



HAWAII MEDICAL BOARD
OFFICE OF ADMINISTRATIVE HEARINGS
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of the
License to Practice Medicine of

DANILO E. PONCE, M.D.,

Respondent.

MED-2019-4-L

BOARD'S FINAL ORDER

BOARD'S FINAL ORDER

On September 7, 2021, the duly appointed Hearings Officer issued his Findings of Fact, Conclusions of Law and Recommended Order in the above-captioned matter. The parties were served with the Hearings Officer's Recommended Order. On September 21, 2021, Petitioner filed Exceptions to the Hearings Officer's Findings of Fact, Conclusions of Law and Recommended Order. On September 22, 2021, Respondent filed Exceptions to the Hearings Officer's Findings of Fact, Conclusions of Law and Recommended Order. On October 6, 2021, Respondent also filed a Statement in Support of the Hearings Officer's Findings of Fact, Conclusions of Law and Recommended Order. Neither party requested to present oral argument before the Board.

Upon review of the entire record of this proceeding, the Board is of the opinion that a modification or reversal of the Hearings Officer's findings of fact or conclusions of law is not warranted. Accordingly, the Board adopts the Hearings Officer's Recommended Order as the Board's Final Order and finds and concludes that Petitioner has not shown by a preponderance of the evidence that Respondent violated any of the allegations in the Petition.

The Board affirms the Hearings Officer's finding and conclusion that Petitioner has not shown that Respondent is in violation of HRS§453-8(a)(7)(9), and HRS §436B-19(7)(9). The Petition filed against Respondent in MED 2019-4-L is dismissed.

DATED: Honolulu, Hawaii, November 18, 2021.



JONE GEIMER-FLANDERS, D.O.
Chairperson
Osteopathic Physician

Peter Halford

PETER HALFORD, M.D.
Vice-Chairperson
Physician

Gary Belcher

GARY BELCHER
Public Member

FRANKLIN V.H. DOA, M.D.
Physician

DARREN K. EGAMI, M.D.
Physician, Maui



ANDREW R. FONG, M.D.
Physician, Hawaii

Peter D Holt MD

PETER D. HOLT, M.D.
Physician

MICHAEL JAFFE, D.O.
Osteopathic Physician



WESLEY MUN
Public Member

D. Tak

DANNY M. TAKANISHI, M.D., FACS
Physician

GERI YOUNG, M.D.
Physician, Kauai



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In the Matter of the)	MED-2019-4-L
License to Practice Medicine of)	
)	HEARINGS OFFICER'S
DANILO E. PONCE, M.D.,)	FINDINGS OF FACT,
)	CONCLUSIONS OF LAW,
Respondent.)	AND RECOMMENDED
)	ORDER
)	
)	Hearing Date: August 3, 2021
)	Hearings Officer: Richard A. Young
)	
)	

HEARINGS OFFICER'S FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND RECOMMENDED ORDER

I. INTRODUCTION

On March 5, 2020, the Department of Commerce and Consumer Affairs, through its Regulated Industries Complaints Office ("Petitioner" or "RICO"), by and through its attorney, Lianne M. Aoki, Esq., filed a Petition for Disciplinary Action Against the License to Practice Medicine of Danilo E. Ponce, M.D. ("Respondent"). On May 14, 2020, Respondent, by and through his attorney, Bradford F.K. Bliss, Esq., filed Respondent's Response to Petition for Disciplinary Action Against the License to Practice Medicine.

A telephone pre-hearing conference was held on May 21, 2020, and this matter was duly set for hearing on June 30, 2020. By agreement of the parties, the hearing was rescheduled to August 13, 2020. Due to the unavailability of Petitioner's witness, the parties agreed to reschedule the hearing date to September 15, 2020.

Due to the Covid-19 pandemic, the Hearings Officer requested that the parties participate in a September 1, 2020 status conference. The hearing date was rescheduled to

January 12, 2021. However, due to continuing health and safety concerns due to the Covid-19 virus, this hearing date was vacated. At a March 31, 2021 Status Conference, this matter was rescheduled for an in-person hearing on August 3, 2021.

On August 3, 2021, the hearing in the above-captioned matter was convened by the undersigned Hearings Officer pursuant to Hawaii Revised Statutes (“HRS”) Chapters 91, 92 and 453. Petitioner was represented by Ms. Aoki. Respondent was represented by Mr. Bliss and Danilo Ponce, M.D. At the conclusion of the evidentiary portion of the hearing, it was requested that the parties file written closing arguments by August 24, 2021. Both parties submitted timely written closing arguments.

