STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF PROFESSIONAL REGULATION, BOARD OF MEDICINE,	)	
Petitioner,	)	
vs.	)	CASE NO. 91-2815
VLADIMIR ROSENTHAL, M.D.,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on September 4 and 5, 1991, at Miami, Florida, before Michael M. Parrish, a duly designated Hearing Officer of the Division of Administrative Hearings. Appearances for the parties at the hearing were as follows:

APPEARANCES

For Petitioner: Richard A. Grumberg, Esquire
Senior Attorney
Department of Professional Regulation
1940 N. Monroe Street
Tallahassee, Florida 32399-0792

For Respondent: Karen Coolman Amlong, Esquire
Amlong & Amlong, P.A.
Second Floor
101 Northeast Third Avenue
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUES

This is a license discipline case in which a medical doctor is charged by administrative complaint with five counts of violations of paragraphs (h), (k), (m), and (t) of Section 458.331(1), Florida Statutes (1988 Supp.).

PRELIMINARY STATEMENT

At the formal hearing the Petitioner presented the live testimony of the following witnesses: B.F. (one of the Respondent's patients); Dr. Nahid Mansoori (patient B.F.'s referring physician); Sandra Owens (an employee of the H.R.S. Office of Licensure and Certification; Dr. Robert E. McCammon (expert witness); Dr. Martin Goldstein (expert witness); and Dr. Herman Epstein (expert witness). The Petitioner also offered six exhibits into evidence, all of which were accepted. One of the Petitioner's exhibits was comprised of the deposition testimony of Linda Sullivan (former employee of the H.R.S. Office of Licensure and Certification).

The Respondent testified on his own behalf and also offered the live testimony of Robert Heaton (an employee of Amlong & Amlong, P.A.) and Dr. Benjamin Graber (expert witness). The Respondent also offered thirteen exhibits into evidence. Respondent's Exhibits 5 and 12 were rejected; all of the Respondent's other exhibits were accepted. Respondent's accepted exhibits include deposition testimony of the following: Dr. Pierre J. Bouis, Jr. (expert witness); Dr. Arnold Wechsler (expert witness); and Dr. Uzi Bodman (expert witness).

At the conclusion of the formal hearing the Petitioner was allowed 60 days from the close of the hearing within which to take and file a deposition of Dr. McCammon, and all parties were allowed 90 days from the close of the hearing within which to file their proposed recommended orders. The Respondent ultimately elected not to take the deposition of Dr. McCammon and no post-hearing deposition was filed. A transcript of the proceedings at the formal hearing was filed with the Hearing Officer on October 8, 1991. At the request of the Respondent, the deadline for submitting proposed recommended orders was extended to December 11, 1991.

Both parties filed proposed recommended orders containing proposed findings of fact and conclusions of law. Specific rulings on all proposed findings of fact submitted by all parties are contained in the Appendix to this Recommended Order.

FINDINGS OF FACT

Findings based on parties' stipulations

1. The Respondent, Vladimir Rosenthal, M.D., (hereinafter "Respondent" or "Dr. Rosenthal") is, and at all material times was, a medical doctor, license number ME 0045574, who practiced at 1320 South Dixie Highway, Coral Gables, Florida.

2. Dr. Rosenthal at all material times owned the business operating as Today's Women Medical Center located at 1320 South Dixie Highway, Suite 1070, Coral Gables, Florida.

3. On or about November 3, 1988, Dr. Rosenthal performed an elective abortion on patient B.F. under general anesthesia.

4. On or about November 3, 1988, Dr. Rosenthal ordered a pathology report of the products of the procedure performed on patient B.F.

5. The pathology report regarding patient B.F. bears the date November 8, 1988. The pathology report revealed no chorionic villi and recommended a "close follow-up" of the patient.

6. Missed abortion and continued pregnancy is a recognized risk of early (first trimester) abortions.

7. Patient B.F. suffered no harm as a result of the November 3, 1988, procedure.

8. On or about December 7, 1988, patient B.F. presented to Dr. Rosenthal. On or about December 7, 1988, patient B.F.'s uterus was examined and found to be enlarged. Subsequently, a repeat pregnancy test was performed on patient B.F., which revealed she was still pregnant.

9. On or about December 10, 1988, Dr. Rosenthal performed a second abortion on patient B.F. with positive results. Patient B.F. suffered no harm as a result of the December 10, 1988, procedure.

Findings based on evidence at hearing

10. The Respondent specializes in the area of gynecology, but does not practice obstetrics. In the course of his medical practice he regularly performs first trimester abortions. The Respondent is very experienced in the performance of first trimester abortions. In recent years he has averaged five thousand (5,000) such procedures per year.

11. Patient B.F. normally goes to Dr. Nahid Mansoori for routine treatment of gynecological matters. Patient B.F. was seen by Dr. Mansoori on October 28, 1988, with a history of a missed menstrual period. Dr. Mansoori examined the patient and observed that the patient had an enlarged uterus and appeared to be 5 or 6 weeks pregnant. The patient expressed an interest in having an abortion. Because Dr. Mansoori does not perform abortions, she referred patient B.F. to the Respondent. Dr. Mansoori also referred patient B.F. to Dr. Martin S. Goldstein for an ultrasound examination.

12. Dr. Mansoori referred patients to the Respondent on a regular basis. She did so for several reasons, including the facts that (a) patients she referred to the Respondent uniformly reported back to her that they were pleased or satisfied with the services they received from the Respondent, (b) none of her patients had complained about their treatment by the Respondent, and (c) none of the patients she had referred to the Respondent had experienced any infection or problems.

13. On October 31, 1988, Dr. Martin S. Goldstein performed an ultrasound examination of patient B.F. On the basis of that ultrasound examination, Dr. Goldstein concluded and reported that the "gestational age" of patient B.F.'s pregnancy was 6 weeks, 0 days. Dr. Goldstein also concluded and reported that patient B.F. had an intrauterine pregnancy, thus ruling out an ectopic pregnancy.

14. On November 3, 1988, patient B.F. went to the Respondent's clinic at 1320 South Dixie Highway for the purpose of having an abortion. The Respondent remembers this particular patient because she was a medical professional and her husband was an attorney. Because of their respective professions, the Respondent was extra careful to explain everything involved in the process to both B.F. and her husband. He especially explained to both of them the importance of a post-abortion follow up examination at either the Respondent's clinic or at the office of the patient's regular gynecologist. Patient B.F. said that she would return to Dr. Mansoori, her regular gynecologist, for the follow up examination.

