STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MEDICINE,	)	
Petitioner,	)	
vs.	)	Case No. 98-4993
LAZARO GUERRA, M.D.,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, the Division of Administrative Hearings, by its duly-designated Administrative Law Judge, William J. Kendrick, held a formal hearing in the above-styled case on July 21, 1999, by video teleconference, with sites in Tallahassee and Miami, Florida.

APPEARANCES

For Petitioner: Carol A. Lanfri, Esquire
Agency for Health Care Administration
Post Office Box 14229
Tallahassee, Florida 32317-4229

For Respondent: Mark David Press, Esquire
1801 West Avenue
Miami Beach, Florida 33139

STATEMENT OF THE ISSUES

At issue in this proceeding is whether Respondent committed the offenses set forth in the Administrative Complaint and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On June 16, 1997, Petitioner issued a two-count Administrative Complaint against Respondent. Count One alleged that Respondent, while acting in his capacity as supervising physician for Mariano Martinez, a certified physician's assistant, violated Rule 59R-30.012(4), Florida Administrative Code, and therefore Section 458.331(1)(x), Florida Statutes, "by failing to review and co-sign the written patient medical records for Martinez." Count Two alleged that Respondent violated the provisions of Section 458.331(1)(dd), Florida Statutes, because he "failed to adequately supervise Martinez's activities in that Respondent allowed the Physician's Assistant to: improperly wear a laboratory coat labeled 'Dr. Martinez'; condone . . . [Coral Gables Hospital] staff's referring to Martinez as 'Dr. Martinez'; and sign written patient records without receiving the appropriate co-signature from Respondent."

Respondent filed an Election of Rights which disputed the factual allegations contained in the Administrative Complaint, and on November 9, 1998, Petitioner referred the matter to the Division of Administrative Hearings for the assignment of an administrative law judge to conduct a hearing pursuant to Sections 120.569, 120.57(1), and 120.60(5), Florida Statutes.

At hearing, Petitioner called Martha Garcia, Dahna Schaubin, and Jan Bennett, as witnesses, and Petitioner's Exhibits 1, 3, 4 (pages 6-10), 5A, 5B, and 6-8 were received into evidence. 1/

Respondent testified on his own behalf and called Mariano Martinez as a witness. Respondent's Exhibits A-E were received into evidence.

The hearing Transcript was filed September 3, 1999, and the parties were accorded ten days from that date to file proposed recommended orders. Both parties elected to file such proposals, and they have been duly considered.

FINDINGS OF FACT

1. The Department of Health, Division of Medical Quality Assurance, Board of Medicine (Department), is a state agency charged with the duty and responsibility for regulating the practice of medicine pursuant to Section 20.43 and Chapters 455 and 458, Florida Statutes.

2. Respondent, Lazaro Guerra, is, and was at all times material hereto, a licensed physician in the State of Florida, having been issued license number ME 0029249. Respondent is board-certified in orthopedic medicine.

3. From on or about November 22, 1993 through at least October, 1994, Respondent was the supervising physician for Mariano Martinez, a certified physician's assistant, who was accorded clinical privileges at Coral Gables Hospital, a health care facility located at 3100 Douglas Road, Coral Gables, Florida.

4. On one occasion in or about August 1994, while making a routine floor inspection at the hospital, Jan Bennett, Director

of Risk Management at Coral Gables Hospital, observed Mr. Martinez wearing a laboratory coat embroidered "Dr. Mariano Martinez, Orthopedic Surgery." Ms. Bennett also overheard a member of the staff address Mr. Martinez as "doctor," without Mr. Martinez's correcting the staff member. Apart from this isolated occurrence, Mr. Martinez was not otherwise observed to have worn such a coat, or to have been addressed as doctor, and there is no proof that Respondent knew, observed, fostered, or condoned Mr. Martinez's behavior.