Having reviewed and considered the evidence and arguments presented at the hearing, the written closing arguments of the parties, together with the entire record of this proceeding, the Hearings Officer renders the following findings of fact, conclusions of law and recommended order.

II. FINDINGS OF FACT

1. Respondent has been licensed to practice medicine by the Hawaii Medical Board (“Board”) since September 3, 1976. Respondent’s medical license, License No. MD 2914, is currently due to expire on January 31, 2022.

2. Respondent is a board-certified psychiatrist who has an Aiea office. According to Respondent, on Saturdays his office is open between 6:00 a.m. and noon.

3. The Complainant, Loriann K. Wallace, had worked part-time at the airport for Hawaiian Airlines as a customer service agent. Mrs. Wallace had another job as a purchasing manager.

4. On June 3, 2018, Mrs. Wallace was injured while performing her duties at Hawaiian Airlines.

5. Dr. Ponce’s initial session with Mrs. Wallace was on September 1, 2018.

6. According to Dr. Ponce’s September 5, 2018 Psychiatric Examination Report, Mrs. Wallace was referred to Respondent for a psychiatric evaluation and treatment, if necessary, by her treating physician at Workstar after filing for an industrial injury claim. Respondent’s report notes that besides the referral note from Workstar, no other records were

available, so the opinions and statements in his report were mainly from his interview/examination of Mrs. Wallace. See, Respondent's Exhibit 1.

7. The report states that Mrs. Wallace was assisting passengers about to board a plane, when she saw little boy tugging at the rope tied to poles delineating filing arrangement of passengers. As she bent down to tell the boy to cease tugging the rope, the boy suddenly jerked the rope, and one of the heavy metal poles hit Mrs. Wallace on the head. Mrs. Wallace was dazed, but did not lose consciousness. Mrs. Wallace went to Pali Momi Emergency Department. Because her primary care physician did not take worker compensation cases, Mrs. Wallace was referred to Workstar. She was diagnosed with contusion of scalp; concussion without loss of consciousness, acute post-traumatic headache, major depressive disorder without prior episode. Neurological complaints included headaches, dizziness, "vertigo", nausea, vomiting. Mrs. Wallace also complained about excessive worrying about her job, weepiness, erratic neuro vegetative system symptoms (sleep, appetite, energy, libido, generalized avoidance), which precipitated the psychiatric referral." See, Respondent's Exhibit 1.

8. Dr. Ponce's September 5, 2018 Psychiatric Examination Report, lists the following diagnostic impressions:

- Adjustment disorder with mixed anxiety and depressed mood;
- Unspecified neuro-cognitive disorder. See, Respondent's Exhibit 1.

9. Dr. Ponce's report lists a treatment plan of: 1) reduction of clinical levels of anxiety/depression from a baseline of 6-7 to 2-3 (on a scale where 0 is pre-injury status, and 10 is immediate hospitalization) as measured by self/family reporting and clinical observations; and 2) resolution of return to work issue.

10 The September 5, 2018 Psychiatric Examination Report concludes that "It is imperative that psychiatric treatment be authorized and commence as soon as possible to prevent further deterioration."

11. Respondent's Psychiatric Progress Report shows that he treated Mrs. Wallace for anxiety/depression and her neuro-cognitive disorder by providing 60 minutes of psychotherapy on the following dates:

- October 13, 2018,
- October 20, 2018,

- October 27, 2018,
- November 3, 2018, and
- November 10, 2018.

13. Mrs. Wallace testified that during the October 13, 2018 therapy session, she discussed her treatment plan with Dr. Ponce, with the goal to get back to pre-injury status by working through her anxiety and depression. Mrs. Wallace stated that she had problems with sleeping, activities of daily living such as gardening, and intimacy with her husband.

14. Dr. Ponce's October 13, 2018 treatment notes indicate that there were continuing concerns with Mrs. Wallace's anxiety, and performing activities of daily living.

15. Mrs. Wallace testified that during the October 20, 2018 therapy session, she noted that she was having trouble getting out of bed; that is, being tired and lacking motivation to do daily activities.

16. Dr. Ponce's October 20, 2018 treatment notes again state that Mrs. Wallace is having difficulty with activities of daily living.

17. Mrs. Wallace testified that during the October 27, 2018 therapy session, she related that she was still struggling to get out of the house. According to Mrs. Wallace, Respondent stated that she should just force herself to get up and go, to "just do it". During this third therapy session, there was some focus on her sex life with her husband.

