

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)	
MEDICINE,)	
)	
Petitioner,)	
)	
vs.)	Case No. 00-4817PL
)	
ZAFAR S. SHAH, M.D.,)	
)	
Respondent.)	
_____)	

RECOMMENDED ORDER

Upon due notice, William R. Cave, an Administrative Law Judge for the Division of Administrative Hearings, held a formal hearing in this matter on March 15-16, 2001, in Dade City, Florida.

APPEARANCES

For Petitioner: Robert C. Byerts, Esquire
Agency for Health Care Administration
Post Office Box 14229
Tallahassee, Florida 32317-4229

For Respondent: Jack D. Hoogewind, Esquire
33283 Cortez Boulevard
Dade City, Florida 33523

STATEMENT OF THE ISSUE

Did the Respondent, Zafar S. Shah, M.D. (Dr. Shah), commit the violations alleged in Counts 7-10 of the Administrative Complaint dated June 26, 2000, and, if so, what penalty should be imposed?

PRELIMINARY STATEMENT

By an Administrative Complaint dated June 26, 2000, and filed with the Division of Administrative Hearings (Division) on August 16, 2000, the Department of Health, Board of Medicine (Board) is seeking to revoke, suspend, or otherwise discipline Dr. Shah's license to practice medicine in the State of Florida. Initially, the Administrative Complaint contained 10 Counts and was assigned Case Number 00-3455PL. A formal hearing on Counts 1-6 was held on November 8-9, 2000, and a Recommended Order as to Counts 1-6 was entered on February 27, 2001. At the request of Respondent, Counts 7-10 were severed and assigned DOAH Case Number 00-4817PL. This Recommended Order addresses those remaining counts.

As grounds therefor, the Board alleges that Dr. Shah violated: (1) Section 458.331(1)(j), Florida Statutes, by exercising influence within a patient-physician relationship for the purposes of engaging a patient in sexual activity, with regard to a patient known as T. H.; (2) Section 458.331(1)(t), Florida Statutes, by failing 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, with regard to a patient known as T. H.; (3) Section 458.331(1)(x), Florida Statutes, by violating an express

prohibition against sexual misconduct stated in Section 458.329, Florida Statutes, and Rule 64B8-9.008, Florida Administrative Code, in his actions with the patient known as T. H.; and (4) Section 458.331(1)(m), Florida Statutes, by failing to keep legible, as defined by department rule in consultation with the board, medical records that identify the licensed physician or the physician extender and supervising physician by name and professional title who is or are responsible for rendering, ordering, supervising, or billing for each diagnostic or treatment procedure and that justify the course of treatment of the patient, in that Respondent failed to document any information to justify writing an antibiotic prescription for patient T. H.

At the hearing, the Board presented the testimony of Tammy Rachel, Daniel Alexander Reid, Manhurilma Das, Bruce Anthony DeKraker, T. H., Rebecca Steponaitis, John Harvey, Jr., M.D., Corey Rachel, Alicia Payne, Timothy Lee Harris, Joe Lovering, Timothy Glen Ball, and Kim Norris. The Board's Exhibits 1 and 3-8 were admitted in evidence. The Board's Exhibit 2 was rejected but was proffered by the Board. After reviewing the Board's proffer, Exhibit 2 is rejected. The Board's Exhibits 9 and 10 were rejected. Dr. Shah testified in his own behalf but did not present any other witness. Dr. Shah's Exhibit 1 was rejected. Dr. Shah's Exhibit 2 was

admitted in evidence. Sections 458.329 and 458.331, Florida Statutes, and Rules 64B8-8.001 and 64B8-9.008, Florida Administrative Code, were officially recognized. The Final Orders and Recommended Orders in Department of Professional Regulation v. William S. Piper, M.D., DOAH Case No. 89-3670, Department of Professional Regulation v. Archbold M. Jones, Jr., M.D., DOAH Case No. 90-3591, and Agency for Health Cadre Administration v. Phillip William Lortz, M.D., DOAH Case No. 96-0793 were officially recognized.