15. When patient B.F. went to the Respondent's clinic on November 3, 1988, she told the Respondent that she had had an ultrasound examination. The Respondent called Dr. Mansoori and Dr. Mansoori told him that the results of the ultrasound examination indicated a "gestational age" 1/ of six weeks and that the ultrasound examination confirmed an intrauterine pregnancy. Dr. Mansoori also mentioned that her clinical examination of patient B.F. indicated a "gestational age" of five or six weeks. Upon manual examination of the patient, the Respondent concluded, and noted in the patient's medical record, that patient B.F.'s uterus was enlarged to a size consistent with a "gestational age"

of five weeks. Later that same day, the Respondent performed an abortion procedure on patient B.F. Following the abortion procedure, patient B.F. took antibiotic medication for several days, which medication had been prescribed and/or dispensed by the Respondent.

16. The Respondent ordered a pathology report of the products of the abortion procedure performed on patient B.F. on November 3, 1988. The Respondent does not order pathology reports on all of his patients, but he did so in this case because it was an early pregnancy, and also because he wanted to take extra care in view of the professions of B.F. and her husband.

17. The pathology laboratory is supposed to call Dr. Rosenthal on all "abnormal" reports. Sometimes the laboratory fails to call and sometimes the laboratory fails to send a written report. The Respondent has established office procedures for handling laboratory reports to try to prevent any reports from going astray and to identify those that do go astray so that follow up activity may be taken. Pursuant to the Respondent's established office procedures, all laboratory reports received at the clinic must be seen and signed by the Respondent before being placed in a patient chart. When a patient returns for her follow up visit, the laboratory report is reviewed during the course of that visit. If a laboratory examination has been ordered, but there is no laboratory report in the chart at the time of the follow up visit, the laboratory is called by telephone. The Respondent usually makes these calls himself.

18. Pursuant to the Respondent's established office procedures, missing laboratory reports for patients who do not return for follow up visits or who return to their regular physicians for follow up visits are picked up when monthly reports to the Department of Health and Rehabilitative Services are compiled and submitted. In order to complete these monthly reports, a log is kept of every patient who has an abortion procedure performed at the Respondent's clinic. The information kept in the log and reported to DHRS includes: the date of surgery, the estimated "gestational age" of the patient, whether a pathology report was ordered, the results of the pathology report, and the date the pathology report was received by the clinic. Such forms were in use at the time B.F. was a patient at the Respondent's clinic. If any pathology reports "fell through the cracks," they were picked up each month when the reports were prepared. The reports are usually prepared on the ninth or tenth of each month. The implementation of these office procedures for the purpose of following up on laboratory reports is sufficient to comply with applicable standards of medical care.

19. The pathology laboratory prepared a report regarding the material removed from patient B.F. during the November 3, 1988, abortion procedure. The written laboratory report was dated November 8, 1988. The most significant finding noted on the laboratory report was "no chorionic villi." Because of this finding, the laboratory report also stated: "close follow up of patient is recommended." The significance of the notation of "no chorionic villi" is that it indicates that the pathology laboratory examination did not reveal evidence of any fetal tissue or other "products of conception." The need for close follow up in this instance is because the absence of chorionic villi can be due to a number of different things. 2/

20. On November 18, 1988, patient B.F. went to Dr. Mansoori's office for a post-abortion follow up visit. At that time the patient was complaining of a vaginal "yeast" infection, a not uncommon occurrence following a course of antibiotic medication. Dr. Mansoori treated the patient's "yeast" infection with

a prescription for Monistat Vaginal Cream. Dr. Mansoori's medical records for that day also include the following notations regarding the patient B.F.: "Had abortion by Today's Woman. Post AB check up O.K." 3/ Dr. Mansoori told patient B.F. to get back in touch with her if the patient missed her next menstrual period.

21. On December 6, 1988, patient B.F. called Dr. Mansoori to report that she had missed her menstrual period. Dr. Mansoori advised her to return to the Respondent and patient B.F. agreed to do so. Dr. Mansoori called the Respondent to advise him that patient B.F. would be returning because she had missed her menstrual period. Dr. Mansoori also arranged for another ultrasound examination to be performed on patient B.F. by Dr. Goldstein.

22. On December 7, 1988, patient B.F. returned to the Respondent's clinic where she was seen and examined by the Respondent. Examination revealed that the patient's uterus was mildly enlarged. A pregnancy test administered that day indicated that the patient was still pregnant. On December 7, 1988, the Respondent realized that he did not have a report from the pathology laboratory, so he called the laboratory and was advised that the most significant finding of the pathology report was "no chorionic villi." The substance of the telephone conversation with the pathology laboratory was noted in the patient's medical record. When he made the telephone call to the pathology laboratory on December 7, 1988, the Respondent had not received the laboratory's written report dated November 8, 1988, 4/ nor had he been otherwise advised of the results of the pathology study of the materials removed during the November 3, 1988, abortion procedure.

23. On December 8, 1988, Dr. Martin S. Goldstein performed a second ultrasound examination of patient B.F. On the basis of the second ultrasound examination, Dr. Goldstein concluded and reported that the "gestational age" of patient B.F.'s pregnancy was 11 weeks, 6 days. This second gestational age was three days older than one would have predicted based on the October 31, 1988, ultrasound examination. In both of the ultrasound examinations of patient B.F., Dr. Goldstein relied upon the "crown rump" measurement as the basis for his estimate of "gestational age."

24. On December 10, 1988, when patient B.F. returned to the Respondent's office for the second abortion procedure, the Respondent conducted a clinical examination of the patient before commencing the procedure. On the basis of his own clinical examination of the patient, the Respondent was of the opinion that patient B.F.'s "gestational age" was 8 or 9 weeks. He reported this on the "Physical Exam" portion of the patient's chart by writing "8-9" beside the entry for uterus. After the patient was anesthetized and the Respondent could examine her while she was more relaxed, the Respondent further examined the patient's uterus and was of the opinion that its size corresponded to a "gestational age" of 8 weeks. He noted this opinion in the "Operative Notes" portion of the patient's chart. It was, and continues to be, the Respondent's opinion that his December 10, 1988, estimates of the patient's "gestational age" were correct. Although he was aware of Dr. Goldstein's ultrasound examination which reported a somewhat older "gestational age," the Respondent had confidence in his own clinical findings and relied on his own clinical findings, which he duly recorded in the patient's medical chart.