18. Dr. Ponce's October 27, 2018 treatment notes show that he was beginning to address Mrs. Wallace's sexual issues.

19. Mrs. Wallace testified that during the fourth therapy session with Dr. Ponce on November 3, 2018, Dr. Ponce spoke about the 3 stages of brain training, which was confusing. According to Mrs. Wallace, during this therapy session Dr. Ponce stated that if she did not have regular sex with her husband, then he would look to someone else. When Mrs. Wallace told her husband about this, he was shocked and stated that he wanted to attend the next therapy session.

20. Mrs. Wallace testified that she asked Dr. Ponce whether her husband could attend the next therapy session to discuss her lack of interest in sexual relations with her spouse. Dr. Ponce testified that when Mrs. Wallace had asked him if her husband could attend the next therapy session, he agreed.

21. Dr. Ponce's November 3, 2018 treatment notes state that to get back to having regular sex, Mrs. Wallace needed to start cuddling with her husband. Dr. Ponce testified that at this therapy session, he encouraged Mrs. Wallace to have her husband present at the next therapy session.

22. Mrs. Wallace testified that during the November 10, 2018 therapy session, her husband was present and stated that the focus of the therapy should not be about sex, but on Mrs. Wallace's return to work. However, according to Mrs. Wallace, Dr. Ponce did not appear to be listening to her husband.

23. Mrs. Wallace further testified that she had made some progress through her therapy sessions with Dr. Ponce. Although she was still not interested in sex, she and her husband had cuddled, which led to having sex. When she told Dr. Ponce this, Dr. Ponce jokingly said her husband should take him to lunch.

24. Dr. Ponce testified that Mrs. Wallace was benefitting from the therapy sessions as she was able to do things she had been avoiding, like intimacy with her husband and gardening. Dr. Ponce's November 10, 2018 treatment notes differ from Mrs. Wallace's testimony, as Dr. Ponce writes, "Sheepishly smiled and admitted that the "cuddling" led to intercourse with husband. Said somewhat coyly, "My husband should take you out to dinner."

25. Although Mrs. Wallace's next appointment with Respondent was scheduled for November 17, 2018, Mrs. Wallace cancelled this appointment due to illness. See, Respondent's Exhibit 1.

26. During her November 24, 2018 treatment, Respondent stated that a new phase of therapy, working on feelings, would be started. Mrs. Wallace agreed to start this new therapy phase. Dr. Ponce sat on a chair facing Mrs. Wallace, who was also seated. Dr. Ponce instructed Mrs. Wallace to hold her arms out, with her palms facing upward. Dr. Ponce held Mrs. Wallace's hands, turned her palms over, and moved his thumbs over her hands.

27. According to Mrs. Wallace, Dr. Ponce then asked her to stand, and told Mrs. Wallace to close her eyes. Dr. Ponce put his hands on her face, and kissed her on her lips with his open mouth. Mrs. Wallace testified that she felt wetness on her lips, and that Dr. Ponce had bad breath. *Record of Proceedings at 10:17 a.m. to 10:18 a.m.; and 10:29 a.m.*

28. When asked to further describe the kiss, Mrs. Wallace said that it seemed to last forever, estimating that it was about 2 minutes long. Mrs. Wallace testified that

she felt uncomfortable, frozen, and did not know what to do. *Record of Proceedings at 11:14 a.m. to 11:15 a.m.*

29. According to Mrs. Wallace, after the kiss, Dr. Ponce asked her how it felt. When Mrs. Wallace said, “ok”; Dr. Ponce stated that if she was being truthful, she should have said, “What is Dr. Ponce doing?”. Mrs. Wallace then left even though the therapy session had not ended. *Record of Proceedings at 10:18 a.m. to 10:20 a.m.*

30. Mrs. Wallace went to her car and cried. She called her husband and told him she would not return for further therapy by herself, and asked her husband if he would go. Mr. Wallace agreed to attend the next therapy session with Mrs. Wallace. *Record of Proceedings at 10:21 a.m. to 10:22 a.m.*

31. Although Respondent admitted holding hands with Mrs. Wallace as part of her therapy, Dr. Ponce denied that a kiss occurred. Respondent testified that Mrs. Wallace hugged him, as she had done in their initial therapy session. Respondent opined that Mrs. Wallace’s traumatic brain injury and concussion may be the reason why she mistakenly testified that he kissed her as she may overblow what happened, especially with sexual issues. *Record of Proceedings at 11:40 a.m. to 11:47 a.m.*

32. It is noted that Dr. Ponce’s Psychiatric Progress Notes has the November 24, 2018 date written, but it appears that his notes may have been redacted. The notes are stamped “REDACTED”. When asked why there were no notes for this session, Dr. Ponce stated that notes were not included as no insurance claim for this session was submitted. *See, Respondent’s Exhibit 1; Record of Proceedings at 11:56 a.m. to 11:57 a.m.*

