

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,)
)
 Petitioner,)
)
 vs.) Case No. 00-4224PL
)
 DEJENE ABEBE, M.D.,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice this cause came on for formal hearing before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings, on September 3 and 4, 2002, in Tallahassee, Florida. The appearances were as follows:

APPEARANCES

For Petitioner: Kim M. Kluck, Esquire
Department of Health
1052 Bald Cypress Way, Bin #C-65
Tallahassee, Florida 32399

For Respondent: Stephen R. Andrews, Esquire
Andrews & Walker
822 North Monroe Street
Tallahassee, Florida 32303

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Respondent has violated Section 458.331(1)(j) and (x),

Florida Statutes, and, if so, what if any penalty should be imposed.

PRELIMINARY STATEMENT

This cause arose upon the filing of an administrative complaint by the State of Florida, Department of Health against the Respondent, Dejene Abebe, M.D., (Respondent), on October 12, 2000, alleging violations of Section 458.331(1)(j) and (x), Florida Statutes. Specifically it is alleged that the Respondent exercised influence within a patient-physician relationship for the purpose of engaging the patient in sexual activity and for violating a provision of Chapter 458, Florida Statutes, and a rule or a lawful order of the board or the department, previously entered in a disciplinary proceeding.

On October 12, 2000, the Respondent filed a request for formal proceeding and the case was forwarded to the Division of Administrative Hearings and ultimately the undersigned administrative law judge.

The parties filed a joint, pre-hearing stipulation on August 30, 2002, and the cause came on for hearing as noticed on the above dates. The Petitioner adduced the testimony of three witnesses and the Respondent called two witnesses including the Respondent himself. The parties introduced six joint Exhibits, by stipulation, which were received into evidence. Joint Exhibits one through five, consisting of various medical records

of B.R. and Joint Exhibit six consisting of certain cellular phone records. The Petitioner introduced Petitioner's Exhibits one and two and the Respondent also introduced Respondent's Exhibits two, three, and four into evidence. Prior to concluding the hearing the parties agreed to take additional depositions and have a disputed prescription subjected to handwriting analysis after the hearing, before the record would be closed. Subsequently, the parties stipulated to the cancellation of additional depositions and the Petitioner's Exhibit three, a prescription, was withdrawn and the proposed hand writing analysis with regard thereto was cancelled. By Order of November 22, 2002, the record was closed. Thereafter proposed recommended orders were timely filed on or before December 5, 2002, after submission of the transcript which was filed on September 30, 2002. Those proposed recommended orders have been considered in the rendition of this recommended order.

FINDINGS OF FACT

1. The Petitioner is an agency of the State of Florida charged with regulating the practice of medicine pursuant to Chapter 458, Florida Statutes, including conducting disciplinary proceedings for alleged violations of the provisions of the Chapter. The Respondent is a licensed physician in the State of Florida, holding license number ME0072783.

2. The Respondent is a native of Ethiopia, where he was reared and educated. During the Ethiopian revolution he was drafted into the Ethiopian military and served as a lieutenant in combat for approximately two years. When a communist-dominated regime seized power in the country the Respondent was forced to flee, ultimately securing a scholarship to study medicine in Yugoslavia. He attended and completed medical school in that country, but had his passport revoked when he refused to join the communist party in Yugoslavia. Ultimately he fled that country and secured political asylum in the United States. He worked at a number of jobs, including as a security guard, for some years before he was able to take the Foreign Medical Graduate's Examination of Medical Science. He passed that examination in 1988 and attended the Harvard Medical School in the Department of Psychiatry in Boston. Thereafter, upon completing internship and residency training, he ultimately located in Tallahassee, Florida, in 1997 and became licensed in the State of Florida. The Respondent testified that he has, from time to time used, his personal history of adversity to help his patients by illustrating to them that, no matter what difficulties they experience, that they can, by persistence, overcome any adverse circumstance. He does this in an attempt to motivate his patients to get better.

