

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF BUSINESS AND )  
PROFESSIONAL REGULATION, BOARD )  
OF VETERINARY MEDICINE, )  
 )  
Petitioner, )  
 )  
vs. ) CASE NO. 94-3567  
 )  
HAROLD L. MCGEE, D.V.M., )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly designated Hearing Officer, Claude B. Arrington, held a formal hearing in the above-styled case on November 17, 1994, in Miami, Florida.

APPEARANCES

For Petitioner: Susan E. Lindgard, Esquire  
Department of Business and  
Professional Regulation  
1940 North Monroe Street  
Northwood Centre, Suite 60  
Tallahassee, Florida 32399-0792

For Respondent: Roderick L. McGee, Esquire  
Gregory J. Prusak, Esquire  
Ligman, Martin & Evans  
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Coral Gables, Florida 33134

STATEMENT OF THE ISSUES

Whether the Respondent, a veterinarian, committed the offenses set forth in the Administrative Complaint and the penalties, if any, that should be imposed.

PRELIMINARY STATEMENT

On April 15, 1994, the Petitioner filed an Administrative Complaint against the Respondent that contained certain factual allegations as to his treatment of a cat named Cathy and as to the medical records he kept for that cat. Based on those allegations, Petitioner charged Respondent with four separate violations of statute or rule governing the practice of veterinary medicine.

Count One alleged that Respondent violated Section 474.214(1)(o), Florida Statutes, by "being negligent or incompetent or committing misconduct related to the practice of veterinary medicine." The Administrative Complaint alleged that the following acts establish this violation: failure to remove both horns of

the uterus when he spayed the cat, failure to note the cat's temperature or body weight for the period May 21-26, 1992, and failure to perform lab work to determine the cause of the cat's illness following the surgery.

Count Two alleged that Respondent violated Section 474.214(1)(ee), Florida Statutes, "for failing to keep contemporaneous written medical records as required by rule of the Board." The Administrative Complaint alleged in Count Two that the medical records kept for the cat between May 21-26, 1992, do not contain sufficient information "to justify the diagnosis or determination of health status or to warrant the treatment administered" as required by Rule 61G18-18.002(1), Florida Administrative Code.

Count Three also alleged that Respondent violated Section 474.214(1)(ee), Florida Statutes, "by failing to keep contemporaneous written medical records as required by rule of the Board." The factual allegation underpinning Count Three is the alleged failure of the Respondent to appropriately document his physical examinations of the cat during the period May 21-26, 1992.

Count Four alleged that Respondent violated Section 474.214(1)(r), Florida Statutes, "by being guilty of incompetence or negligence by failing to practice veterinary medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent veterinarian as being accepted under similar conditions and circumstances." This conclusory allegation contains no new factual allegations.

Respondent timely denied the material allegations of the Administrative Complaint, the matter was referred to the Division of Administrative Hearings, and this proceeding followed.

At the formal hearing, the Department presented the testimony of James Bogdansky, D.V.M., Hugh Fitzpatrick, and Gary Ellison, D.V.M. Dr. Bogdansky is a veterinarian who performed an autopsy on the cat Cathy. Mr. Fitzpatrick is an investigator employed by the Department. Dr. Ellison was accepted as an expert witness in the field of veterinary medicine. Petitioner presented two exhibits, both of which were accepted into evidence. At the request of the Petitioner, official recognition was taken of Chapter 474, Florida Statutes, and of Chapter 61G, Florida Administrative Code.

Respondent testified on his own behalf and presented the additional testimony of Virginia Schoubreck and James L. Diluzio, D.V.M.. Ms. Schoubreck was, at the times pertinent to this proceeding, Respondent's assistant and office manager. Dr. Diluzio was accepted as an expert witness in the field of veterinary medicine.

A transcript of the proceedings was filed on March 3, 1995. Thereafter, Respondent's attorney filed a motion to strike the transcript which asserted in general terms that the transcript filed March 3, 1995, was replete with errors. On April 10, 1995, a revised transcript was filed. Respondent's attorney asserted, again in general terms, that there were errors in the revised transcript. The parties were instructed to confer in an attempt to specifically identify any errors in the revised transcript. Roderick L. McGee, who was representing Respondent at that juncture, did not cooperate in that effort. Thereafter, each party was given the opportunity to submit separate errata sheets to specifically identify each portion of the transcript filed April 10, 1995, that the party considered to contain an error. The Petitioner timely filed an errata sheet, but the Respondent did not. After the deadline for identifying any alleged errors had passed, an order was entered that accepted

the transcript filed April 10, 1995, as corrected by the Petitioner's errata sheet filed June 2, 1995. The order also set the deadline of July 7, 1995, for the filing of proposed recommended orders. Thereafter, that deadline was extended to July 31, 1995, after Roderick L. McGee, the attorney in the firm of Ligman, Martin, and Evans, who had represented the Respondent became unavailable to represent him further. Gregory J. Prusak, Esquire, another attorney in the firm of Ligman, Martin, and Evans, was substituted as the attorney of record for the Respondent.