33. Mrs. Wallace testified that after the November 24, 2018 therapy session she went to work, but had a hard time working. Mrs. Wallace also said she had a hard time sleeping. Mrs. Wallace stated that everyday she asked her husband to come with her to the next therapy session scheduled for December 1, 2018. According to Mrs. Wallace, her husband agreed. *Record of Proceedings at 10:21 a.m. to 10:22 a.m.*

34. Mrs. Wallace added that she did not call the police or report what happened during the November 24, 2018 therapy session to anyone as she felt this may be a part of therapy. However, Mrs. Wallace did not want to go alone to further therapy sessions. *Record of Proceedings at 10:22 a.m. to 10:23 a.m.*

35. Mrs. Wallace testified that on both November 24, and 25, 2018, she asked her husband to come with her to the next therapy session on December 1, 2018. *Record of Proceedings at 11:08 a.m.* Mrs. Wallace added that her husband was attentive, supportive, and patient. *Record of Proceedings at 10:30 a.m.* Mrs. Wallace said she needed to continue her treatment so she could return to work. *Record of Proceedings at 11:10 a.m.*

36. Although he had previously agreed to attend the December 1, 2018 therapy session, on that morning, Mr. Wallace said he had another engagement and could not be there. Mrs. Wallace yelled at her husband, who asked what's wrong. Mrs. Wallace told her husband about the exercise (kiss). Mr. Wallace told her not to go back to Dr. Ponce. *Record of Proceedings at 10:23 a.m. to 10:25 a.m.*

37. The testimony of Mrs. Wallace establishes that she told her husband on the morning of December 1, 2018, that Dr. Ponce kissed her. It was not clear whether Mrs. Wallace had told her husband that Dr. Ponce kissed her before this date.

38. Mrs. Wallace added that for her December 1, 2018 appointment, there was no scheduled appointment time, that she could come to Dr. Ponce's office at any time. *Record of Proceedings at 11:12 a.m.* However, Dr. Ponce testified that patients are given appointment times. *Record of Proceedings at noon to 12:01 p.m.*

39. Mrs. Wallace testified that she called the nurse practitioner on December 1, 2018, explained what had happened, and asked to cancel further appointments with Dr. Ponce. According to Mrs. Wallace, the nurse practitioner was shocked and told her she needed to report this to the police. The nurse practitioner further said she would contact Dr. Rowan. *Record of Proceedings at 10:25 a.m.*

40. Linda J. Rowan, M.D. testified that she is a rehabilitation physician. Dr. Rowan first saw Mrs. Wallace soon after the June 3, 2018 work injury, and was in charge of coordinating care for Mrs. Wallace to enable her to return to work. Dr. Rowan usually met with Mrs. Wallace monthly. Dr. Rowan testified that Mrs. Wallace did not exhibit any mental impairment as a result of the work injury, which she described as a mild concussion. *Record of Proceedings at 9:30 a.m. to 9:37 a.m.*

41. Additionally, Dr. Rowan testified that Mrs. Wallace's CT scan on the date of the work accident, and subsequent MRI were reported as normal. *Record of Proceedings at 9:39 a.m.*

42. Mrs. Wallace further testified that the next time she saw Dr. Rowan was on December 6, 2018. At this time, she told Dr. Rowan that Respondent had kissed her during a therapy session. According to Mrs. Wallace, Dr. Rowan instructed her to file a complaint with RICO, and that Dr. Rowan would write a letter explaining what had happened. *Record of Proceedings at 10:26 a.m. to 10:28 a.m.*

43. According to Mrs. Wallace, the nurse practitioner helped her with the RICO complaint form, which she submitted either on the same date she filed her police report, or a few days later. *Record of Proceedings at 11:12 a.m.*

44. Mrs. Wallace testified that the kiss from Dr. Ponce resulted in her having nightmares, anxiety, and panic attacks. *Record of Proceedings at 10:29 a.m.*

45. Prior to this referral from Workstar, Mrs. Wallace and Dr. Ponce had never met.

46. Dr. Rowan testified that both she and the nurse practitioner were informed by Mrs. Wallace that Dr. Ponce had kissed her. However, neither Dr. Rowan nor the nurse practitioner questioned Dr. Ponce about the kiss. *Record of Proceedings at 9:46 a.m.*

47. Dr. Rowan further testified that she provided Mrs. Wallace with options about what to do, including filing a police report and a complaint with RICO. However, Dr. Rowan also testified that she would not advise a person in this situation what to do, that she tries to remain neutral. *Record of Proceedings at 9:46 a.m.*