At the conclusion of the hearing, the Board requested that the parties be given 35 days from the date of mailing the Transcript to file their Proposed Recommended Orders. The request was granted with the understanding that any time constraint imposed under Rule 28-106.216(1), Florida Administrative Code, was waived in accordance with Rule 28-106.216(2), Florida Administrative Code. By a Motion to Abate or in the Alternative, Extend Time for Filing Proposed Recommended Order, the Board requested that the parties be given an additional 45 days to submit their Proposed Recommended Orders. However, this motion was subsequently withdrawn. A four-volume Transcript was filed with the Division on April 17, 2001. The parties timely filed their respective Proposed Recommended Orders under the extended time frame.

FINDINGS OF FACT

Upon consideration of the oral and documentary evidence adduced at the hearing, the following relevant findings of fact are made:

1. The Board is the agency charged with regulating the practice of medicine in the State of Florida.

2. Dr. Shah is and, at all times material hereto, has been licensed to practice medicine in the State of Florida, having been issued license number ME0071706. Dr. Shah is board-certified in internal medicine.

3. Dr. Shah was born, and spent the first 29 years of his life, in Pakistan. Dr. Shah is 35 years of age.

4. Dr. Shah began working at MidTown Clinic in Zephyrhills, Florida, in October 1996, and continued to work at MidTown Clinic until he was terminated in 1999.

5. Tammy Rachel (Tammy) worked as a certified nursing assistant at MidTown Clinic from June 1996 until she was terminated in March 1999. Tammy worked with Dr. Shah as his Medical Assistant during Dr. Shah's tenure at MidTown Clinic.

6. At all times material to this proceeding, Tammy was married to, and lived with, Corey Rachel, her husband. Although T. H., Tammy's oldest daughter, age approximately 15 years, was at all times material hereto, living in the Rachel household, her biological father was the custodial parent.

Tammy's two younger daughters also lived with their mother in the Rachel household.

7. At all times material to this proceeding, Dr. Shah did not have any family living in the United States. After Tammy began working for Dr. Shah, she and Dr. Shah became close friends. As a result, Tammy, along with her husband and her daughters, including T. H., spent a great deal of time with Dr. Shah. Tammy and her family treated Dr. Shah as if he was a member of their family. Tammy and her family, including her husband, spent almost every weekend with Dr. Shah at his home or on outings with Dr. Shah. Dr. Shah visited Tammy's home on week nights during this period of time. This visitation, both weekend and week nights, between Dr. Shah and Tammy's family occurred between December 1996 and August 1999.

8. Initially, the relationship between Dr. Shah and Tammy was a working relationship. However, in February 1997, Dr. Shah and Tammy began a sexual relationship which lasted until March 1999. When confronted by Corey Rachel about her relationship with Dr. Shah, Tammy denied having a sexual relationship with Dr. Shah. In fact, Tammy did not tell Corey Rachel of her sexual relationship with Dr. Shah until after August 5, 1999.

9. During the period of time that Dr. Shah and Tammy's family were visiting back and forth, Dr. Shah established a

close relationship with T. H., in that Dr. Shah: (a) gave more attention to T. H. than the other girls; (b) spent more time with T. H. than with the other girls; and (c) spent time alone with T. H. when she cleaned his house and at other times at the mall, etc. Tammy was aware of the relationship between Dr. Shah and T. H. and that T. H. was alone with Dr. Shah on occasions. However, there is no evidence that this relationship was intimate or in any way sexual in nature, notwithstanding the testimony of Tammy or Corey Rachel to the contrary, which I find lacks any credibility in this regard.

10. A prescription in the name of T. H. with a date of January 18, 1999, for 60 250-milligram tablets of Erythromycin, an antibiotic, was presented to the Winn Dixie Pharmacy by Corey Rachael. The prescription was filled on January 20, 1999, and picked up by Corey and Tammy Rachel on that same date. The prescription carried what appeared to be the signature of Dr. Shah. However, Dr. Shah denies that he ever prescribed Erythromycin for T. H. or that he wrote or signed the prescription in question. Tammy gave the medication to T. H., which T. H. used, including the refills, for the acne on her face. However, it was T. H.'s testimony, which I find to be credible, that Dr. Shah never discussed the problem of acne with her, and did not prescribe Erythromycin

or any other medication to treat the acne on her face.