3. The Respondent has more than, 1000 patients in his practice and specializes in the treatment of children in the context of psychopharmacology. He does not practice psychotherapy. He has never before had a complaint filed against him by the Board of Medicine.

4. In February of 1999, the Respondent and Dr. Thu Thai agreed to form a partnership whereby they would share overhead and make referrals to each other. Specifically, the Respondent and Dr. Thai agreed that the Respondent would refer all of his adult patients to Dr. Thai and that Dr. Thai would refer child patients to the Respondent. Before that arrangement could become effective, however, Dr. Thai had to establish himself with privileges at Tallahassee Memorial Hospital (TMH), in order to handle in-patient cases. As a consequence, the Respondent and Dr. Thai agreed to formalize their practice relationship in the summer of 1999. They formally opened their joint practice on June 25, 1999.

5. B.R. moved to the Tallahassee area sometime in the latter part of the 1990's, either shortly before or after leaving her abusive husband. After moving to Tallahassee B.R. was under extreme stress due to lack of financial resources from her estranged husband. She was in constant pain as a result of severe scoliosis in her back, for which she had nine prior surgeries. The surgeries were unsuccessful in the sense that

she was left with chronic, often severe pain, as a result. Because of the constant pain she was forced to take prescription pain medication on a daily basis. She began to suffer from significant depression due to the constant pain, her severe financial stress and, as she testified, became addicted to pain medication and at times could not function without it. She sought treatment from numerous physicians to be sure that she always had a supply of prescription pain medication. She became more and more concerned about money due to being estranged from her husband and his financial support. She often had insufficient funds to buy food and still pay her rent. In early 1999, she began to have suicidal ideations. She was thus suffering from severe emotional and physical stress.

6. Finally, on March 31, 1999, she admitted herself to the TMH. She was extremely underweight at this time and in constant physical pain and was suffering from severe depression. She was also suffering from suicidal ideations upon her admission.

7. Dr. Abebe was assigned as her treating psychiatrist at TMH. The psychiatric treatment for each psychiatric patient at TMH involved group therapy and individual treatment during the treating psychiatrist's rounds.

8. During B.R. treatment sessions at TMH, according to her testimony, Dr. Abebe would talk about topics from his personal history at times. They discussed a recent incident or incidents

in which her husband or former husband had forced her to have intercourse. An issue arose in her testimony concerning Dr. Abebe purportedly telling her that he had had a vasectomy. She maintains that he told her this on an occasion in June of 1999 at her apartment when they purportedly had sexual intercourse and she expressed fear of becoming pregnant. She maintained he reassured her by telling her that he had had a vasectomy. Dr. Abebe however, testified that he may indeed have told her that he had had a vasectomy, but it was in the context of treatment at TMH when they discussed the sexual abuse purportedly committed by her husband and her concern about becoming pregnant as a result; he counseled her concerning various means of pregnancy prevention.

9. In any event, B.R. testified that she developed trust and confidence in Dr. Abebe because she felt he really cared about her. She felt he would be able to help her overcome her depression.

10. B.R. was discharged from TMH on April 12, 1999, and was ordered to follow-up with Dr. Abebe with an appointment on May 4, 1999, for continued psychiatric treatment and medication. B.R.'s first appointment with Dr. Abebe, for treatment was on May 4, 1999. On April 28, 1999, she saw him, however, because she reported to him that she had lost her medication. He gave her enough medication on that occasion, by prescription, to

provide her until her regularly scheduled appointment on May 4, 1999.

11. B.R. did not appear for her May 4, 1999, appointment with Dr. Abebe. He or his secretary dispatched the police to her residence to check on her welfare. When the police came to her apartment she believed that this was another indication that Dr. Abebe was a "good doctor" and cared about her getting better. Dr. Abebe then saw B.R. again on May 10, 1999, for treatment and medication refills.