25. Relying on his own estimate of "gestational age," the Respondent performed the abortion procedure on December 10, 1988, on patient B.F. with a number eight suction tip. The abortion procedure was accomplished successfully and without any difficulty or complication. A report from a pathology

laboratory confirmed that the December 10, 1988, abortion procedure was successful. 5/

26. The prevailing standards of acceptable care do not require a physician to order a pathology examination of the material removed during the course of a routine first trimester abortion procedure. In an abortion procedure involving a very early pregnancy, a physician may wish to order such a pathology examination in order to be more certain as to the results of the procedure, but it is a matter of physician preference, rather than a requirement.

27. A physician who orders a pathology examination of the material removed during a first trimester abortion procedure has an affirmative duty to follow up on the examination and find out the results of the examination within a reasonable period of time. 6/ The Respondent's follow up on December 7, 1988, on the results of the pathology examination of the material removed from patient B.F. during the November 3, 1988, procedure was reasonable under the circumstances. 7/ The Respondent's delay until December 7, 1988, before following up on that pathology examination was not a departure from applicable standards of medical care. 8/

28. The Respondent's medical records for patient B.F. justify the course of treatment of the patient.

29. The use of ultrasound examination as a method of estimating "gestational age" is not an exact science and cannot be relied upon to determine an exact "gestational age." As a general rule, "gestational age" estimates derived by means of ultrasound examination are accurate within a margin of error of plus or minus two weeks. 9/

30. Clinical or manual examination of a patient as a method of estimating "gestational age" is also not an exact science and cannot be relied upon to determine an exact "gestational age." As a general rule, "gestational age" estimates derived by means of clinical or manual examination of a patient are accurate within a margin of error of plus or minus two weeks, if done by an experienced physician. It is not a departure from applicable standards of medical care for an estimate of "gestational age" to vary from the actual "gestational age" by as much as plus or minus two weeks when the estimate is based on the physician's clinical or manual examination of the patient.

31. A reasonably prudent physician who is experienced in clinical or manual examination of patients for the purpose of estimating "gestational age" should rely on his own findings, even if those findings appear to conflict with findings based on ultrasound examination. Such a physician should also note his own findings on the patient's medical records, regardless of what is reported by the ultrasound.

32. There is no great discrepancy between the estimate of "gestational age" reported in Dr. Goldstein's ultrasound report of December 8, 1988, and the Respondent's estimate of "gestational age" on December 10, 1988. The Respondent's notations in patient B.F.'s medical records on December 10, 1988, to the effect that her pregnancy was of a "gestational age" of eight weeks was an honest notation of the Respondent's clinical judgment and was not a statement the Respondent knew to be false. 10/ Similarly, those notations were not deceptive, untrue, or fraudulent representations.

33. On or about August 3, 1989, the Respondent's clinic, known as Today's Woman Medical Center, located at Suite 1070, 1320 South Dixie Highway, Coral

Gables, Florida, was inspected by an employee of the Office of Licensure and Certification of the Department of Health and Rehabilitative Services. 11/ At the time of that inspection the Respondent was not present at the clinic, there were no procedures being performed at the clinic, and there were no patients at the clinic.

CONCLUSIONS OF LAW

34. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. Sec. 120.57(1), Fla. Stat.

35. In a license discipline proceeding of this nature the Petitioner bears the burden of proving its charges by clear and convincing evidence. See Ferris v. Turlington, 510 So.2d 292 (Fla. 1987). The nature of clear and convincing evidence has been described as follows in Slomowitz v. Walker, 429 So.2d 797, 800 (Fla. 4th DCA 1983):

> We therefore hold that clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. 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.

See also, Smith v. Department of Health and Rehabilitative Services, 522 So.2d 956 (Fla. 1st DCA 1988), which, at page 958, quotes with approval the above Slomowitz. The Smith case also includes the following at page 958:

> "Clear and convincing evidence" is an intermediate standard of proof, more than the "preponderance of the evidence" standard used in most civil cases, and less than the "beyond a reasonable doubt" standard used in criminal cases. See State v. Graham, 240 So.2d 486 (Fla. 2d DCA 1970).

36. Section 485.331(2), Florida Statutes (1988 Supp.), reads as follows, in pertinent part:

> (2) When the board finds any person guilty of any of the grounds set forth in subsection (1), it may enter an order imposing one or more of the following penalties:
> (a) Refusal to certify, or certification with restrictions, to the department an application for licensure, certification, or registration.
> (b) Revocation or suspension of a license.
> (c) Restriction of practice.
> (d) Imposition of an administrative fine not to exceed $5,000 for each count or separate offense.
> (e) Issuance of a reprimand.
> (f) Placement of the physician on probation for a period of time and subject to such conditions as

the board may specify, including, but not limited to, requiring the physician to submit to treatment, to attend continuing education courses, to submit to reexamination, or to work under the supervision of another physician

(g) Issuance of a letter of concern.

(h) Corrective action.

(i) Refund of fees billed to and collected from the patient.

Discussion of Count One

37. Count One of the Administrative Complaint charges that the Respondent violated Section 458.331(1)(t), Florida Statutes (1988 Supp.). The cited statutory provision authorizes disciplinary action upon proof of the following:

> (t) 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. 766.102 when enforcing this paragraph. As used in this paragraph, "repeated malpractice" includes, but is not limited to, three or more claims for medical malpractice within the previous 5-year period resulting in indemnities being paid in excess of $10,000 each to the claimant in a judgment or settlement and which incidents involved negligent conduct by the physician. As used in this paragraph, "gross 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," shall not be construed so as to require more than one instance, event, or act. Nothing in this paragraph shall be construed to require that a physician be incompetent to practice medicine in order to be disciplined pursuant to this paragraph.

38. The factual predicate for Count One is alleged in Paragraph 15 of the Administrative Complaint to be ". . . that Respondent failed to follow up Patient #1 [Patient B.F.], pursuant to a pathologist report, he falsely noted on his medical records that Patient #1 was eight (8) weeks pregnant when she was actually eleven (11) weeks pregnant." The evidence in this case is insufficient to establish the allegations upon which Count One is based. In this regard it is first noted that the greater weight of the evidence is to the effect that the Respondent did not receive actual knowledge of the pathology report dated November 8, 1988, until he contacted the laboratory by telephone on December 7, 1988. As soon as the Respondent had knowledge of the information contained in the November 8, 1988, pathology report, he took appropriate action. Therefore, there was no failure to follow up patient B.F. To the extent that Count One is based upon the premise that the Respondent should have contacted the pathology laboratory sooner and should have initiated the follow up of patient B.F. sooner, it is sufficient to note that that premise is not asserted in the Administrative Complaint 12/ and, in any event, the greater weight of the evidence is to the effect that the Respondent's office procedures for following up on laboratory reports were sufficient to meet applicable standards of care.