However, T. H. did discuss the acne problem with Tammy.

11. It was not unusual for Dr. Shah to carry prescription pads home with him, which were then available to those in his home. Likewise, it was not unusual for a Medical Assistant, such as Tammy, to have access to Dr. Shah's prescription pads at work. In fact, it was not unusual for a Medical Assistant to fill in the necessary information on a prescription for the doctor's signature.

12. The MidTown Clinic has no medical records or any other records reflecting that Dr. Shah ever saw T. H. as a patient. Likewise, Dr. Shah did not have any records reflecting that he had ever treated T. H. as a patient or that he had given T. H. a physical examination.

13. T. H. did not have a regular physician. When she needed medical treatment, T. H. went to the Health Department or Tammy would secure medical treatment for T. H. from physicians with whom Tammy worked. Other than the allegation concerning the acne problem, there is no allegation that Tammy sought medical treatment for T. H. from Dr. Shah, or that Dr. Shah saw T. H. as a patient.

14. An analysis by the Board's handwriting expert indicates that the signature on the prescription in question is consistent with the presumed, not known, signature of

Zafar Shah, M.D. on 20 other prescriptions taken from the Wal-Mart Pharmacy in Zephyrhills, Florida. The Board offered no evidence that the signatures on the 20 prescriptions from Wal-Mart were in fact the signature of Zafar Shah, M.D., other than the testimony of the pharmacist from Wal-Mart that the signatures on those 20 prescriptions filled at Wal-Mart appeared to him to be the signature of Zafar Shah, M.D. Although the Board's handwriting expert was given the opportunity to compare current samples of Dr. Shah's signature, to be given by Dr. Shah prior to the hearing, with the signature on the prescription in question, he chose not to make this comparison. The Board's handwriting expert did not compare the signature in question to any known signature of Zafar Shah, M.D.

15. There is insufficient evidence to establish facts to show that Dr. Shah wrote the prescription in question, notwithstanding the testimony of the Board's handwriting expert to the contrary, which I find lacks credibility in this regard. Likewise, there is insufficient evidence to establish facts to show that Dr. Shah ever treated T. H. for the acne on her face or for any other medical problem or that a patient-physician relationship ever existed between Dr. Shah and T. H., notwithstanding the testimony of Tammy or Corey Rachel

to the contrary, which I find lacks credibility in this regard.

16. On August 5, 1999, Dr. Shah had dinner with Tammy, Corey Rachel, T. H., and Tammy's two younger daughters at the Rachel's home in Dade City, Florida, as he had on many previous occasions.

17. On August 5, 1999, Dr. Shah was to spend the night in the Rachel's home, as he had on many previous occasions. As usual, Dr. Shah was to sleep on an air mattress in the living room.

18. Around 11:00 p.m. Tammy and Corey Rachel went to bed. Sometime thereafter, T. H. went to her room to prepare for bed and Dr. Shah proceeded to prepare for bed in the living room on the air mattress.

19. Around 1:00 a.m. on August 6, 1999, Tammy testified that she was awakened by what she thought was a noise and got out of bed. After getting out of bed, Tammy checked on her two younger daughters, and then checked on T. H. who was not in her bedroom. Tammy then proceeded to look elsewhere in the house for T. H.

20. Tammy also testified that when she walked into the living room she observed T. H. and Dr. Shah having, what appeared to her, to be sexual intercourse. Tammy became very upset and began beating Dr. Shah on the back and calling Corey

Rachel. Dr. Shah attempted to protect himself from Tammy's onslaught by gathering his belongings and leaving the house. During the time Tammy was beating on Dr. Shah, she also slapped T. H.'s face. Corey responded to Tammy and instructed T. H. to go to her room. T. H. then went to her room. At this time, T. H. still had on the long T-shirt and under pants, which she had worn to bed. Likewise, Dr. Shaw had on the clothing that he had worn to bed.