48. Dr. Rowan testified that she was unable to find another psychiatrist to treat Mrs. Wallace. Further, after reporting she was kissed by Dr. Ponce, Mrs. Wallace's recovery declined. *Record of Proceedings at 9:49 a.m. to 9:50 a.m.*

49. Mrs. Wallace testified that she filed a police report on December 6, 2018, 12 days after Dr. Ponce kissed her on the lips during a therapy session. This was the date that Mrs. Wallace first saw Dr. Rowan after her November 24, 2018 treatment with Dr. Ponce. Mrs. Wallace stated that she filed the police report at the suggestion of the nurse case manager and her husband. *Record of Proceedings at 11:00 a.m. to 11:05 a.m.*

50. Mrs. Wallace added that she had not known of the RICO prior to this incident. Mrs. Wallace filed a complaint with RICO so that others would be aware of Dr. Ponce's actions.

51. There were no criminal charges filed against Dr. Ponce regarding the November 24, 2018 treatment of Mrs. Wallace.

52. Mrs. Wallace added that she did not file a civil action against Dr. Ponce.

53. At the hearing, Antonia S. Austria, M.D. testified as a member of RICO's Medical Advisory Committee. Dr. Austria is a psychiatrist with the Department of Health, Adult Mental Health Division.

54. Dr. Austria testified that kissing a patient during a therapy session is an act of sexual misconduct and professional misconduct in violation of the statutes and rules governing medical doctors.

55. In her January 26, 2020 letter to RICO, Dr. Austria writes, in part, in response to the following questions from RICO:

-In your opinion, how would a psychiatrist kissing a patient during a therapy session affect the quality of care of this patient? "I believe kissing a patient during a therapy session is detrimental to patient's wellbeing and is a violation of professional conduct."

- In your opinion, is there any situation where a psychiatrist kissing a patient in a therapy session is acceptable? "In my opinion there is no situation where a psychiatrist kissing a patient in a therapy session is an acceptable component of therapy." *See, Petitioner's Exhibit 4.*

56. Dr. Austria further testified that her opinion does not address whether the alleged unprofessional conduct of Respondent occurred.

57. Dr. Ponce testified that he has never had any prior disciplinary action against his Hawaii medical license.

58. The Petition contains one paragraph under the Statement of Facts Which Support the Alleged Violations of Statutes and Rules. Paragraph 5 states:

"Complainant was referred to Respondent for a worker's compensation case. Complainant became Respondent's patient. Respondent is a licensed psychiatrist who treated Complainant during several psychotherapy sessions. During one of the psychotherapy sessions, Respondent kissed Complainant, Respondent's patient, on Complainant's lips."

59. In its closing argument, RICO recommends that Respondent's medical license be revoked.

60. In its closing argument, Respondent recommends that the Petition be dismissed. Alternatively, if a violation was found, Respondent recommends that, at most, the only appropriate sanction would be a letter of reprimand from the Medical Board.

III. CONCLUSIONS OF LAW

Petitioner has charged Respondent with violating the following statutory provisions:

§453-8 Revocation, limitation, suspension, or denial of licenses. (a) In addition to any other actions authorized by law, any license to practice medicine and surgery may be revoked, limited, or suspended by the board at any time in a proceeding before the board, or may be denied, for any cause authorized by law, including but not limited to the following:

* * * *

(7) Professional misconduct, hazardous negligence causing bodily injury to another, or manifest incapacity in the practice of medicine or surgery;

(9) Conduct or practice contrary to the recognized standards of ethics of the medical profession as adopted by the Hawaii Medical Association or the American Medical Association;

* * * *

§436B-19 Grounds for refusal to renew, reinstate or restore and for revocation, suspension, denial, or condition of licenses. In addition to any other acts or conditions provided by law, the licensing authority may refuse to renew, reinstate or restore, or may deny, revoke, suspend, or condition in any manner, any license for any one or more of the following acts or conditions on the part of the licensee or the applicant thereof:

* * * *

(7) Professional misconduct, incompetence, gross negligence, or manifest incapacity in the practice of the licensed profession or vocation; and

(9) Conduct or practice contrary to the recognized standards of ethics for the licensed profession or vocation.

In this case, the question is whether Respondent committed the act which is alleged in the Petition; that is, whether Dr. Ponce kissed Ms. Wallace on her lips during a therapy session.

The evidence presented by Mrs. Wallace was that during her November 24, 2018 therapy session as a patient of Dr. Ponce, Respondent kissed her on the lips with an open mouth for an estimated 2 minutes. According to Mrs. Wallace, Respondent stated that a new phase of therapy would be started. Dr. Ponce sat on a chair facing Mrs. Wallace and instructed her to hold her arms out, with her palms facing upward. Dr. Ponce held Mrs. Wallace's hands.