Because the time for filing post-hearing submissions was, at the request of the parties, set for more than ten days following the filing of the transcript, the requirement that a recommended order be rendered within thirty days after the filing of the transcript was waived. Rule 60Q-2.031, Florida Administrative Code. Rulings on the Petitioner's proposed findings of fact may be found in the Appendix to this Recommended Order. Respondent did not file a proposed recommended order.

#### FINDINGS OF FACT

1. The parties stipulated that the following factual allegations contained in the Administrative Complaint were admitted by the Respondent and were not at issue at the formal hearing. The following findings of fact are based on that stipulation.

A. Petitioner is the state agency charged with regulating the practice of veterinary medicine pursuant to Section 20.165, Chapter 455, and Chapter 474, Florida Statutes.

B. Respondent is a licensed veterinarian having been issued license number VM 0000231.

C. Respondent's last know address is DBA (sic) Miami Veterinary Hospital, 3520 N.W. 36th Street, Miami, Florida 33142.

D. On or about May 19, 1992, J.F. presented his kitten, aged approximately seven months, to Respondent for shots, a spay, and boarding.

E. On or about May 19, 1992, Respondent noted in the kitten's [medical] records that all of its vital statistics were "ok" or normal.

F. On or about May 20, 1992, Respondent spayed the kitten. 1/

G. On or about May 21, 1992, Respondent noted in the kitten's records that it had diarrhea and no appetite. 2/

H. On or about May 22-24, 1992, Respondent noted in the kitten's records that it was treated with antibiotics, fluids, vitamins, and given intensive care (sic) with hand-feeding.

I. On or about May 25, 1992, Respondent noted in the kitten's records that its condition was greatly improved.

J. On or about May 26, 1992, Respondent noted in the kittens's records that its condition was normal.

K. On or about May 27, 1992, the kitten died. 3/

L. "Spay" is a layman's term which may refer to an ovariohysterectomy.

M. Respondent failed to perform any lab work on the kitten when it became ill during the period after the surgery and until its death.

N. Rule 61G18-18.002(1), Florida Administrative Code, provides that medical records shall contain all clinical information pertaining to the patient with sufficient information to justify the diagnosis or determination of health status and warrant any treatment recommended or administered.

2. Respondent had been practicing veterinary medicine in Florida for 48 years at the time of the formal hearing. Respondent testified, credibly, that he has performed a minimum of 10,000 spays during the course of his practice.

3. At the times pertinent to this proceeding, Respondent was the owner and sole practicing veterinarian at Miami Veterinary Hospital in Miami, Florida.

4. On May 19, 1992, James Forney presented his cat named Cathy to Respondent's clinic to be boarded for one week. During that week, the Respondent was to spay Cathy and give her any appropriate shots. "Spay" is a layman's term that may refer to an ovariohysterectomy. The term ovariohysterectomy is generally understood by veterinarians to be a procedure during which the ovaries and both horns of the uterus are removed.

5. On or about May 20, 1992, Respondent spayed Cathy. Respondent placed the cat under anesthesia and made a small incision, which he referred to as a "bottle hole incision". Through this small incision, he removed the ovaries and a portion of both uterine horns. He did not remove the stumps of either uterine horn and he did not remove the uterus. The cat died on May 27, 1992.

6. Dr. James Bogdansky performed an autopsy of Cathy on May 28, 1992, during which he made contemporaneous records of his examination. Dr. Bogdansky observed that Cathy's uterus and portions of both uterine horns were present. The ovaries were not present.