5. Following the incident in question, Ms. Bennett looked at medical records on the floor, as well as records for patients that had been discharged, to see if Mr. Martinez's written orders had been countersigned by Respondent (evidencing his review) within seven days. According to Ms. Bennett, she did find medical records that had not been countersigned by Respondent within seven days; however, she did not address the number of occasions she found that Respondent had failed to countersign Mr. Martinez's written orders, and she did not produce or identify any such records at hearing. Indeed, the only proof presumatively offered to address such particulars were Physician's Orders for two patients (identified as Patient 1 and Patient 2), received into evidence (without objection) as Petitioner's Exhibit 4, pages 8-10; however, these records were not further discussed or identified at hearing, and the records for Patient 2 relate to an admission in August 1993, a time

Respondent was not shown to have been a supervising physician for Mr. Martinez. Under the circumstances, the proof, at best, supports the conclusion that Respondent failed to countersign Mr. Martinez's written orders regarding one patient (Patient 1), within seven days.

6. With regard to such failure, Respondent observed that he certainly never "knowingly fail[ed] to sign or countersign any written patient medical records that were prepared by Mr. Martinez." Rather, Respondent averred that he had an established procedure whereby he would countersign Mr. Martinez's written orders as they made rounds together, or, if Mr. Martinez made rounds on his own, Respondent would make rounds the next day and countersign Mr. Martinez's orders. If the patient had been discharged in the interim, the patient's records were transferred to the Medical Records Section (from the floor) for storage, and the Medical Records Section had an established protocol whereby the staff would flag (mark) the records that required Respondent's countersignature. With regard to Respondent's failure to countersign Mr. Martinez's orders for Patient 1, there is no (known) explanation; however, as likely an explanation as any other is that the Medical Records Section failed to mark the orders and Respondent, therefore (inadvertently) failed to countersign them.

CONCLUSIONS OF LAW

7. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of these proceedings. Sections 120.569, 120.57(1), and 120.60(5), Florida Statutes.

8. Where, as here, the Department proposes to take punitive action against a licensee, it must establish grounds for disciplinary action by clear and convincing evidence. Section 120.57(1)(h), Florida Statutes (1997), and Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996). "The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established." Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). Moreover, the disciplinary action taken may be based only upon the offenses specifically alleged in the administrative complaint. Cottrill v. Department of Insurance, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996)("Predicating disciplinary action against a licensee on conduct never alleged in the administrative complaint or some comparable pleading violates the Administrative Procedures Act.") See also Kinney v. Department of State, 501 So. 2d 129 (Fla. 5th DCA 1987); Sternberg v. Department of Professional Regulation, Board of Medical Examiners, 465 So. 2d 1324 (Fla. 1st DCA 1985); and Hunter v. Department of Professional Regulation, 458 So. 2d 844 (Fla. 2d DCA 1984). Finally, in determining whether Respondent

violated the provisions of Section 458.331, Florida Statutes, as alleged in the administrative complaint, one "must bear in mind that it is, in effect, a penal statute. . . . This being true, the statute must be strictly construed and no conduct is to be regarded as included within it that is not reasonably proscribed by it." Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

9. Pertinent to this case, Section 458.331(1), Florida Statutes, provides that the Board of Medicine may discipline a licensee if it has been shown that the licensee is guilty of:

> (x) Violating any rule of the board or department . . . .
>
> * * *
>
> (dd) Failing to supervise adequately the activities of those physician assistants, paramedics, emergency medical technicians, or advanced registered nurse practitioners acting under the supervision of the physician.

10. Also pertinent to this case, Rule 64B8-30.012, Florida Administrative Code, currently provides:

> (3) All tasks and procedures performed by the physician assistant must be documented in the appropriate medical record. The supervising physician must review, sign and date the physician assistant record within seven (7) days.

Such rule provision was (as observed in the Administrative Complaint) previously codified at Rule 59R-30.012(4), Florida Administrative Code, and more recently at Rule 64B8-30.012(4), Florida Administrative Code.