After asking Mrs. Wallace to stand, Dr. Ponce then kissed her on her lips with his open mouth. Mrs. Wallace testified that she felt wetness on her lips, and that Dr. Ponce had bad breath. When asked to further describe the kiss, Mrs. Wallace said that it seemed to last a long time, estimating that it was about 2 minutes long. Mrs. Wallace testified that she felt uncomfortable, did not know what to do, and left even though the therapy session had not ended.

Respondent testified that he held hands with Mrs. Wallace as part of her therapy, but denied that a kiss occurred. Respondent opined that Mrs. Wallace's traumatic brain injury and concussion may be the reason why she mistakenly testified that he kissed her as she may overblow what happened, especially with sexual issues.

RICO presented evidence through the testimony of Dr. Austria that it is a violation of the rules and regulations of a medical doctor to kiss a patient under any circumstances. Further, that under the American Medical Association's Principles of Medical Ethics, romantic or sexual interactions between physicians and patients that occur concurrently with the patient-physician relationship are unethical. Respondent does not contest this.

It is also uncontested that prior to this workers compensation referral from Workstar, Mrs. Wallace and Dr. Ponce had never met.

Although Mrs. Wallace testified that Dr. Ponce kissed her on her mouth, Dr. Ponce denies that he ever kissed Ms. Wallace during any therapy session. The issue in this case is credibility.

In this case there is no other direct evidence to support either Mrs. Wallace's or Dr. Ponce's opposing testimonies regarding the kiss. There was no 3rd party present during the November 24, 2018 therapy session. There were, however, inconsistencies between Mrs. Wallace's testimony and the testimonies of the witnesses.

The testimony of Mrs. Wallace establishes that she told her husband on the morning of December 1, 2018, that Dr. Ponce kissed her. It was not clear whether Mrs. Wallace had told her husband that Dr. Ponce kissed her before this date; that is, on the date that Mrs. Wallace said the kiss occurred – November 24, 2018. Mrs. Wallace testified that after the kiss occurred, she went to her car and cried. She called her husband and told him she would not return for further therapy by herself, and asked her husband if he would go. Mr. Wallace agreed to attend the next therapy session with Mrs. Wallace.

Mrs. Wallace further testified that after the November 24, 2018 therapy session she went to work, but had a hard time working. Mrs. Wallace also said she had a hard time sleeping. Mrs. Wallace stated that every day she asked her husband to come with her to the next therapy session scheduled for December 1, 2018. According to Mrs. Wallace, her husband agreed. Mrs. Wallace also testified that her husband was attentive, supportive, and patient with her - so it would seem likely that she would tell her husband about the kiss right after it occurred, especially as she could not concentrate at work and had difficulty sleeping.

However, on the morning of December 1, 2018, the date of the next scheduled therapy session after the alleged kiss, once Mrs. Wallace told her husband about the kiss, her husband told Mrs. Wallace not to go back to Dr. Ponce. If he had known about the kiss earlier, then Mr. Wallace would have likely told Mrs. Wallace not to go back for further sessions at the time he was told, not the morning of the next scheduled therapy session.

On cross-examination, Mrs. Wallace testified that she asked her husband to go with her to the next therapy session on both the 24th and 25th of November, the day the alleged kiss occurred and the day after. It would seem likely that Mrs. Wallace would tell her husband why she wanted him to go to the next therapy session right after the November 24, 2018 therapy session when Mrs. Wallace left the therapy session, crying, and called her husband when she got to her car. It is unlikely that she would ask him to attend the next therapy session later that day or the next day. Mr. Wallace must have agreed to attend, as Mrs. Wallace testified that she was upset when Mr. Wallace said he had a prior engagement on the morning of December 1, 2018.

There is an inconsistency regarding when Mrs. Wallace told her husband she had been kissed by Dr. Ponce. The facts showed that Mrs. Wallace had an appointment to see Dr. Ponce on the morning of December 1, 2018, and that she expected her husband to accompany her to

this appointment. However, this appointment was one week after Respondent had allegedly kissed Mrs. Wallace. The fact that this appointment was not cancelled until the morning of December 1, 2018, raises questions as to when Mrs. Wallace told her husband about the kiss.

