section 458.331(1)(t), Fla.Stat., predicated on the allegation that Respondent's conduct of engaging in sexual activity with a patient (D. [redacted]) constituted gross or repeated malpractice or the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances.

At the final hearing Petitioner called Hans Steiner--an expert in psychiatry and psychoanalysis, D. [redacted] G. [redacted] complainant, and Respondent, Emilio Yero, M.D., as witnesses. Petitioner offered Exhibits 1 through 4, and they were received into evidence. Respondent testified on his own behalf, and offered Exhibit 1, which was received into evidence.

The transcript of hearing was filed December 10, 1984. At the parties' request an extension of time was given in which to submit proposed findings of fact and conclusions of law. The parties waived the requirement set forth in Rule 28-5.402, F.A.C., that a recommended order be entered within 30 days after the transcript is filed.

Petitioner and Respondent have submitted proposed findings of fact and conclusions of law. The parties' proposed findings and conclusions have been reviewed and considered. To the extent that any proposed findings have not been adopted in this Recommended Order, they have been rejected as being subordinate, cumulative, immaterial, or unnecessary, or as being contrary to the facts as found in this Recommended Order.

FINDINGS OF FACT

1. Petitioner, Department of Professional Regulation, Board of Medical Examiners, is a state agency charged with regulating the practice of medicine pursuant to Section 28.30, Fla.Stat.

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2. Respondent, Emilio Yero, M.D., M.B., and was at all times material to this case, a licensed medical doctor in the State of Florida, having been issued license No. ME 0032320.

3. At all times material hereto, Respondent was employed as a psychiatrist by a health plan provider at 560 Northwest 165 Street Road, Miami, Florida. The health plan, which covered complainant, B. C. permitted 20 psychotherapy sessions a year.

The Patient-Physician Relationship

4. On January 15, 1982, Ms. G underwent her first psychotherapy session with Respondent, and a patient-physician relationship began. There is substantial conflict between the parties regarding the duration of the patient-physician relationship.

5. The evidence reflects a total of 20 sessions from January 15, 1982 through May 7, 1982. Respondent's progress notes, however, also reflect an office visit on December 14, 1982, following which Respondent made the notation "case closed."

6. Respondent insists that his last session, in accordance with the 20-session limit imposed by the health care plan, was May 7, 1982, and that the patient-physician relationship terminated on that date. He further insists that the visit of December 14, 1982, was an unannounced visit by Ms. G and that he saw her on that date only as a courtesy.

7. Ms. G insists that she made approximately 40 visits to Respondent's office from January 15, 1982 through December, 1982. She states she personally paid for three or four of these visits at the front desk, and, on Respondent's advice, avoided the necessity of paying for further visits by advising the receptionist that her "\$100 limit was up." No receipts, cancelled checks, or other documentation was offered at final hearing to substantiate her claim.

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8. Hans Steiner, M.D., an expert in psychiatry and psychoanalysis, testified that the patient-physician relationship is primarily a contractual one, to be determined by the agreement of the parties. Dr. Steiner's testimony, therefore, does not help in resolving the conflict in testimony on this issue.

The Sexual Activity

9. While Respondent concedes he had sexual intercourse with Ms. G [redacted] their respective testimony is contradictory regarding the date of inception, the duration, and the impetus for their encounter.

10. Respondent testified that he had sexual intercourse with Ms. G [redacted] on only three or four occasions between the middle or end of June 1982 and October or November 1982. Respondent further testified that there was no petting or sexual activity between Ms. G [redacted] and him at his office, his condominium, or any other location except the St. Michelle--a hotel located in close proximity to Respondent's condominium in Coral Gables, Florida.

11. Respondent further testified that he did not initiate any sexual advances toward Ms. G [redacted] but succumbed to her "threats." According to Respondent, Ms. G [redacted] threatened to complain to the American Psychiatric Association, his employer, the Board of Medical Examiners, and to sue him civilly because of his treatment of her condition. According to Respondent, it was only because of these "threats" that he succumbed and had sexual intercourse with Ms. G [redacted].