12. B.R. admitted herself to the hospital again on May 15, 1999, staying in the hospital until May 18, 1999. During this hospital stay she was treated by Dr. Alcera for depression. Dr. Abebe refused to treat B.R. during this hospital stay. She was assigned to the treatment of Dr. Alcera during that admission to the hospital. Dr. Abebe did accept her for follow-up treatment, however. She was discharged on May 18, 1999, and told to follow-up in her treatment with Dr. Abebe, with an appointment on May 27, 1999. She did not appear for that appointment.

13. A second occasion arose when B.R. called the Respondent's office requesting a prescription, alleging that something had happened to her supply of medication. On this occasion on or about June 7, 1999, she called the Respondent's office requesting prescriptions, stating that her husband had

thrown away her medicine, or words to that effect. This resulted in B.R.'s seeing the Respondent at his office on June 10, 1999, when he gave her prescription for sixteen tablets of Lortab. He then saw her at his office on June 15, 1999, and gave her a prescription for a weeks supply with four refills. Refilling the prescription did not require her to again see the Respondent. B.R. apparently was also obtaining prescriptions from at least one other doctor for larger amounts of pain medication during the period of late May and early June 1999. On cross-examination, B.R. admitted that she had engaged in "doctor shopping" as she termed it, in order to get prescriptions from the Respondent and other Tallahassee area physicians. During the course of her testimony, B.R. also admitted to forging prescriptions, on at least two occasions.

14. The Respondent saw B.R. on June 15, 1999, for the last time. On that date he formally discharged B.R. to the care of Dr. Thai, who was opening his practice with the Respondent on June 25, 1999. B.R. maintains that the Respondent transferred her care to Dr. Thai because he told her that he could no longer see her as a patient because of their alleged sexual relationship. The Respondent, on the other hand, contends that he discharged B.R. to the care of Dr. Thai because Dr. Thai's practice is focused on adult patients, while the Respondent's practice involves treating children.

15. In any event, B.R. made an appointment on June 15, 1999, to see Dr. Thai on July 19, 1999. She kept that appointment and Dr. Thai met with the patient on July 19, 1999. On that occasion, B.R. said nothing to Dr. Thai concerning any inappropriate conduct on the part of the Respondent, making no mention of visits to her apartment or any description of sexual activity or encounters between B.R. and the Respondent. Dr. Thai's only other contact with B.R. was as a result of a conversation with a pharmacist. A pharmacist called him to verify the authenticity of a prescription that B.R. was attempting to have the pharmacist fill. The result of that conversation was that Dr. Thai denied that he had issued that prescription and directed the pharmacist to report the matter to the police, it being discovered that B.R. had forged or otherwise altered that prescription, which she admitted during her testimony.

16. After the last appointment B.R. had with Respondent on June 15, 1999, B.R. was arrested and incarcerated, on approximately June 17, 1999 on a charge of grand theft. This was related to the fact that she had had a rental car in her possession for a substantial period of time in excess of the time provided for in the rental contract, which apparently related to the period of time she was incapacitated in the hospital. While she was incarcerated she called the Respondent

to attempt to get him to bail her out of jail. He refused to do so.

17. B.R. maintains that the Respondent began to visit her at her residence in early June and visited her residence on approximately six to eight occasions, all of which were purported to be in June. On the first occasion, according to her version of events, he came to her residence when she was not present and left her a note indicating that he was concerned about her and wanted to check on her welfare. A short time later, in early June, he allegedly again came to her residence and on or about this time she maintains that he discussed his sexual attraction to her and that she performed an act of oral sex with him. On another occasion in early June prior to her incarceration on or about June 17, 1999, she testified that he came to her residence and they engaged in sexual intercourse. She maintains that a third sexual encounter occurred in late June of 1999, after her incarceration, when he had refused to bail her out of jail, on which occasion they purportedly had sexual intercourse.