7. There was a dispute in the evidence as to whether the Respondent was negligent by failing to remove all portions of both horns of the uterus when he spayed the cat. The testimony of Dr. Ellison and that of Dr. Diluzio established that the preferred medical practice in performing an ovariohysterectomy is to completely remove through an appropriately placed and sized incision the ovaries, all portions of both horns of the uterus, and the uterus. Dr. Ellison testified that there is no medical benefit to leaving portions of both uterine horns and the uterus and that the chance of a rare, life-threatening infection (pyometritis) increases when the horns of the uterus

are not removed. 4/ Dr. Ellison further testified that the portions of the uterine horns not removed may become wrapped around the bladder, causing adhesions or strictures on the bladder. 5/ Dr. Ellison was of the opinion that Respondent was negligent in failing to remove both uterine horns and the uterus. 6/

8. From the testimony of the Respondent and Dr. Diluzio, it is found that veterinarians in South Florida commonly make a small incision which permits the removal of the ovaries and thereby sterilizes the animal, but does not permit the removal of the two horns of the uterus in their entirety. The practitioner has to exercise clinical judgment to determine how much of the horns of the uterus will be left. The main benefit of using a smaller incision is that the animal suffers less trauma from the surgery.

9. Dr. Diluzio agreed that the method described by Dr. Ellison was the preferred method of performing an ovariohysterectomy. Dr. Diluzio's main concern was that a subsequently treating veterinarian may assume that the Respondent had removed both uterine horns and the uterus, which could lead to a misdiagnosis in the event the cat ever had a uterine infection. Notwithstanding his concern and the concerns expressed by Dr. Ellison, Dr. Diluzio did not believe that the method used by the Respondent was below an accepted standard of care. Dr. Diluzio's opinion is buttressed by evidence as to procedures being followed by practitioners such as the Respondent.

10. It is concluded that the Petitioner did not establish that the procedure Respondent followed in spaying Cathy was below an accepted standard of care. In reaching that conclusion, the undersigned is persuaded by the testimony of Dr. Diluzio that the procedure followed by Respondent in spaying the cat, Cathy, is not an uncommon procedure. Since there was no evidence that he used poor clinical judgment in the procedure he followed, it is found that Petitioner failed to establish that Respondent was negligent or incompetent by his spay of the cat, Cathy.

11. Petitioner asserts that the Respondent failed to adequately look for a working diagnosis of the cause of the cat's illness following surgery. The Respondent was not asked what his diagnosis was for the postoperative illness. From Dr. Diluzio's testimony based on the antibiotics and other treatment administered, it appears that the working diagnosis was infection of unknown etiology. Respondent did not perform any lab work on the cat in the postoperative period to determine the cause of the illness. Instead, Respondent treated the cat symptomatically. The spay occurred on or about May 20, 1992. The medical records noted that the cat had no appetite on May 21, 1992. The scanty medical records note that the cat began to improve on May 25, 1992. The cat's physical condition between the onset of the improvement and the date of improvement is not reflected by the medical records. The evidence established that Respondent closely monitored the cat's condition following the surgery and that he administered treatment to the cat. Except for Dr. Ellison's question as to why the steroid prednisone was administered, Dr. Ellison and Dr. Diluzio found no fault with the treatment actually administered by Respondent. Dr. Ellison was of the opinion that Respondent was negligent in failing to perform basic blood tests, including a complete blood count, because such tests may have determined the cause of the cat's illness or indicated the proper course of treatment. Blood tests could also have helped determine whether the cat was hemorrhaging internally. Dr. Diluzio was of the opinion that it was acceptable practice to treat the cat symptomatically for the first few days after surgery without ordering lab work. Dr. Diluzio opined that since the cat appeared to improve between the onset of the illness and its death, lab work was not

necessary in this case. Because of these conflicting opinions, both of which are supported by logical rationale, it is concluded that the Petitioner failed to establish that Respondent exceeded his clinical judgement or that he practiced below an accepted standard of care in his postoperative treatment of this cat by treating the cat symptomatically instead of ordering lab tests.

12. On May 19, 1992, Respondent began a medical record for Cathy on a form that contained an area for identifying information as to the owner and as to the animal. The form also had spaces to record the findings of a physical examination, a description of any abnormal symptoms, any diagnosis made, any treatment administered, and any appropriate remarks.

13. On May 21, 1992, continuing through May 24, 1992, Respondent noted in Cathy's records that she was treated with antibiotics, fluids, vitamins, and given intensive care with hand-feeding.

14. The medical records should have reflected the Respondent's working diagnosis for the cat's illness so as to justify the treatment administered. The records do not contain a working diagnosis for the cat's illness and failed to justify the treatment administered.

15. The medical records should have reflected the dosages of antibiotics given to the cat. The records do not record the dosages of antibiotics given to Cathy.

16. The medical records should have stated the reason(s) the cat was given one cc. of the steroid prednisone (referred to in the records as "pred"). There were no medical records kept that justified the administration of this steroid.