39. With regard to so much of Count One as is predicated upon the assertion that the Respondent "falsely" noted in his records that patient B.F. was eight (8) weeks pregnant, the evidence in this case is insufficient to establish that the Respondent made any false notations in his records. The most that can be said in this regard on the basis of the record in this case is that the Respondent may have made an erroneous or incorrect notation in his records with regard to the duration of patient B.F.'s pregnancy. 13/ He has not been charged with making erroneous or incorrect notations in his records and, in any event, the evidence in this case is insufficient to establish that an erroneous or incorrect notation of the duration of a patient's pregnancy is a departure from applicable standards of care. To the contrary, the evidence in this case establishes that a margin of error of plus or minus two weeks in the estimation of "gestational age" is within applicable standards of medical care. Such being the case, even if it were to be proved that the Respondent's estimate was incorrect by as much as two weeks, such proof would not constitute a basis for any disciplinary action. Accordingly, Count One of the Administrative Complaint should be dismissed.

Discussion of Count Two

40. Count Two of the Administrative Complaint charges that the Respondent violated Section 458.331(1)(h), Florida Statutes (1988 Supp.). The cited statutory provision authorizes disciplinary action upon proof of the following:

> (h) Making or filing a report which the licensee knows to be false, intentionally or negligently failing to file a report or record required by state or federal law, willfully impeding or obstructing such filing or inducing another person to do so. Such reports or records shall include only those which are signed in the capacity as a licensed physician.

41. The factual predicate for Count Two is alleged in Paragraph 18 of the Administrative Complaint to be that "Respondent made or filed a report which the licensee knew to be false in that he noted on Patient #1's [Patient B.F.'s] medical records that she was eight (8) weeks pregnant when Respondent had an ultrasound stating that Patient #1 was eleven (11) weeks pregnant." As discussed above regarding Count One, the evidence in this case is insufficient to establish that the Respondent made any false notations in his medical records. The evidence being insufficient to establish that there was a false notation in the medical records, it follows inescapably that the evidence is insufficient to establish that the Respondent "knew" he was making a false report. Because the evidence is insufficient to establish that the Respondent made a false report, Count Two of the Administrative Complaint should be dismissed.

Discussion of Count Three

42. Count Three of the Administrative Complaint charges that the Respondent violated Section 458.331(1)(k), Florida Statutes (1988 Supp.). The cited statutory provision authorizes disciplinary action upon proof of the following:

> (k) Making deceptive, untrue, or fraudulent representations in the practice of medicine or employing a trick or scheme in the practice of medicine.

43. The factual predicate for Count Three is alleged in Paragraph 21 of the Administrative Complaint to be that "Respondent made a deceptive, untrue or fraudulent misrepresentation when he noted on Patient #1's [Patient B.F.'s] medical records that she was eight (8) weeks pregnant when Respondent had an ultrasound stating that Patient #1 was eleven (11) weeks pregnant." As noted in the foregoing discussions of Counts One and Two, the evidence in this case is insufficient to show more than that the Respondent may have made an erroneous or incorrect notation in his records with regard to the duration of Patient B.F.'s pregnancy. An erroneous or incorrect notation in the records is insufficient to establish a violation of Section 458. 331(1)(k), Florida Statutes (1988 Supp.). In discussing the application of a similar statute, in Dept. of Professional Regulation, Bd. of Medicine v. Pamela Sue Morgan, DOAH Case No. 92-0014 (Recommended Order issued April 20, 1992), Hearing Officer Lerner included the following discussion in his conclusions of law:

> 5. Section 468.365(1)(a), Florida Statutes, authorizes the Board to discipline a Florida- licensed respiratory care practitioner for " renewing a certificate or registration as provided by this part . . . by fraudulent misrepresentation." To establish that a licensee committed such a violation, the Department must show not only that the licensee provided false or misleading information on her renewal application, but that she knowingly did so with the intent to deceive or mislead the Board. Cf. First Interstate Development Corp. v. Ablandeo, 511 So.2d 536, 539 (Fla. 1987)("intentional misconduct is a necessary element of fraud. Indeed, to prove fraud, a plaintiff must establish that the defendant made a deliberate and knowing misrepresentation designed to cause, and actually causing detrimental reliance by the plaintiff."); Charter Air Center, Inc. v. Miller, 348 So.2d 614, 616 (Fla. 2d DCA 1977), cert. denied, 354 So.2d 983 (Fla. 1977)("[t]he elements of fraudulent representation are: a false statement pertaining to a material fact, knowledge that it is false, intent to induce another to act on it, and injury by acting on the statement."); Gentry v. Department of Professional and Occupational Regulations, 293 So.2d 95, 97 (Fla. 1st DCA 1974)(statutory provision prohibiting licensed physicians from "[m]aking misleading, deceptive and untrue representations in the practice of medicine" held not to apply to "representations which are honestly made but happen to be untrue ; ""[t]o constitute a violation . . . the legislature intended that the misleading and and untrue representations must be made willfully (intentionally)"; Naekel v. Department of Transportation, 782 F.2d 975, 978 (Fed. Cir. 1986)("a charge of falsification of a government document [in this case an employment application] requires proof not only that an answer is wrong, but also that the wrong answer was given with intent to

> deceive or mislead the agency;" "[a] system of real people pragmatic in their expectations would not easily tolerate a rule under which the slightest deviation from the truth [on an employment application] would sever one's tenuous link to employment"; Nyren v. HRS, 5 FCSR para. 126 (Fla. PERC 1990)("[a] mere mistaken entry on a travel voucher does not necessarily reflect that an employee has committed fraud or has intended to deceive the agency;" a showing that the employee intended to defraud or deceive the agency "is essential to sustain a charge of falsification of records").

44. The above-quoted conclusions by Hearing Officer Lerner are equally applicable here and compel a conclusion that Count Three of the Administrative Complaint must be dismissed. In this regard it should be noted that the statutory language applicable in this case is substantially identical in effect to the statutory language interpreted by the court in Gentry v. Dept. of Professional and Occupational Regulations, 293 So.2d 95 (Fla. 1st DCA 1974). 14/

Discussion of Count Four

45. Count Four of the Administrative Complaint charges that the Respondent violated Section 458.331(1)(m), Florida Statutes (1988 Supp.). The cited statutory provision authorizes disciplinary action upon proof of the following:

> Failing to keep written medical records justifying the course of treatment of the patient, including, but not limited to, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; and reports of consultations and hospitalizations.