It is unlikely that Mr. Wallace had forgotten that Mrs. Wallace told him Dr. Ponce had kissed her and had to be reminded on the morning of the next therapy session. Mrs. Wallace had described her husband as attentive, supportive, and patient. Mrs. Wallace also testified that she asked her husband to attend the December 1, 2018 therapy session everyday. Yet, on the morning of the next scheduled appointment, Mrs. Wallace testified that she was upset as her husband said he had a prior engagement. After being reminded daily to attend the next therapy session, and being attentive, supportive, and patient; it is inconsistent that Mr. Wallace would have a prior engagement on the morning of the next therapy session.

There was also inconsistency between Mrs. Wallace's testimony and Dr. Ponce's records regarding who said Mr. Wallace should take Dr. Ponce to dinner or lunch after Mr. and Mrs. Wallace had engaged in sex after Dr. Ponce had suggested cuddling. Mrs. Wallace testified that although she was still not interested in sex, she and her husband had cuddled, which led to having sex. When she told Dr. Ponce this, Dr. Ponce jokingly said her husband should take him to lunch. Dr. Ponce's November 10, 2018 treatment notes differ from Mrs. Wallace's testimony, as Dr. Ponce writes, "Sheepishly smiled and admitted that the "cuddling" led to intercourse with husband. Said somewhat coyly, "My husband should take you out to dinner."

While the questions of whether it was dinner or lunch, or who suggested to take Dr. Ponce out, are not significant; the fact that there is a difference in recollection shows that at least one of the parties is not recalling what happened accurately. While it is difficult to determine which version is correct, it is noted that Dr. Ponce's treatment notes were made at or near the time the event occurred.

Additionally, there is inconsistency between what Mrs. Wallace and Dr. Rowan testified regarding what Dr. Rowan did after being informed by Mrs. Wallace that Respondent had kissed her. According to Mrs. Wallace, Dr. Rowan advised her to file a criminal complaint against Dr. Ponce. Mrs. Wallace further stated that Dr. Rowan instructed her to file a complaint with RICO, and that Dr. Rowan would write a letter explaining what had happened while the nurse practitioner helped her with the complaint form.

Dr. Rowan did not confirm or deny that she told Mrs. Wallace that she would write a letter explaining what had happened while the nurse practitioner helped her with the RICO complaint form. However, Dr. Rowan testified that she provided Mrs. Wallace with options about what to do, including filing a police report and a complaint with RICO. However, contrary to Mrs. Wallace's testimony, Dr. Rowan also stated that she would not advise a person in this situation what to do, that she tries to remain neutral.

Further, Mrs. Wallace testified that she called the nurse practitioner on December 1, 2018 to cancel further appointments with Dr. Ponce, and stated that the nurse practitioner was shocked when she learned that Dr. Ponce had kissed Mrs. Wallace. According to Mrs. Wallace, the nurse practitioner stated she would contact Dr. Rowan. However, Mrs. Wallace further testified that the next time she saw Dr. Rowan was on December 6, 2018. At this time, she told Dr. Rowan that Respondent had kissed her during a therapy session.

It appears that Dr. Rowan was first informed that Respondent had kissed Mrs. Wallace on December 6, 2018. This is 5 days after the nurse practitioner learned that Dr. Ponce had kissed Mrs. Rowan and said she would contact Dr. Rowan. It appears that although shocked by Dr. Ponce's conduct, the nurse practitioner did not tell Dr. Rowan about this, even though Mrs. Wallace testified that she said she would.

Another inconsistency between testimonies was whether Dr. Ponce's patients had appointment times for their Saturday therapy sessions with Dr. Ponce. Mrs. Wallace testified that for her December 1, 2018 appointment, there was no scheduled appointment time, that she could come to Dr. Ponce's office at any time. However, Dr. Ponce testified that patients are given appointment times. As noted in the billing forms, Mrs. Wallace's psychotherapy sessions were an hour long. It would make more sense that patients were given appointment times as testified by Dr. Ponce, rather than have no scheduled appointment time, as Mrs. Wallace testified.

As noted above, in this case credibility is an issue as Mrs. Wallace said Dr. Ponce kissed her, while Dr. Ponce denies that he kissed Mrs. Wallace.

In cases alleging violations of the rules and regulations governing licensees, the Petitioner has the burden of proof to show that the allegations have been proven by a preponderance of the evidence. In this case, with no 3rd party witness to affirm or deny that a

kiss occurred, consistency of testimony between witnesses, and other supporting evidence such as documentation, or circumstances, are factors to consider.

Dr. Ponce's testimony was also scrutinized. Respondent's Psychiatric Progress Report lists Mrs. Wallace's treatment dates and provide details about her therapy sessions. However, it is noted that Dr. Ponce's Psychiatric Progress Report has the November 24, 2018 date written, but it appears that his notes may have been redacted. The notes are stamped "REDACTED". When asked why there were no notes for this session, Dr. Ponce stated that notes were not included, in part, because no insurance claim for this session was submitted.