11. Count One of the Administrative Complaint alleged that Respondent violated Rule 59R-30.012(4), now Rule 64B8-30.012(3), Florida Administrative Code, and therefore Section 458.331(1)(x), Florida Statutes, "by failing to review and co-sign the written patient medical records for Martinez [within seven days]." As noted in the Findings of Fact, the proof demonstrated, at best, that Respondent failed to co-sign the written orders of Mr. Martinez, regarding one patient, within seven days and that such failure was most likely (given its isolated nature) inadvertent. Nevertheless, such failure does constitute at least a technical violation of the law.

12. Count Two of the Administrative Complaint alleged that Respondent violated the provisions of Section 458.331(1)(dd), Florida Statutes, because he "failed to adequately supervise Martinez's activities in that Respondent allowed the Physician Assistant to: improperly wear a laboratory coat labeled 'Dr. Martinez'; condone . . . [Coral Gables Hospital] staff's referring to Martinez as 'Dr. Martinez'; and sign written patient medical records without receiving the appropriate co-signature from Respondent." Here, since there was no proof that Respondent knew, observed, fostered, or condoned such behavior, there was no competent evidence produced to support such charge. See, e.g., Pauline v. Lee, 147 So. 2d 359 (Fla. 2d DCA 1962)(A beverage license cannot be suspended for a violation of law unless the licensee is found to be culpably responsible for the violations

as a result of his own negligence, intentional wrongdoing, or lack of diligence; however, the persistent and practiced manner of the violations may be sufficient to permit a factual inference that the violations were either fostered, condoned, or negligently overlooked by the licensee.).

13. Having reached the foregoing conclusions, it remains to resolve the appropriate penalty that should be imposed for the violation of Section 458.331(1)(x), Florida Statutes. Pertinent to this issue, Rule 64B8-8.001, Florida Administrative Code, establishes the penalty guidelines, as well as the aggravating and mitigating circumstances, to be considered by the Board of Medicine when it elects to take disciplinary action against a practitioner. Gadsden State Bank v. Lewis, 348 So. 2d 343 (Fla. 1st DCA 1977)(Agencies must honor their own substantive rules until they are amended or abrogated.); Cf. Williams v. Department of Transportation, 531 So. 2d 994 (Fla. 1st DCA 1988)(Agency is required to comply with its disciplinary guidelines in taking disciplinary action against its employees.). For a violation of Subsection 458.331(1)(x), Florida Statutes, Rule 64B8-8.001(2)(x), Florida Administrative Code, provides for a penalty "[f]rom a reprimand to revocation or denial, and an administrative fine from $250.00 to $5,000.00."

14. Here, giving due regard to the Board's disciplinary guidelines, as well as its mitigating and aggravating circumstances, it must be concluded that Respondent's violation

could warrant a reprimand, but that it would be more appropriate to withhold the imposition of any penalty. In so concluding, it is observed that Respondent had an established protocol to assure he countersigned Mr. Martinez's written orders and that the failure shown (with regard to Patient 1) was isolated and most likely inadvertent.

RECOMMENDATION

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

RECOMMENDED that a final order be rendered which finds Respondent guilty of violating Subsection 458.331(1)(x), Florida Statutes, as alleged in Count One of the Administrative Complaint, but which withholds the imposition of any penalty for such violation.

It is further RECOMMENDED that the final order find Respondent not guilty of the violation alleged in Count Two of the Administrative Complaint.

DONE AND ENTERED this 24th day of September, 1999, in Tallahassee, Leon County, Florida.

WILLIAM J. KENDRICK
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 24th day of September, 1999.

ENDNOTE

1/ Petitioner's Exhibit 2 was marked for identification but rejected (based on Respondent's objection). Petitioner's Exhibit 4 was a composite consisting of 10 pages. The Motion for Protective Order of Coral Gables Hospital (CGH) to pages 1-5 of Petitioner's Exhibit 4, on the basis of privilege, was sustained, and those pages have been sealed to maintain their confidentiality.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.