18. B.R. claims that the Respondent always called her house before arriving and that she did not have a home phone, but only a cell phone. She maintains that on one occasion he left her money and a telephone credit card. She also contends that the Respondent left her prescriptions for Lortab on her

coffee table, the last two times that she claims they had sexual encounters. The Respondent denies that he ever went to B.R.'s residence and denies that they ever engaged in any sexual activity.

19. The Petitioner advances the Respondent's cell phone records (Joint Exhibit 6) as probative of B.R.'s version of these events. B.R. pinpointed the three alleged sexual encounters as occurring in June, both before and after her incarceration, which occurred on or about June 17, 1999. The Respondent's cell phone records, however, show no phone calls made to B.R.'s cell phone from the Respondent's cell phone during the month of June. Although B.R. testified that her cell phone was her only phone, B.R.'s cell phone records are notably absent from the record in this case. The only phone records introduced into evidence, the Respondent's, did not establish that the Respondent called B.R. during the month of June 1999.

20. The Petitioner postulates five phone calls made between July 1, 1999, and August 15, 1999, from the Respondent's cell phone to B.R.'s cell phone, as probative of B.R.'s version of these events to the effect, that the Respondent would always call her before coming over to her house, including on those occasions when they purportedly had a sexual encounter and when he allegedly later attempted to unsuccessfully schedule visits to her house. It is important to note, however, that each of

the five calls at issue are recorded as "one minute" phone calls, which indicates the minimum charge for simply dialing a number. Thus, it is also entirely possible that the Respondent either only called B.R. for a period of one minute or less, or even never reached B.R. with a phone call or only reached her voice mail, on any of the five occasions at issue. Both the Respondent and Dr. Thai testified that they frequently receive pages from their answering service indicating a patient call, which under the standard of care they must return, according to Dr. Thai. Dr. Thai testified that in fact he has been called by a patient of the Respondent and returned that call and told the caller that the caller would need to call the Respondent as the treating physician. Likewise, as to the five phone calls at issue in July and August 1999, the Respondent may have returned the phone call and found that the caller may have been a patient of Dr. Thai's, including, at that point in time, patient B.R., who was by that time under the care of Dr. Thai. Thus, the Respondent may have not had a conversation at all, in such a one-minute-or-less- duration phone call; may have merely referenced the caller to call Dr. Thai if the caller who had left a page was a patient of Dr. Thai (including possibly patient B.R.); or the Respondent may have indeed called B.R. In any event, five phone calls during July and August, of one-minute duration or less, during a period of a month and a half

are not persuasively probative of B.R.'s claim concerning the Respondent's always calling before attempting to schedule a rendezvous scheduling with B.R. at anytime in June, July or August 1999.

21. The Petitioner also contends it to be inculpatory that the Respondent shared personal information, particularly his method of birth control, with B.R. B.R. claimed that on one occasion when they are supposed to have engaged in sexual intercourse she expressed fears of becoming pregnant and that the Respondent told her not to worry, that he had had a vasectomy. This is unpersuasive. On direct examination B.R. related that it was the Respondent's treatment style to relate personal experiences or difficulties in his own life in an effort to motivate her to overcome obstacles and adversity. B.R. likened the Respondent's motivational style to "Tony Robbins." This is consistent with the Respondent's description of his method of interaction or counseling with his patients, where he described recounting personal experiences of adversity in his own life in an effort to motivate patients to overcome difficulties and get better. It is thus plausible that the Respondent may have mentioned his own method of birth control when the B.R., in the hospital, raised a concern about becoming pregnant by her abusive husband as a result of sexual abuse by her husband.

22. The Petitioner maintains that the Respondent's testimony in this regard unbelievable. The Petitioner contends that it is incredible that the Respondent would merely discuss methods of birth control with a patient describing a rape or sexual abuse by her husband. The record, however, does not indicate that this is the only counseling advice or comment that the Respondent made to B.R. concerning alleged sexual abuse by her husband. The record does not establish that this was the only response he made to her description of sexual abuse by her husband. Standing alone the Petitioner's description of events concerning his counseling of B.R. during her hospital stay does not establish that he was insensitive to the psychiatric ramifications of alleged sexual abuse by B.R.'s husband.