12. Ms. G [redacted] however, testified that Respondent first made sexual advances towards her at the end of March or early April 1982. At that time, with her permission, Respondent fondled her. Ms. G [redacted] further testified that she and Respondent first had sexual intercourse the end of May 1982 at her home, during the summer at his office, in August at his condominium, in September or October at the Hotel St. Michelle, and in January 1983 at her apartment.

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13. Ms. G [redacted] Respondent's condominium and testified that she received a watch from Respondent as a Christmas present in 1983. Respondent concedes the accuracy of her description of his condominium, but denies her presence there, and surmises that she "extracted" such detailed information from him. Respondent did not deny the gift.

14. According to Ms. G [redacted] their relationship progressed from a "spontaneous kiss"--"a peck"--to fondling, to sexual intercourse. She testified she made no threats and that Respondent expressed his desire to have sex with her. According to Ms. G [redacted] she was in love with Respondent, and the intimacies were a result of that affection.

15. Ms. G [redacted] however, did mail letters to Respondent which could be construed as threats. She insists they were merely expressions of hurt and anger at his lack of acceptance of her.

The Self-Interest of the Parties

16. A resolution of the conflicting testimony is further complicated by the self-interest of Respondent and Ms. G [redacted] as well as Ms. G [redacted] mental state. The self-interest of Respondent in these disciplinary proceedings is apparent. Ms. G [redacted] self-interest arises by virtue of a current civil action she has pending in the Circuit Court of Dade County, Florida, wherein she seeks to recover compensatory and punitive damages against the Respondent as a consequence of the intimacies which she alleges occurred during the course of the patient-physician relationship. The complaint Ms. G [redacted] filed against Respondent with the Board of Medical Examiners, and which precipitated the filing of the Administrative Complaint in this action, was filed subsequent to her civil suit.

17. Ms. G [redacted] mental condition is another factor. Ms. G [redacted] has been diagnosed as a borderline personality. According to Dr. Steiner, people with that diagnosis are fragile

(have difficulty) in adjusting to reality or emotional situations. Such personalities may become psychotic under stressful and emotional situations, may suffer aggressive infatuation (pursuit), and are very unlikely to improve with treatment.

18. Ms. G's mental state was additionally complicated by the phenomenon known as transference which occurred during her treatment by the Respondent. Transference is a term used to describe the development of strong emotional feelings of a patient toward a psychiatrist, feelings which in the past were attached to other people of significance in her life.

Resolution of the Conflicting Testimony

19. The evidence in this case is in irreconcilable conflict as to when the patient-physician relationship terminated and when any sexual intercourse commenced. The absence of any evidence to corroborate Ms. G's testimony or to impeach Dr. Vero's testimony further complicates a resolution of the conflict. Therefore, in conformity with Robinson v. Florida Board of Dentistry, 447 So.2d 930 (Fla. 3d DCA 1984), the Hearing Officer finds that the Petitioner has failed to establish the patient-physician relationship extended beyond May 7, 1962, and that any sexual intercourse occurred before the termination of that relationship.

CONCLUSIONS OF LAW

1. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings.

2. The allegations in this case are that Respondent, Emilio Vero, M.D., violated Sections 458.329, 458.331(1)(a), 458.331(1)(t), and 458.331(1)(x), Fla. Stat. Section 458.329, Fla. Stat., provides:

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.

Section 458.331, Fla.Stat., provides in pertinent part:

(1) The following acts shall constitute grounds for which the disciplinary action specified in (2) may be taken.

(k) 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.

(l) Gross or repeated malpractice or the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances. The board shall give great weight to the provisions of s. 768.45 when enforcing this paragraph.

(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 of the department.

3. Respondent asserts that the absence of a patient-physician relationship at the time of the sexual activity in question precludes a finding that he committed any offense. Petitioner's proposed recommended order tacitly concedes Petitioner's assertion.

4. Although it is axiomatic that statutes authorizing the disciplining of a license to practice a profession must be strictly construed, since they are penal in nature, the hearing

Officer declines to adopt the narrow construction advocated by Respondent.