46. The factual predicate for Count Four is alleged in Paragraph 24 of the Administrative Complaint to be that "Respondent failed to keep written medical records that justified the course of treatment in that Respondent's medical records on Patient #1 [Patient B.F.] failed to reflect Respondent's follow up treatment of Patient #1 pursuant to the pathology report dated November 8, 1988." Again, the evidence in this case is insufficient to establish the factual predicate for this Count. To the contrary, the greater weight of the evidence is to the effect that the Respondent's medical records of the treatment of patient B.F. are sufficient to justify the course of treatment. As noted in the discussion above regarding Count One, the greater weight of the evidence is to the effect that the Respondent did not receive actual knowledge of the pathology report dated November 8, 1988, until he contacted the laboratory by telephone on December 7, 1988. The information he received by telephone from the laboratory on December 7, 1988, is noted in his medical records regarding patient B.F., and that information, plus other information received that day and noted in the medical records, justified the course of treatment. Accordingly, Count Four of the Administrative Complaint should be dismissed.

Discussion of Count Five

47. Count Five of the Administrative Complaint charges the Respondent with another violation of Section 458.331(1)(t), Florida Statutes (1988 Supp.). The cited statutory provision is quoted above in the discussion of Count One. The factual predicate for Count Five is alleged in Paragraph 27 of the

Administrative Complaint to be that the Respondent "maintained a clinic in unsafe conditions based on the findings pursuant to an inspection by the Department of Health and Rehabilitative Services." Again, the evidence in this case is insufficient to establish the factual predicate for the violation alleged in this Count. This is primarily because, as discussed in the notes to the Findings of Fact and in the Appendix, I have given but little credit to the testimony of the witness Linda Sullivan and have concluded that her testimony and the written report she prepared do not constitute clear and convincing evidence and are, for the most part, an insufficient basis for fact-finding. Absent clear and convincing evidence of the condition of the clinic at the time alleged in the Administrative Complaint, Count Five of the Administrative Complaint must be dismissed.

48. Even if Linda Sullivan's testimony had been credited and used as a basis for finding that the Respondent's clinic was in the condition described in Ms. Sullivan's testimony and report, such findings of fact would still be insufficient to establish the violation Charged in Count Five because there is neither allegation nor proof in this case that the Respondent treated patients in the clinic while it was in the condition described by Ms. Sullivan, or, if the clinic was in the condition described by Ms. Sullivan, that the Respondent knew it was in such condition. Absent proof that the Respondent knew of the alleged condition of the clinic, the Respondent cannot be disciplined because of any such condition. See, generally, Bach v. Florida State Board of Dentistry, 378 So.2d 34 (Fla. 1st DCA 1979). Absent proof that the Respondent treated patients in the clinic at a time when it was in the condition alleged by Ms. Sullivan, it cannot be concluded that he was practicing medicine, and if he was not practicing medicine, he cannot be found to be in violation of Section 458.331(1)(t), Florida Statutes (1988 Supp.). See, generally, Elmariah v. Dept. of Professional Regulation, Bd. of Medicine, 574 So.2d 164 (Fla. 1st DCA 1990).

RECOMMENDATION

On the basis of all of the foregoing, it is RECOMMENDED that a Final Order be entered in this case DISMISSING all charges against the Respondent, Vladimir Rosenthal, M.D.

DONE AND ENTERED this 2nd day of October, 1992, at Tallahassee, Leon County, Florida.

MICHAEL M. PARRISH, 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 2nd day of October, 1992.

ENDNOTES

1/ The meaning of the term "gestational age" is addressed at length in the Appendix in conjunction with the ruling on Paragraph 10 of the Petitioner's proposed findings of fact.

2/ The absence of chorionic villi in a pathology laboratory report regarding materials removed during an abortion procedure can be due to any of the following: (a) the fact that the patient was not actually pregnant, (b) the fact that the abortion procedure was unsuccessful and failed to remove any fetal parts or other "products of conception," (c) the fact that the pregnancy is ectopic (elsewhere than in the uterus), or (d) the fact that in very early pregnancies, due to the small size of the materials involved, it is sometimes difficult for the pathologist to locate and identify chorionic villi.

3/ Although neither of the parties has directed attention to the matter, and although the record evidence as to what transpired during patient B.F.'s November 18, 1988, visit to Dr. Mansoori is too skimpy to provide a basis for reaching any firm conclusions, one cannot help but wonder whether some important diagnostic information was overlooked during that visit. When Dr. Mansoori examined the patient on October 28, 1988, the doctor's manual examination detected an enlarged uterus, which the doctor estimated to be consistent with a "gestation age" of five to six weeks. In view of the fact that the November 3, 1988, abortion procedure was unsuccessful, in the normal course of events, a similar examination of the same patient should have revealed an enlarged uterus that was slightly larger than it had been on October 28, 1988. Dr. Mansoori's medical records for November 18, 1988, contain no notation regarding uterus size.

4/ There is no clear explanation in the record of this case as to why the Respondent did not receive the written laboratory report. Perhaps it was misaddressed; throughout the record in this case the Respondent's clinic is identified as being in "Suite 1070," but the subject laboratory report indicates that it was sent to "Suite 1051." According to several of the expert witnesses who testified in this case, it is not uncommon for laboratory reports to go astray. That is why it is important to have follow up procedures to determine the fate of laboratory studies.

5/ The pathology report regarding the December 10, 1988, procedure stated: "The specimen consists of multiple fragments of tan-brown to dark brown friable bloody mucoid tissue totaling 36 grams fetal parts. Representative sections. Sections demonstrate portions of placenta with trophoblasts, chorionic villi and decidua."

6/ All of the expert witnesses who testified on this issue agree that there is such an affirmative duty. However, the testimony in this case reflects a great deal of difference of opinion as to how soon the follow up must be done. There is no persuasive evidence in the record of this case of any specific minimum time period within which a physician must initiate follow up of laboratory reports. The greater weight of the evidence is to the effect that the Respondent's follow up on December 7, 1988, was not so tardy as to constitute a departure from applicable standards of medical care.

7/ The relevant circumstances include the fact that the Respondent had an office procedure in place that would at least once a month bring to his attention any missing laboratory reports. Further, patient B.F., by her own choice, went to Dr. Mansoori for her post- abortion check up on November 18,

1988. If patient B.F. had returned to the Respondent for the post-abortion check up, he would have discovered at that time that he did not have the laboratory report, and could have obtained the results somewhat sooner. Further, if in the course of the November 18, 1988, post-abortion check up, Dr. Mansoori had discovered that patient B.F. had an enlarged uterus (as she almost certainly did), that discovery would most likely have resulted in the patient's prompt return to the Respondent and in earlier follow up on the laboratory report.