23. B.R. claims that she became distraught and extremely depressed as a result of the alleged sexual exploitation by the Respondent. She recounts, in essence, that she felt abused and essentially worthless and treated like a "prostitute" by the Respondent's alleged conduct, described above. She testified that she became so distraught as a result of the Respondent, her conduct that she attempted suicide and purportedly overdosed on 84 Lortab tablets with the result that she was hospitalized on August 19, 1999. She states that this was a voluntary admission to the Apalachee Center for Human Services or as she described it the "Eastside Facility." She testified that on this occasion

she elected to admit herself at that facility, as opposed to TMH, because she did not want to have any contact with the Respondent as a potential treating physician, if she had been admitted to TMH.

24. Upon the occasion of that admission however, B.R. did not make any allegations to any of the personnel of that facility that the Respondent had engaged in the inappropriate behavior described above. She contends that she failed to do so because she did not want to "get the Respondent in trouble" and, due to embarrassment or other reasons, was reluctant to discuss the matter, likening herself to a rape victim who is reluctant to describe such an incident.

25. The record, however, belies the occurrence of such a suicide attempt as the reason for this hospitalization. B.R., while testifying that she took 84 Lortabs, a massive overdose, testified that her stomach was not pumped. Moreover, she indicated that this was a voluntary admission and, based upon her testimony, she apparently had the presence of mind to make an election as to which facility she wanted to be admitted to. Dr. Thai, however, testified unequivocally that an overdose of 84 Lortabs would kill any person if the person's stomach was not pumped on an immediate basis, even if 84 Lortabs had not been consumed at once, but over as much as a twelve hour period. Thus, it is found that this description of a suicide attempt

occurring, and as being based upon extreme distress caused by the purported sexual abuse of B.R. by the Respondent is false and a false attempt to inculcate the Respondent in the conduct described by B.R. as having occurred in June of 1999.

26. In essence, the Petitioner's theory of this case is that the Respondent provided prescriptions for drugs to B.R. in exchange for sex with her. Specifically, B.R. claimed that the Respondent left her a prescription for Lortab following an alleged sexual encounter, before her incarceration, in mid-June and a second prescription for Lortab following another alleged sexual encounter after her incarceration, or in late June. The only prescriptions for Lortab in evidence, however, coincide with regular office visits and/or phone calls for refills. The Petitioner alleges that the Respondent wrote another prescription for Lortab dated June 1, 1999. The Respondent denied that allegation. The disputed prescription was produced the morning of the hearing and conditionally admitted, based upon the stipulation that the disputed prescription would be subjected to handwriting analysis, by agreement of counsel. The disputed prescription was later withdrawn by the Petitioner when the Petitioner conceded that the Eckerd's pharmacy in question had made a mistake and that really no prescription dated June 1, 1999, had been written by the Respondent.

27. The Petitioner sought to produce a second disputed prescription, dated July 15, 1999, which was not disclosed to the Respondent until it was presented by the Petitioner on cross-examination. This is not a rebuttal exhibit and had been in the possession of Petitioner's counsel for at least most of the day when it was advanced in an effort to impeach upon cross-examination. The prescription was excluded from evidence for reasons reflected in the transcript of this proceeding. The Petitioner's proposed fact findings contained in the Petitioner's Proposed Recommended Order based upon this prescription are not accepted.