5. Section 459.331(1)(k), Fla.Stat., condemns a physician who exercises influence within the patient-physician relationship for the purpose of engaging a patient in sexual activity. A violation of that section can result even if the sexual activity occurred subsequent to the termination of the patient-physician relationship. It is the influence which is exercised upon the patient during the relationship, to engage in sexual activities, not when the sexual activities occur, which is the operative factor. Similarly, Section 459.329, Fla.Stat., prohibits the use of the relationship to induce the patient to engage in sexual activity outside the scope of the practice. It is the use of the patient-physician relationship, the special trust and confidence which has developed, to induce the patient to engage in sexual activity--not when the sexual activity occurs--which is again the operative issue.

6. Viewing the evidence in the light most favorable to Respondent, it is apparent he first had sexual relations with Ms. G within six weeks of her last visit. The question then is whether such sexual intercourse resulted from influence exercised within the patient-physician relationship for the purpose of, or the use of the physician-patient relationship to induce the patient to, engage in sexual activity.

7. Dr. Yero admittedly diagnosed Ms. G as a borderline personality. Ms. G had a poor self-image, was a dependent personality, was fragile in her adjustment to reality and emotional situations, and could become psychotic under stressful or emotional situations. During the course of the patient-physician relationship Ms. G offered transference and, consequently, had a strong emotional attachment to Dr. Yero, which she perceived as reciprocal. Notwithstanding the fact that he was fully cognizant of her condition, and recognized that the

cause of her emotional attachment was grounded in the patient-physician relationship, Dr. Yero concedes he had sexual intercourse with Ms. G The cause-effect of the patient-physician relationship and the sexual intercourse which ensued is apparent.

8. Although the cause-effect of the patient-physician relationship and the sexual intercourse is clear, a violation of Sections 458.329, 458.331(1)(x) and 458.331(1)(k), Fla. Stat., requires proof of intent. Sections 458.329 and 458.331(1)(x) condemn Respondent's actions only if he used the physician-patient relationship to induce Ms. G to engage in sexual activity. Section 458.331(1)(k), Fla. Stat., condemns his actions only if he exercised his influence for the purpose of engaging her in sexual activity.

9. A resolution of the intent issue suffers the same deficient record as other issues presented. On the one hand any sexual intercourse between Ms. G and Dr. Yero occurred six weeks following the termination of the patient-physician relationship. While not dispositive of the intent issue, the fact Dr. Yero did not engage in sexual intercourse with Ms. G at an earlier date certainly militates against the existence of the requisite intent. Further, Ms. G concedes that their intimacies were the natural result of her affections--however they may have arisen. On the other hand, Dr. Yero's explanation that he "succumbed" to Ms. G demands for sexual intercourse, because of her threats to "expose him," borders on the incredulous for a psychiatrist. Further, Respondent's recognition that the cause of Ms. G emotional attachment was grounded in the patient-physician relationship, and that their intimacies flowed from that relationship, speaks of impropriety. But while Respondent's actions speak of impropriety and indifference, they are nevertheless as easily characterized as the actions of a weak man as those of an intentional seducer.

cause of her emotional attachment was grounded in the patient-physician relationship, Dr. Yero concedes he had sexual intercourse with Ms. G. The cause-effect of the patient-physician relationship and the sexual intercourse which ensued is apparent.

8. Although the cause-effect of the patient-physician relationship and the sexual intercourse is clear, a violation of Sections 458.329, 458.331(1)(x) and 458.331(1)(k), Fla. Stat., requires proof of intent. Sections 458.329 and 458.331(1)(x) condemn Respondent's actions only if he used the physician-patient relationship to induce Ms. G. to engage in sexual activity. Section 458.331(1)(k), Fla. Stat., condemns his actions only if he exercised his influence for the purpose of engaging her in sexual activity.