17. The medical records should have reflected the findings of his physical examinations following the surgery. The medical records kept by Respondent did not reflect the findings of his physical examinations of the cat during that period. He failed to document the physical examinations he made after the cat's operation. He did not record the cat's weight, its daily temperature, or the dosages of the antibiotics administered.

18. Petitioner established that the postoperative care given the cat was not adequately documented by Respondent's medical records.

19. Respondent had never, prior to this proceeding, been the subject of a disciplinary action by the Department. During the course of his practice, Respondent served four years on the Board of Veterinary Medicine for the State of Florida, has served as the president of the South Florida Veterinary Association and as the treasurer of the state association.

#### CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction of the parties to and the subject matter of this proceeding. Section 120.57(1), Florida Statutes.

21. Petitioner has the burden of proving by clear and convincing evidence the allegations against Respondent. See *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987); *Evans Packing Co. v. Department of Agriculture and Consumer Services*, 550 So.2d 112 (Fla. 1st DCA 1989). *Evans Packing*, supra, 550 So. 2d 112, 116, fn. 5, provides the following pertinent to the clear and convincing evidence standard:

That standard has been described as follows:  
[C]lear 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 evidence 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 the firm belief of (sic) conviction, without hesitancy, as to the truth of the allegations sought to be established. *Slomowitz v. Walker*, 429 So.2d 797, 800 (Fla. 4th DCA 1983).

22. Chapter 474, Florida Statutes, regulates the practice of veterinary medicine in the State of Florida.

23. Section 474.214, Florida Statutes, authorizes the Petitioner to discipline the licensure of a veterinarian and sets forth the following grounds pertinent to this proceeding:

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

\* \* \*

(o) Fraud, deceit, negligence, incompetency, or misconduct, in or related to the practice of veterinary medicine.

\* \* \*

(r) Being guilty of incompetence or negligence by failing to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent veterinarian as being acceptable under similar conditions and circumstances.

\* \* \*

(ee) Failing to keep contemporaneously written medical records as required by rule of the board.

24. Rule 61G18-18.002, Florida Administrative Code, has been duly adopted by the Petitioner and requires veterinarians to keep medical records for each patient. The rule provides, in pertinent part, as follows:

(1) There must be an individual medical record maintained on every patient examined or administered to by the veterinarian . . . The medical record shall contain all clinical information to justify the diagnosis or determination of health status and warrant any treatment recommended or administered.

\* \* \*

(3) Medical records shall be contemporaneously written and include the date of each service performed. They shall contain the following information:

Name of owner or agent.  
Patient identification.

Record of any vaccinations administered.  
Complaint or reason for provision of services.  
History.  
Physical examination.  
Any present illness or injury noted.  
Provisional diagnosis or health status  
determination.

25. Count One of the Administrative Complaint alleged that Respondent violated Section 474.214(1)(o), Florida Statutes, by "being negligent or incompetent or committing misconduct related to the practice of veterinary medicine." The Administrative Complaint alleges that the following acts establish this violation: failure to remove both horns of the uterus, failure to note the cat's temperature or body weight for the period May 21-26, 1992, and failure to perform lab work to determine the cause of the cat's illness following the surgery. As discussed in the findings of fact portion of this Recommended Order, the Petitioner failed to establish that the Respondent acted below an accepted standard of care in making a small incision and in leaving a portion of the horns of the uterus. The Petitioner did not establish, clearly and convincingly, that the standard of care dictates that the horns of the uterus be removed. Petitioner established by clear and convincing evidence that Respondent failed to note the temperature and body weight of the cat during the period May 21-26, 1992, and that he failed to note the dosages of the antibiotics administered. That failure, however, should be considered a failure to keep adequate medical records as required by Section 474.214(1)(ee), Florida Statutes. There was no evidence that the Respondent did not weigh the cat or take its temperature or that he failed to properly administer medications to the cat postoperatively. Petitioner also failed to establish that Respondent exceeded his clinical judgment in his postoperative care of the cat.

26. Count Two and Count Three alleged that Respondent violated Section 474.214(1)(ee), Florida Statutes, "for failing to keep contemporaneous written medical records as required by rule of the Board." This allegation is based on the medical records kept by the Respondent between the time of the spay and the time of the cat's death. Petitioner established by clear and convincing evidence by establishing that the medical records do not contain a diagnosis of the cat's postoperative illness so as to justify the course of treatment, do not contain sufficient information as to the cat's physical examination, do not contain sufficient information as to the doses of antibiotics administered, and do not contain sufficient documentation to justify the use of a steroid. Petitioner has asserted these violations in two separate counts. The factual allegations that underpin both Count Two and Count Three were established by clear and convincing evidence.