28. Parenthetically, it is noted that the Respondent conceded that the signature on this July 15, 1999, prescription is his but that he did not write the other information, (the patient's name and the date) on that prescription. If indeed B.R. obtained that prescription on July 15, 1999, or if it was written on that date, this would contradict B.R.'s testimony that, after their alleged third sexual encounter in late June that she was so disgusted with the Respondent that she refused to see him, admit him to her residence or even answer his phone calls. Alternatively, it is also possible that the date on the prescription was altered by B.R. or, under Petitioner's theory of the case it could conceivably have been a prescription signed by the Respondent and given to the B.R. during their purported

rendezvous during the month of June 1999, which she completed or filled out with her name and the July 15th date at some point. Given the fact that the Respondent candidly admitted the signature on the prescription was his, and given the fact that the B.R. admitted to forging other prescriptions on more than one occasion and for the other reasons of record for which B.R.'s testimony is found uncreditible, this is the least likely explanation. In any event, because of the problematic circumstances surrounding the advanced Exhibit even had it been admitted into evidence the prescription dated July 15, 1999, can be accorded no evidentiary weight.

29. In essence, it must be found that the Respondent's testimony and evidence are more credible and worthy of belief than that adduced by the Petitioner in the form of B.R.'s testimony and related Petitioner evidence. In addition to the reasons found above for accepting the Respondent's testimony and evidence over that offered by the Petitioner, there is, for instance, record evidence that B.R. may have made these allegations at least in part for pecuniary gain. The Respondent's Exhibit three, in evidence, demonstrates this as a possible motive, especially in light of B.R.'s testimony regarding to the subject matter of the letter which is Respondent's Exhibit three, to the effect that she sought the sum of \$25,000.00 from the Respondent. This was proposed

evidently in return for declining to pursue her complaint to, or "cooperation" with the Petitioner agency.¹⁷

30. B.R. also testified that she was transferred to the care of Dr. Thai so that the Respondent could continue his purported illicit affair with her. Dr. Thai and the Respondent, however, testified that B.R. was going to be transferred to Dr. Thai's care in the summer of 1999 in any event, by an agreement which dates from their February 1999 decision to combine their practices and because Dr. Thai focused his practice on adult patients and Dr. Abebe focused on child patients. B.R. was in fact transferred to Dr. Thai contemporaneously with the time that he moved his practice to the offices of the Respondent. More importantly, Dr. Thai testified that the Respondent introduced him to B.R. during her March 1999 hospitalization at TMH and informed her that this would be the psychiatrist he would send her to as an outpatient. B.R.'s testimony is also contradicted by documentary evidence that when she was re-admitted to TMH, in May of 1999, that the Respondent would not accept her as a patient.

31. B.R. also testified that the Respondent went to her house on six or eight occasions. She testified that she told her mother of his coming to her residence, but no testimony was taken from B.R.'s mother which might have corroborated her version of these events.

32. B.R. also testified that she wrote a letter to TMH complaining about the Respondent coming to her home, before they allegedly engaged in sexual activity and that the hospital had responded to her with a letter of its own requiring her to fill out a form with certain information regarding the events she had purportedly related to hospital personnel. No such correspondence or documents were produced by the Petitioner to corroborate this testimony. B.R. testified that the Respondent told her, upon one of the alleged early visits to her apartment, that even when she had been in the hospital when he had first begun treating her, that he was sexually attracted to her. She attributed the statement to him, regarding that time period, as being to the effect that he was "f-ing her with his eyes." He denied making such a statement. Her testimony in this regard, and in relating her version of events, concerning his purported visits to her residence, is belied by the fact that when she missed her May 4, 1999, appointment, after she was released from TMH, that instead of using that as an excuse to go check on her at her home that he directed his secretary to summon the police to check on her welfare at her home. He sent a third party to B.R.'s home rather than going himself.

33. B.R. testified that the Respondent gave her money, a phone credit calling card, and prescriptions under the Petitioner's theory that the Respondent was trading "drugs for

sex." Yet, at the very point in time when the Respondent was allegedly involved in an illicit affair with B.R., she became incarcerated and the Respondent refused to bail her out of jail. B.R.'s testimony simply is not clothed with an aura of truth. It lacks circumstantial probability of reliability.