9. A resolution of the intent issue suffers the same deficient record as other issues presented. On the one hand any sexual intercourse between Ms. G. and Dr. Yero occurred six weeks following the termination of the patient-physician relationship. While not dispositive of the intent issue, the fact Dr. Yero did not engage in sexual intercourse with Ms. G. at an earlier date certainly militates against the existence of the requisite intent. Further, Ms. G. concedes that their intimacies were the natural result of her affections--however they may have arisen. On the other hand, Dr. Yero's explanation that he "succumbed" to Ms. G.'s demands for sexual intercourse, because of her threats to "expose him," borders on the incredulous for a psychiatrist. Further, Respondent's recognition that the cause of Ms. G.'s emotional attachment was grounded in the patient-physician relationship, and that their intimacies flowed from that relationship, smacks of impropriety. But while Respondent's actions smack of impropriety and indifference, they are nevertheless as easily characterized as the actions of a weak man as those of an intentional seducer.

10. Petitioner's burden of proof was that of "clear and convincing evidence." See Reid v. Florida Real Estate Commission, 128 So.2d 846 (Fla. 2d DCA 1966). The evidence presented was not "clear and convincing," nor did it approach the level of "competent substantial evidence" required by Section 120-57. See Robinson v. Florida Board of Dentistry, 447 So.2d 830 (Fla. 3d DCA 1984), Howling v. Department of Insurance, 394 So.2d 165 (Fla. 1st DCA 1981). By failing to prove circumstantially or otherwise the requisite intent by Dr. Yero to use his influence or the patient-physician relationship for the purpose of engaging Ms. G in sexual activity, Petitioner has not satisfied his burden of proof. Therefore, Petitioner has failed to establish a violation of Sections 458.329, 458.331(1)(x), or 458.331(1)(k), Fla.Stat.


11. The final charge leveled against Respondent is for a violation of Section 458.331(1)(t), Fla.Stat., predicated on the allegation that by engaging in sexual activity with Ms. G he was guilty of gross or repeated malpractice or a failure to practice medicine with that degree of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances. Essentially, this is a charge of negligence. Unlike a charge of violating Section 458.331(1)(k), Fla.Stat., which requires no proof of a standard of care, a charge under Section 458.331(1)(t), Fla.Stat., necessarily requires evidentiary proof of some standard of professional conduct as well as a deviation therefrom. Purtis v. Department of Professional Regulation, 51 So.2d (Fla. 1st DCA 1984), op. filed 11/16/84. While Respondent's actions may appear improper, Petitioner failed to offer any evidence regarding a standard of conduct or any deviation therefrom. Consequently, Petitioner has failed to establish a violation of Section 458.331(1)(t)*.

*Parenthetically, 458.329, Fla.Stat., also requires proof of a standard of conduct and any deviation therefrom. Petitioner also failed to establish a violation of 458.329. Fla.Stat. because Petitioner failed to establish

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Administrative Complaint filed against Respondent, Emilio Yarb, M.D., be dismissed with prejudice.

DONE AND ENTERED this 11th day of February, 1985, at Tallahassee, Florida.


WILLIAM J. KENDRICK
Hearing Officer
Division of Administrative
Hearings
Oakland Building
2009 Apalachee Parkway
Tallahassee, Florida 32301
904/985-9675

FILED with the Clerk of
the Division of Administrative
Hearings this 11th day of
February, 1985.

Copies furnished to:

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

EMILIO YARO, M.D.,

Appellant,

NOT FINAL ORDER IN EXCISE NO. 90
FILED WITH FOR CARRYING AND
DISPOSING OF THE CASE IS FILED.

DEPARTMENT OF PROFESSIONAL
REGULATION, BOARD OF
MEDICAL EXAMINERS,

CASE NO. 84-240

Appellee.

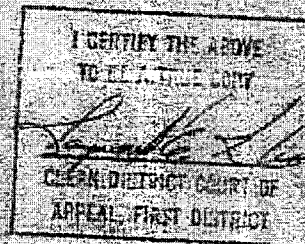
Opinion filed December 23, 1985.

An Appeal from an Order of the Department of Professional
Regulation, Board of Medical Examiners

Peter R. Lopez, Miami, for Appellant.

Joseph L. Shields and William M. Furlow, Department of
Professional Regulation, for Appellee.

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HIMONS, J.

This is an appeal from a final order of the Board of Medical
Examiners (the Board), reprimanding the appellant Emilio Yaro,
M.D., suspending his license to practice medicine for three
months, and imposing a probationary term. We reverse.