27. Count Four alleged that Respondent violated Section 474.214(1)(r), Florida Statutes, "by being guilty of incompetence or negligence by failing to practice veterinary medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent veterinarian as being accepted under similar conditions and circumstances." As discussed above, the evidence fails to establish that Respondent was negligent by using the "keyhole" procedure to spay the cat or in his postoperative care of the cat. The only violations established in this proceeding pertained to medical records. Consequently, it is concluded that Petitioner failed to establish a violation by clear and convincing evidence that Respondent violated the provisions of Section 474.214(1)(r), Florida Statutes, as alleged in Count Four.



28. Rule 61G18-30.001(ee), Florida Administrative Code, provides that the recommended penalty for a violation of Section 474.214(1)(ee), Florida Statutes, consists of the issuance of a reprimand, the imposition of probation for six months, and the assessment of investigative costs. In considering the penalty to imposed in this proceeding, the undersigned has considered the foregoing guidelines, that there was no evidence as to the costs of investigation, and that Respondent has practiced veterinary medicine in the State of Florida for 48 years with distinction and without any prior disciplinary action being brought against him.

#### RECOMMENDATION

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

RECOMMENDED that the Petitioner enter a final order that adopts the findings of fact and conclusions of law contained herein. Based on those findings and conclusions, it is recommended that Petitioner find Respondent not guilty of the violations alleged in Counts One and Four of the Administrative Complaint, and guilty of the violations alleged in Counts Two and Three of the Administrative Complaint. For the violations of Counts Two and Three, it is recommended that the Petitioner issue Respondent a formal reprimand and place his licensure on probation for a period of six months.

DONE AND ENTERED this 1st day of September, 1995, in Tallahassee, Leon County, Florida.

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CLAUDE B. ARRINGTON  
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 1st day of September, 1995.

#### ENDNOTES

1/ Paragraph 6 of the Administrative Complaint alleged that "[O]n or about May 20, 1992, Respondent spayed the kitten." Respondent admitted this allegation and the parties stipulated that the fact was not at issue. At hearing, the Respondent's assistant, Ms. Schoubreck, testified that the cat was spayed on a Saturday. If her testimony is accurate, the spay occurred on Saturday, May 23, 1992. May 20, 1992, fell on a Wednesday. The date of the surgery is further called into question by the Respondent's medical record, which appears to record the spay as being on May 19, 1992. The finding that the spay occurred on or about May 20, 1992, is based on the stipulation of the parties that the allegations set forth in paragraph 6 of the Administrative Complaint were not at issue.

2/ Petitioner Exhibit 1 is the form on which Respondent kept the cat's medical records. There is no entry on that form reflecting that the cat had diarrhea while under Respondent's care.

3/ The cause of death of the cat was not established. Respondent is not accused of causing the death of this cat.

4/ That this infection is rare in cats is underscored by the testimony of Dr. Ellison, Dr. Diluzio, and the Respondent as to their experiences with this illness. Dr. Ellison has been a faculty member at the University of Florida since 1983 where he teaches and does clinical surgery and research. Dr. Ellison has only seen three cases of pyometritis in cats during his career. Dr. Diluzio, who has practiced in Florida since 1967, and Respondent, who has practiced for 48 years in Florida, have never encountered a case of pyometritis in a cat.

5/ Respondent testified, credibly, that the portions of the horns of the uterus left in this cat were immature and subject to atrophy following surgery. Based on that testimony, it is concluded that Dr. Ellison's testimony as to theoretical damage to the bladder does not provide sufficient rationale to support a conclusion that the procedure followed by Respondent was below an accepted standard of care.

6/ The Administrative Complaint does not charge Respondent with failing to remove the uterus.

APPENDIX TO RECOMMENDED ORDER, CASE NO. 94-3567

The following rulings are made as to the proposed findings of fact submitted by the Petitioner.

1. The proposed findings of fact in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 15, 17, 18, 19, 20, 22, 23, 24, 26, 27, and 28 are adopted in material part by the Recommended Order.

2. The proposed findings of fact in paragraphs 10 and 16 are subordinate to the findings made.

3. The proposed findings of fact in paragraph 21 are adopted in part by the Recommended Order, but are rejected to the extent that the course of treatment is found to be within the clinical judgment of the practitioner.

4. The proposed findings of fact in paragraph 25 are adopted as being the opinion of Dr. Ellison.

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 ten 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.