8/ In this regard it is important to note that the Respondent did not have any information about the results of the subject pathology examination until he called the laboratory on December 7, 1988. As soon as he became aware of the laboratory results, he took prompt appropriate action. The witnesses who found fault with the Respondent's follow up of the laboratory results appear to have assumed that the Respondent became aware of the laboratory results on the date of the laboratory report (November 8, 1988) and then waited almost a month before doing anything about it. The greater weight of the evidence is otherwise. One of the witnesses who initially criticized the Respondent's follow up agreed that if the Respondent did not receive knowledge of the laboratory results until December 7, 1988, then there was, in the witness's opinion, no departure from the applicable standard of care. (See testimony of Dr. Herman M. Epstein at transcript pages 283-284, 291-292.)

9/ Most of the expert witnesses who testified on this subject were of the opinion that estimates of "gestational age" derived from ultrasound examinations should be treated as having a potential margin of error of plus or minus two weeks. Other witnesses were of the opinion that the margin of error was somewhat smaller. Dr. Herman M. Epstein was of the opinion that such estimates of "gestational age" should be treated as having a margin of error of plus or minus one week. The greater weight of the evidence is to the effect that the margin of error is plus or minus two weeks.

10/ Quite to the contrary, the Respondent believed the statement to be true and accurate. Whether the statement was accurate is irrelevant, because the Respondent has not been charged with making an inaccurate or erroneous statement.

11/ I have not made any findings of fact regarding the condition of the clinic at the time of the inspection on August 3, 1989, because the record in this case does not contain clear and convincing evidence of the condition of the clinic at that time. The insufficiencies of the evidence in this regard are addressed in the Appendix. (See Appendix, discussion of Paragraphs 12 and 31 of the Petitioner's proposed findings of fact.)

12/ It is well settled in this state that it is a denial of due process to find a licensee guilty of an offense not specifically charged in the Administrative Complaint. See Wray v. Dept. of Professional Regulation, Bd. of Medical Examiners, 435 So.2d 312 (Fla. 1st DCA 1983); Sternberg v. Dept. of Professional Regulation, Bd. of Medical Examiners, 465 So.2d 1324 (Fla. 1st DCA 1985).

13/ The evidence in this case is insufficient to establish that the Respondent did, in fact, make an erroneous or incorrect notation in the medical records concerning patient B.F. It is sufficient only to show that such might have been the case. The evidence in this case is equally consistent with the possibility that the physician who performed the two ultrasound procedures on patient B.F. may have reached and reported erroneous or incorrect conclusions regarding the duration of patient B.F.'s pregnancy. It is also possible that the differences

between the ultasound estimates and the Respondent's estimates are due in part to differences in what the respective physicians meant when they used the term "gestational age." The records reveals that Dr. Goldstein's use of that term results in an estimate that is approximately two weeks longer than the date of conception. The record does not indicate whether the Respondent's estimates of "gestational age" use a beginning point of onset of last menstrual cycle or a beginning point of conception.

14/ The physician in the Gentry case was charged with a violation of a statute that authorized disciplinary action for "[m]aking misleading, deceptive and untrue representations in the practice of medicine."

APPENDIX TO RECOMMEDED ORDER
IN CASE NUMBER 91-2815

The following are my specific rulings on all proposed findings of fact submitted by all parties.

Proposed findings submitted by the Petitioner:

Paragraphs 1 through 6: Accepted.

Paragraph 7: Accepted in substance, but with many subordinate details omitted.

Paragraphs 8 and 9: Accepted.

Paragraph 10: Accepted in substance with some additional clarifying details. Throughout this Recommended Order I have placed the term "gestational age" in quotation marks because it appears to, in some instances, be a term of art which has a meaning different from the meaning one would derive from a dictionary. The American Heritage Dictionary of the English Language (1973 Ed.), at page 554, states that the word gestation means: "The period of carrying developing offspring in the uterus after conception; pregnancy." Webster's Third New International Dictionary (Unabridged 1976 Ed.), at page 952, gives the following meaning: "[T]he carrying of young usu. in the uterus from conception to delivery: pregnancy." From the quoted definitions it is clear that the dictionary definition of the term "gestational age" contemplates a period of time the beginning point of which is conception. But, as explained, by Dr. Martin Goldstein at pages 183-84 of the transcript, that is not what physicians always mean when they use the term "gestational age:"

> A. Okay. When we talk about a gestational age of six weeks or seven weeks, we're really talking about the time that has elapsed since the first day of the lady's last period before she became pregnant. Now, a little bit of physiology will tell you that she really hasn't been pregnant at that time, because you only get pregnant from two weeks later when she ovulated and conceived.
>
> However, so in very strict terms, when we're giving menstruation gestational age, it's off by two weeks. However, the standard of nomenclature is to use that and automa- tically add those two weeks on to the pregnancy, because most women will know the first day of their last period far better than they know the day they actually conceived. So, when we talk about a pregnancy of 12
> weeks, 16 weeks, 40 weeks, we are using that convention.

***

A. That's menstrual gestational age. Which is, that phrase, just been shortened to be gestational age. That is the standard that everybody uses.

But apparently that convention is not used by everybody. Dr. Mansoori did not use that convention. (See transcript page 63, line 4; page 64, lines 4-6; page 65, lines 4-7; page 66, lines 3- 8.) Dr. Arnold Wechsler does not use that convention, because he recognizes a difference between "menstrual age" and "gestational age" and believes that when radiologists use the term "gestational age" in ultrasound reports they are estimating the time that has elapsed since conception. (See pages 40-41 of Wechsler deposition transcript.) Dr. Herman M. Epstein agrees with Dr. Goldstein's use of the term "gestational age." (See transcript page 270, lines 16- 20.) The record in this case is not clear with regard to the meaning attributed to the term "gestational age" by the other experts who testified in this case.

Paragraph 11: Accepted.

Paragraph 12: Accepted in substance with some additional clarifying details.

Paragraph 13: First sentence is accepted. The remainder of this paragraph is rejected as not proved by clear and convincing evidence. The only evidence of the findings proposed in this paragraph consists of the written report and deposition testimony of Linda Sullivan (Petitioner's Exhibits 3 and 4). The findings proposed in this paragraph are a fair summary of information reported by and testified to by Ms. Sullivan, but I am simply not persuaded that the evidence offered through Ms. Sullivan is worthy of belief. First, it is simply very unlikely that conditions were as described by Ms. Sullivan. Second, Ms. Sullivan's testimony and report are uncorroborated. Third, Ms. Sullivan's testimony was somewhat vague in some areas and she had a number of failures of recollection. This evidence does not meet the standards for "clear and convincing evidence" described in Slomowitz v. Walker, 429 So.2d 797, 800 (Fla. 4th DCA 1983).