34. B.R., in describing the Respondent's purported visits to her residence, and their purported, illicit sexual activities, described walking him to the door of her residence and observing him drive away in his car. She described a late-model car of dark green color. The Respondent on the other hand testified that his car at this time "cream colored" was a 1995 Mazda.

35. Moreover, when the patient voluntarily admitted herself to the Apalachee Center for Human Services a second time, on September 20, 1999, when she made the allegations that the Respondent had engaged in inappropriate, sexually-related behavior with her, she purportedly told her version of these events to a staff member, Linda Johnson, as well as to mental health counselor Andrew Daire and Dr. Degala, M.D. Testimony and documentary evidence adduced through Andrew Daire and Dr. Degala are in evidence, by way of their recounting of the report of the alleged inappropriate conduct which B.R. made to them. This apparently initiated the investigation resulting in the

instant proceeding. However, staff counselor Linda Johnson was not called as a witness by the Petitioner.

36. In summary, the testimony of the Respondent and the evidence adduced by the Respondent is accepted as more credible and worthy of belief than the testimony of B.R. and the evidence adduced by the Petitioner. It is found that the above-referenced, alleged inappropriate conduct on the part of the Respondent, involving visits to the patient's residence and purported sexual activity with the patient B.R., did not occur.

CONCLUSIONS OF LAW

37. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. Sections 120.569 and 120.57, Florida Statutes.

38. Section 458.331(2), Florida Statutes, (2000) empowers the Board of Medicine to revoke, suspend or otherwise discipline the license of a physician for violating Section 458.331(1),(j), Florida Statutes. Section 458.331(1)(j), Florida Statutes (2000), prohibits "exercising influence within a patient-physician relationship for the purposes of engaging a patient in sexual activity. A patient shall be presumed to be incapable of given free, full and informed consent to sexual activity with his/her physician." Section 458.331(1),(x), Florida Statutes (2000), proscribes "violating any provision of this chapter, a rule of the board or department, or a lawful order of the board

or department previously entered in a disciplinary hearing or failing to comply with a lawfully issued subpoena of the department."

39. The Petitioner in this proceeding is not seeking suspension or revocation of the Respondent's license. The Petitioner amended its Administrative Complaint to remove both revocation and suspension as potential penalties in order to lower its burden of proof to one of "the greater weight of the evidence" versus the clear and convincing standard which applies to proceedings in which the agency is seeking revocation or suspension of a physicians license. Section 458.331(3), Florida Statutes (2000).

40. The Petitioner has not demonstrated by the greater weight of the evidence, or by preponderant evidence, that the Respondent committed the inappropriate conduct and the statutory violations charged, as demonstrated by the above findings of fact and by the Administrative Law Judge's findings concerning the credibility of the witnesses and evidence. Because the Petitioner failed to meet its burden of proof, the issue concerning penalties need not be addressed.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and

demeanor of the witnesses and the pleadings and arguments of the parties it is

RECOMMENDED:

That a final order be entered finding that the Respondent did not violate the statutory provisions charged by the agency and that the administrative complaint be dismissed in its entirety.

DONE AND ENTERED this 7th day of February, 2003, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us.

Filed with the Clerk of the
Division of Administrative Hearings
this 7th day of February, 2003.

ENDNOTE

1/ Parenthetically, it is noted that there is a representation by the Respondent's co-counsel, at the outset of the hearing, to the effect that B.R. had apparently initiated preliminary steps (demand letter) regarding a potential civil action against the Respondent.

COPIES FURNISHED:

Kim M. Kluck, Esquire
Department of Health
1052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399

Stephen R. Andrews, Esquire
Andrews & Walker
822 North Monroe Street
Tallahassee, Florida 32303

R. S. Power , Agency Clerk
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1701

William W. Large, General Counsel
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1701

Larry McPherson, Executive Director
Department of Health
4052 Bald Cypress Way
Tallahassee, Florida 32399-1701

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.