Dr. Yaro was employed as a psychiatrist by a health
maintenance organization. He was not authorized to provide
treatment on a private basis outside the organization. He

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C. [redacted] the complainant, was a member of the health maintenance organization which provided its members up to twenty psychotherapy sessions per year. Ms. G [redacted] began treatment under Dr. Yero's care on January 12, 1982. The twenty-visit treatment plan was explained to Ms. G [redacted]. Dr. Yero diagnosed Ms. G [redacted] as having "a borderline personality structure," one in which the patient has difficulty in adjusting to reality in emotional situations. Between January 15 and May 7, 1982, Ms. G [redacted] had 20 treatment sessions with Dr. Yero. At her 19th session, Dr. Yero informed Ms. G [redacted] that her psychotherapy treatment program was coming to a close. Her response to this impending termination was to send Dr. Yero a threatening letter stating that she was hurt and angry, and "if I let my anger go, I will write the American Psychiatric Association, your director, INA, and sue."

When Ms. G [redacted] came in for her last visit on May 7th, she was calm. Dr. Yero explained to her that she was informed of long-term treatment and that there was an absolute need that she see another therapist for long-term treatment. Dr. Yero testified that Ms. G [redacted] seemed to understand and "left quietly at that point." He testified that she was apologetic and not threatening. Dr. Yero also testified that this May 7th visit represented the termination of the physician-patient relationship.

Dr. Yero admits that sometime after the May 7th visit terminating treatment, and after threats to himself, his family, and his property, he succumbed to Ms. G [redacted]'s demands and did in fact have sexual intercourse with Ms. G [redacted] at a hotel in Coral Gables on three or four occasions between the middle or end of June 1982 and October or November 1982. Ms. G [redacted] testified that Dr. Yero made sexual advances towards her beginning in March or early April 1982 and that they had intercourse thereafter at various times and at various places until January 1983. She

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testified that she was in love with Dr. Yero and that their intimacies were a result of that affection.

On December 14, 1982, Dr. Yero unexpectedly received a call from his receptionist informing him that a lady wanted to see him. Since he had no appointments scheduled at that time, he instructed that the lady be shown to his office. It was Ms. G. Dr. Yero testified that her visit was brief. He told her that it was not convenient for him to see her and that there was no reason for her to be there. She left without further incident. Dr. Yero made a record of this unscheduled visit and marked Ms. G.'s file "closed."

In September of 1980, in response to a complaint filed by Ms. G. the Department of Professional Regulation filed a three count Complaint with the Board against Dr. Yero. Count one alleged violations of Sections 458.329 and 458.331 (1)(a), Florida Statutes (1983) for sexual misconduct with a patient. Count two alleged a violation of Section 458.331 (1)(a) which prohibits exercising influence within a patient-physician relationship for purposes of engaging in sexual activity with a patient. Count three alleged malpractice, a violation of Section 458.331(1)(b).

In his findings of fact, the hearing officer found that the Department failed to establish that the physician-patient relationship extended beyond May 7, 1982 and to establish that any sexual intercourse occurred before the termination of that professional relationship. The hearing officer further found that the evidence failed to establish that Dr. Yero used the physician-patient relationship to induce Ms. G. to engage in sexual activity.² The hearing officer also found that the evidence failed to establish that Dr. Yero exercised influence within a physician-patient relationship for purposes of engaging a patient in sexual activity.³ The hearing officer concluded that the Department failed to prove any violation of Section

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458.120, 458.331(1)(a), 458.331(1)(b) or 458.331(1)(c) and recommended a disposition of the administrative complaint.

The Board's final order accepted all of the hearing officer's findings of fact except that it rejected his findings that the physician-patient relationship did not continue after May 7, 1982, and that no sexual intercourse occurred before the termination of that relationship. Instead, the Board substituted the following finding:

However, the uncontroverted evidence is that Ms. G saw Dr. Yero at his office on December 14, 1982 and was on that date that her case was marked "closed" by the Respondent. Thus, it is clear that Respondent's own records establish that the physician-patient relationship did not terminate until at least December 14, 1982. In light of Respondent's own admission to the existence of a sexual relationship with Ms. G prior to December 1982, the Board finds that there was sexual activity between Ms. G and Dr. Yero while the physician-patient relationship was in existence.