Paragraph 14: First two sentences are rejected as subordinate and unnecessary details. (These are all details considered by the Hearing Officer in deciding which competing version of the facts to accept or which competing expert opinion to accept, but they are not facts relevant to the issues raised by the pleadings in this case and they are not matters that serve any useful purpose in the findings of fact, which will be quite long enough without them.) The opinion implicit in the third sentence of this paragraph is rejected as being broader than what is supported by the greater weight of the evidence. The opinion implicit in the fourth sentence of this paragraph is rejected as contrary to the greater weight of the evidence. The three reasons set forth in the last sentence of this paragraph are accepted as the reasons for which a pathology report would be ordered following a first semester abortion, but the "mandatory" aspect of the proposed finding is rejected as contrary to the greater weight of the evidence.

Paragraph 15: Rejected as argument or as subordinate and unnecessary details. (Also see discussion above of findings proposed at paragraph 14.)

Paragraph 16: Rejected as subordinate and unnecessary details.

Paragraph 17: The opinion implicit in this paragraph is rejected as contrary to the greater weight of the evidence.

Paragraph 18: The reasons set forth in this paragraph are accepted as the reasons for which a pathology report would be ordered following a first semester abortion, but the "mandatory" aspect of the proposed finding is rejected as contrary to the greater weight of the evidence.

Paragraph 19: Rejected as irrelevant anecdotal details that are stated in such broad terms as to be of no useful application in the resolution of the

issues in this case. (In retrospect, the relevancy objections addressed to this subject matter should have been sustained.)

Paragraph 20: Rejected for the several reasons which follow. This is an example of unnecessary and unhelpful summarization of testimony. The only fact that can be drawn from the testimony quoted in the first sentence of this paragraph is that Dr. McCammon does not know how a certain thing might happen; a fact totally irrelevant to anything that needs to be decided here. If counsel wish to support their proposed findings by directing the attention of Hearing Officers to portions of the evidence, they should do so by parenthetical reference to the underlying evidence, by footnote reference to the underlying evidence, or by separate brief containing argument about and/or quotations from the underlying evidence. But they should not add to the Hearing Officers' task by cluttering up proposed findings of fact with arguments and with summaries or fragments of testimony. The opinion implicit in the last sentence of Paragraph 20 of the Petitioner's proposed findings is rejected as contrary to the greater weight of the evidence.

Paragraph 21: Rejected as consisting primarily of commentary and argument about the testimony, rather than as proposed findings of fact. And in any event, "being consistent with" is not the same thing as "being evidence of," and is, therefore, irrelevant.

Paragraph 22: Rejected as subordinate and unnecessary details.

Paragraph 23: First two sentences are accepted in substance. The third sentence is rejected as too broad or vague, and as contrary to the greater weight of the evidence. The fourth sentence is rejected as subordinate and unnecessary details. The fifth and sixth sentences are rejected as contrary to the greater weight of the evidence. (The record in this case contains a great deal of conflicting evidence regarding the accuracy of ultrasound estimates of gestational age. In resolving those conflicts I have found that ultrasound estimates of gestational age during the first trimester should be treated as being accurate to within plus or minus two weeks.)

Paragraph 24: The first sentence is rejected as subordinate and unnecessary details in view of my findings regarding the accuracy of ultrasound estimates of gestational age. The second sentence is rejected as contrary to the greater weight of the evidence. Last sentence rejected as an anecdotal detail that fails to shed any light on anything relevant to the issues in this case.

Paragraph 25: Rejected as subordinate and unnecessary details.

Paragraph 26: Rejected as argument about the credibility of witnesses, rather than proposed findings of fact. (As noted elsewhere, the argument has been resolved otherwise.)

Paragraph 27: Rejected as unnecessary commentary about the status of the evidentiary record, rather than proposed findings of fact.

Paragraphs 28 through 30: Rejected as subordinate and unnecessary details.

Paragraph 31: The fact that Ms. Sullivan wrote a report is a subordinate and unnecessary detail. The remainder of the details proposed in this paragraph are rejected as not being established by clear and convincing evidence. (For further details see the explication above regarding Paragraph 13 of the Petitioner's proposed findings.)

Paragraph 32: The opening sentence of this paragraph is rejected as inaccurate by being a broader statement than can be supported by the evidence. Also rejected as irrelevant in view of the lack of clear and convincing evidence of the condition of the clinic on August 3, 1989.

Paragraph 32(A): Rejected for the following reasons. First, it is irrelevant in view of the lack of clear and convincing evidence of the condition of the clinic on August 3, 1989. Second, implicit in Dr. McCammon's opinion that the condition of the clinic fell below the standard of care is an

assumption that was neither charged nor proved; the assumption that the Respondent was treating patients in a clinic in that condition.

Paragraph 32(B): Rejected for the following reasons. First, it is irrelevant in view of the lack of clear and convincing evidence of the condition of the clinic on August 3, 1989. Second, explicit in Dr. Epstein's opinion that the condition of the clinic fell below the standard of care is an assumption that was neither charged nor proved; the assumption that the Respondent was treating patients in a clinic in that condition. Third, any reliance one might have placed on Dr. Epstein's opinion in this regard was undermined by his unsolicited comment: "It's not appetizing, certainly, but I can't say that this would necessarily jeopardize anybody." (Transcript page 273)

Paragraph 32(C): Rejected for the following reasons. First, it is irrelevant in view of the lack of clear and convincing evidence of the condition of the clinic on August 3, 1989. Second, explicit in Dr. Graber's opinion that the condition of the clinic fell below the standard of care is an assumption that was neither charged nor proved; the assumption that the Respondent was treating patients in a clinic in that condition. Third, Dr. Graber explained: "As long as the facility is cleaned up and ready when patients come in, that's acceptable standard of care." (Transcript page 372)

Paragraph 32(D) [including its three subparts]: Rejected for the following reasons. First, it is irrelevant in view of the lack of clear and convincing evidence of the condition of the clinic on August 3, 1989. Second, explicit in Dr. Bodman's opinion that the condition of the clinic fell below the standard of care is an assumption that was neither charged nor proved; the assumption that the Respondent was treating patients in a clinic in that condition. Third, Dr. Bodman expressed some inconsistent opinions on this subject. (Compare lines 14 - 17 of page 64 with lines 18 - 24 of page 64. Also see lines 19 - 25 at page 68.)