While this explanation may suffice for billing purposes, there is no question that on November 24, 2018 Dr. Ponce provided therapy for Mrs. Wallace, and it is suspicious as to why the therapy notes were redacted, especially since this is the date that it is alleged when Dr. Ponce kissed Mrs. Wallace.

The parties were provided an opportunity to submit written closing briefs to clarify how the evidence presented either proved or did not prove the allegations asserted.

Petitioner argued that Dr. Rowan testified that she believed Mrs. Wallace's report that Respondent had kissed her during a therapy session; and that Mrs. Wallace did not have any issues understanding or perceiving reality after her head injury at work. Petitioner further argues against Respondent's opinion that Mrs. Wallace misperceived the hug for a kiss as she may be overblowing events that are sexually related. Petitioner notes that Dr. Ponce's Psychiatric Progress Report does not show that Mrs. Wallace misinterprets anything or struggles to perceive reality. Further, Petitioner argues that Respondent's failure to report the November 24, 2018 therapy session in his notes, shows that he is hiding the facts of this therapy session.

In his closing argument, Respondent argues that Mrs. Wallace's testimony was bizarre and nonsensical, citing, among other things, Mrs. Wallace's driving to work after the alleged kiss, while being emotionally distraught; and her husband's inconsistent action of having a commitment on the day of the December 1, 2018 therapy session after he had agreed to go with Mrs. Wallace to the next scheduled appointment, and being reminded daily.

The Hearings Officer has credibility concerns regarding both Mrs. Wallace's and Dr. Ponce's testimonies. On one hand, the testimony and actions of Mrs. Wallace and Dr. Rowan regarding what Dr. Rowan advised Mrs. Wallace to do after the alleged kiss during the

November 24, 2018 therapy session are inconsistent. Further, as Respondent argues, Mrs. Wallace's driving to work while being emotionally distraught after the alleged kiss does not make sense. Additionally, Mr. Wallace's having a commitment on the day of the December 1, 2018 therapy session after he had agreed to go with Mrs. Wallace to the next scheduled appointment, and being reminded daily, are not consistent actions.

On the other hand, there is no question that on November 24, 2018 Dr. Ponce provided therapy for Mrs. Wallace, and it is suspicious as to why the therapy notes were redacted, especially since this is the date that it is alleged when Dr. Ponce kissed Mrs. Wallace. Further, as Petitioner argues, Dr. Ponce's opinion that Mrs. Wallace misperceived the hug for a kiss as she may be overblowing events that are sexually related, is not consistent with Respondent's Psychiatric Progress Report which does not show that Mrs. Wallace misinterprets anything or struggles to perceive reality.

Under the Hawaii Administrative Rules, the Petitioner has the burden of proof to show that the allegations in the Petition are proven by a preponderance of the evidence. Specifically, HAR Section 16-201-21(d) states that "the burden of proof, including the burden of producing evidence and the burden of persuasion, shall be upon the party initiating the proceeding. Proof of a matter shall be by a preponderance of the evidence."

Because both Mrs. Wallace's and Dr. Ponce's testimonies contain inconsistencies with other facts, circumstances, or testimonies, the Hearings Officer finds and concludes that both witnesses' testimonies have credibility concerns.

The Hearings Officer concludes that Petitioner has not met its burden of proof. The evidence did not show proof by a preponderance of the evidence that Respondent violated the rules and regulations governing his medical license by kissing Mrs. Wallace during the November 24, 2018 therapy session.

IV. RECOMMENDED ORDER

Based on the foregoing findings and conclusions, the Hearings Officer recommends that the Board find and conclude that Respondent has not established by a preponderance of the evidence that Respondent kissed Complainant in violation of any of the allegations in the Petition:

§453-8(a)(7) Professional misconduct in the practice of medicine;

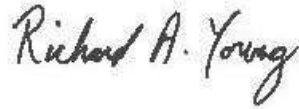
(a)(9) Conduct or practice contrary to the recognized standards of ethics of the medical profession;

§436B-19(7) Professional misconduct or incompetence in the practice of the licensed profession; and

(9) Conduct or practice contrary to the recognized standard of ethics for the licensed profession.

The Hearings Officer recommends that the Petition for Disciplinary Action against Respondent's medical license be dismissed.

DATED at Honolulu, Hawaii: September 7, 2021.



RICHARD A. YOUNG
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs

Hearings Officer's Findings of Fact, Conclusions of Law, and Recommended Order; In Re Danilo E. Ponce, M.D.; MED 2019-4-L.