The Board erred in making the above substituted finding. The evidence was such that the hearing officer could properly find that the physician-patient relationship did not extend beyond May 7, 1982. This finding is supported by Dr. Yero's testimony as to what was discussed on the May 7th visit, the fact that there was an understanding that treatment was limited to only 20 visits, and Dr. Yero's testimony concerning the December 14th visit to the effect that he only saw her long enough to tell her that there was no reason for her to be there and to ask her to leave.

In the determination of whether the physician-patient relationship continued beyond May 7th, the Board and the parties relied upon ordinary methods of proof involving the weighting of the evidence and credibility of the witnesses. This is the province of the hearing officer. The Board's substitute finding represents an improper reweighing of the evidence.

Because the Board based his final order on his substituted finding, the Board found it unnecessary to reach the question of

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whether Dr. Yero was guilty of violating either Section 421.374 or 458.51(1)(k) by engaging in sexual activities with Mrs. G after the termination of the physician-patient relationship. The hearing officer correctly concluded that the occurrence of the sexual activities after the termination of the physician-patient relationship would not necessarily insulate the physician from being proceeded against under either of the above statutes. However, the hearing officer went on to find, as pointed out earlier in this opinion, that the evidence failed to establish that Dr. Yero either used the physician-patient relationship to engage in sexual activity or exercised influence within a physician-patient relationship for purposes of engaging a patient in sexual activity. This was a factual finding of the hearing officer which was supported by competent substantial evidence and thus entitled to the same deference as the hearing officer's other findings discussed above.

Accordingly, the Board's final order is reversed and remanded for the entry of a final order dismissing the Department's complaint in accordance with the hearing officer's recommended order.

REVERSED AND REMANDED.

ERVIN and SMITH, JJ., CONCUR.

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FOOTNOTES

1 Although the hearing officer did not report the testimony of Dr. Yero concerning Ms. G's harassment or bizzare conduct towards, and threats made to him, the hearing officer did report Dr. Yero's explanation that he "succumbed" to Ms. G's demands for sexual intercourse.

2 Section 458.329, prohibits "sexual misconduct in the practice of medicine" which conduct is defined to include a physician's use of the physician-patient relationship to induce a patient to engage in sexual activity. Section 458.331(1)(c) includes as a ground for disciplinary action the violation of any provision of Chapter 458.

3 Section 458.331(1)(k) provides as a ground for disciplinary action a physician's "exercising influence within a patient-physician relationship for purposes of engaging a patient in sexual activity."

4 Section 458.331(1)(z) includes malpractice as a ground for disciplinary action. We need not describe further this malpractice ground inasmuch as the Board's final order accepted the recommended order's finding that such section was not violated.

5 The Board's final order states:

"At all times pertinent to the allegations, [Ms.] G was a patient of Respondent. In light of that, the legal issue [presented by the]... sexual activity [occurring]... after the physician-patient relationship terminates need not be ruled upon in this case."

MANDATE

From

DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

To the Honorable, ~~EMILIO YERO~~

J. Darrell Shea, M.D.
Chairman

WHEREAS, in that certain cause filed in this Court styled: _____

DEPARTMENT OF PROFESSIONAL
REGULATION

Case No. BH-210

vs.

EMILIO YERO, M.D.

Your Case No. 0047186

The attached opinion was rendered on December 23, 1985

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rules of this Court and the laws of the State of Florida.

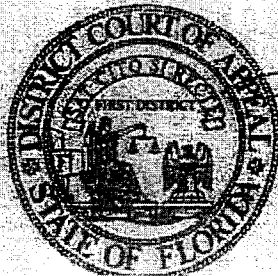
WITNESS the Honorable _____

Anne C. Booth

Chief Judge of the District Court of Appeal of Florida, First District and the Seal

of said court at Tallahassee, the Capitol, on this

27th day of January, 1986



James E. Rhodes
Clerk, District Court of Appeal of Florida,
First District