Paragraph 32(E): Rejected for the following reasons. First, it is irrelevant in view of the lack of clear and convincing evidence of the condition of the clinic on August 3, 1989. Second, explicit in Dr. Wechsler's opinion that the condition of the clinic fell below the standard of care is an assumption that was neither charged nor proved; the assumption that the Respondent was treating patients in a clinic in that condition.

Paragraph 33: First sentence is rejected as not supported by competent substantial evidence; Dr. Rosenthal's admission was qualified by reference to performing surgery in such a facility. Second sentence is rejected as irrelevant because it incorporates matters that were neither charged nor proved; specifically, the matter of performing surgery on patients in a clinic in that condition.

Paragraph 34: Rejected as constituting argument, rather than proposed findings of fact.

Paragraphs 35 and 36: Rejected as subordinate and unnecessary details.

Paragraph 37: Rejected as constituting legal arguments or conclusions of law, rather than proposed findings of fact.

Paragraph 38: Rejected as irrelevant in view of lack of clear and convincing evidence regarding the condition of the clinic.

Paragraphs 39 through 42: Rejected as constituting legal arguments or conclusions of law, rather than proposed findings of fact.

Proposed findings submitted by the Respondent:

Paragraph 1: Rejected as constituting a conclusion of law, rather than a proposed finding of fact.

Paragraphs 2 and 3: Accepted.

Paragraph 4: Most of the details in this paragraph have been rejected as, at most, subordinate and unnecessary details; some of these details are also

simply irrelevant to the issues in this case. A few of the details are necessary for context.

Paragraphs 5 through 18: Accepted in substance with some subordinate and unnecessary details omitted.

Paragraph 19: The first sentence is accepted in substance. The second sentence and subparagraphs (a) through (f) are rejected as constituting primarily an unnecessary summary of all of the testimony on the matter at hand, rather than a specific proposed finding of fact the Respondent wishes to have made. In my findings on this subject I have found that the Respondent's actions regarding the pathology report did not depart from the appropriate standard of care.

Paragraph 20: The first four sentences are accepted in substance. The last sentence of this paragraph is rejected as argument.

Paragraph 21: Accepted in substance, but with some additional details.

Paragraphs 22 through 25: Accepted in substance.

Paragraph 26: Rejected as being too narrow or restricted a statement, and thus inaccurate. There are other possible explanations.

Paragraph 27: Accepted in substance.

Paragraph 28: This paragraph and its subparagraphs (a) through (f) are rejected as constituting summaries of the testimony, rather than a specific proposed finding of fact the Respondent wishes to have made. On this subject I have resolved the conflicts in the evidence in favor of a finding that ultrasound estimates of fetal age are accurate within plus or minus two weeks.

Paragraphs 29 through 32: Rejected as subordinate and unnecessary details.

Paragraph 33: Rejected as constituting primarily argument, rather than proposed findings of fact. (The argument is essentially correct, but is argument nevertheless.)

Paragraphs 34 and 35: These paragraphs are more mixed statements of fact and law and come closer to being ultimate conclusions to be reached after applying the law to the facts, rather than pure findings of fact. Therefore, while I have included conclusions similar to these in my conclusions of law, I have not included these statements in my findings of fact.

Paragraphs 36 through 38: Accepted in substance, but with many details omitted as subordinate and unnecessary.

Paragraph 39: Rejected as a combination of argument and statement of position, rather than proposed findings of fact.

Paragraph 40: Accepted in substance.

Paragraph 41: The first paragraph numbered 41 is rejected as irrelevant.

Paragraph 41: The second paragraph numbered 41 is accepted in substance.

Paragraph 42: The first paragraph numbered 42 is rejected as irrelevant.

Paragraph 43: The first paragraph numbered 43 is rejected as irrelevant because Ms. Sullivan's account of conditions at the clinic has been found not to constitute clear and convincing evidence.

Paragraph 42: The second paragraph numbered 42 is rejected as subordinate and unnecessary details.

Paragraph 43: The second paragraph numbered 43 is rejected as subordinate and unnecessary details.

Paragraphs 44 through 47: Rejected as subordinate and unnecessary details.

Paragraph 48: Rejected as irrelevant because Ms. Sullivan's account of conditions at the clinic has been found not to constitute clear and convincing evidence.

Paragraph 49: Accepted in substance.

Paragraph 50: Rejected as irrelevant because Ms. Sullivan's account of conditions at the clinic has been found not to constitute clear and convincing evidence.

Paragraph 51: Rejected as constituting argument, rather than proposed findings of fact.

Paragraph 52: Rejected as argument, as irrelevant, and as, at best, subordinate and unnecessary details.

COPIES FURNISHED:

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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 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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AGENCY FINAL ORDER

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DEPARTMENT OF PROFESSIONAL REGULATION
BOARD OF MEDICINE

DEPARTMENT OF PROFESSIONAL
REGULATION,

Petitioner,

v.

DPR CASE NO. 89-10153
DOAH CASE NO. 91-2815
LICENSE NO. ME 0045574

VLADIMIR ROSENTHAL, M.D.,

Respondent.
_____/

FINAL ORDER

This cause came before the Board of Medicine (Board) pursuant to Section 120.57(1)(b)10, Florida Statutes, on December 4, 1992, in Orlando, Florida for the purpose of considering the Hearing Officer's Recommended Order (a copy of which is attached hereto as Exhibit 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 was represented by Rafael A. Centurion, 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. Finding of fact set forth in the Recommended Order are approved and adopted and incorporated herein.

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 last sentence of Paragraph 38 is amended to delete everything after footnote 12 on the basis that the issue of appropriateness of the care, under the circumstances, need not be resolved. In all other respects, 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 charges against Respondent are DISMISSED.

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

DONE AND ORDERED this 21st day of December, 1992.

BOARD OF MEDICINE

_____
JAMES BURT, M.D.
VICE 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 Vladimir Rosenthal, M.D., 1320 South Dixie Highway, Suite 1070, Coral Gables, Florida 33146, Karen Coolman Amlong, Esquire, Amlong & Amlong, P.A., Second Floor, 101 Northeast Third Avenue, Fort Lauderdale, Florida 33301, Michael Parrish, 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, 1940 North Monroe Street Tallahassee, Florida 32399-0750 at or before 5:00 P.M., this 29th day of December, 1992.

_____
Dorothy J. Faircloth
Executive Director
Board of Medicine