21. Tammy reported the incident to the Pasco County Sheriff's Department. Deputy Timothy Harris and Sergeant Rowan responded to the call by Tammy. Upon arrival at the Rachel home, the officers spoke with Tammy, Corey Rachel, and T. H. When T. H. was interviewed by Deputy Harris, she told Deputy Harris that she and Dr. Shah had been engaged in sexual intercourse at the time Tammy came into the living room. In fact, T. H. related a very explicit account of the incident, using language which was not in her normal vocabulary. T. H. also provided a written statement of the incident to Deputy Harris where she again admitted to having sex with Dr. Shah. After providing the written statement, T. H. went home with her father. T. H. was not under oath on either of these occasions.

22. Deputy Harris inspected the scene of the incident for physical evidence that sexual intercourse had taken place

between T. H. and Dr. Shah. Deputy Harris did not find any physical evidence that sexual intercourse had occurred.

Deputy Harris also took some clothing that T. H. had been wearing as evidence for the purpose of examining for evidence of sexual intercourse. Upon examination, this clothing did not yield any evidence of sexual intercourse.

23. Later in the morning of August 6, 1999, Detective Ball went to the home of Timothy Harvey and interviewed T. H. In this interview, T. H. again stated that she and Dr. Shah were engaged in sexual intercourse earlier that morning at the Rachel's home, and had, on previous occasions, had sexual intercourse at the Rachel's residence and at Dr. Shah's residence. She also related that she was in love with Dr. Shah and that they were going to be married when she turned 18 years of age. T. H. further related to Detective Ball that Tammy was jealous of her relationship with Dr. Shah. When Detective Ball requested that T. H. undergo a physical examination to uncover possible evidence of sexual intercourse between T. H. and Dr. Shah, T. H. refused to undergo the physical examination. T. H.'s reason for not taking the physical examination was that she loved Dr. Shah and any evidence found would obviously be used against him.

24. Later, during the day of August 6, 1999, Tammy and Dr. Shah agreed to meet at Brewmasters, a restaurant in Wesley Chapel, halfway between Dr. Shah's house and Dade City, Florida. This meeting was arranged by Tammy at the request of the Pasco County Sheriff's office in an attempt to get Dr. Shah to admit to having had sexual intercourse with T. H. on August 6, 1999. Tammy was wired and the Detectives from the Pasco County Sheriff's office attempted to monitor the conversation. However, the monitoring was not too successful. During this meeting between Dr. Shah and Tammy, which lasted approximately 45 minutes, Dr. Shah repeatedly denied having sexual intercourse with T. H.

25. At the conclusion of this meeting with Tammy, the Detectives approached Dr. Shah and requested that he accompany them to the County Jail. Although Dr. Shah was not officially placed under arrest at this time, he was unsure of his rights and felt intimidated by the Detectives. The Detectives did not offer Dr. Shah the opportunity to drive his vehicle to the County Jail. Dr. Shah was transported to the County Jail by the Detectives.

26. Once at the County Jail, the Detectives went through their interrogation (interview) routine. Dr. Shah's understanding was that the Detectives were giving him the choice of admitting to having had consensual sexual

intercourse with T. H. or to having raped T. H. With that understanding, Dr. Shah admitted to having had consensual sexual intercourse with T. H. Dr. Shah was upset, confused and intimidated by the Detectives. Dr. Shah gave the Detectives the answers that he assumed they wanted. Upon being advised of Miranda rights, Dr. Shah requested an attorney and made no further statements.

27. On September 28, 1999, Detective Ball and Bill Joseph, a Crime Scene Technician, went to the Rachel's home with a Lumalite for the purpose of illuminating body fluids that may have been left on the carpet or any other area as result of the alleged sexual intercourse. No evidence of body fluids was found.

28. Under oath, during the State Attorney's investigation, T. H. recanted the story given in her written statement on August 6, 1999, and the story given verbally to Deputy Harris and Deputy Ball on August 6, 1999, and denied that she and Dr. Shah were engaged in sexual intercourse at the Rachel's home on August 6, 1999, when Tammy came into the living room or at any time previous to August 6, 1999. Subsequently, the State Attorney, on February 14, 2000, filed a No Information concluding that the facts and circumstances of this case did not warrant prosecution at that time.

29. Again, under oath at the hearing, T. H. recanted the story given in her written statement on August 6, 1999, and the story given verbally to Deputy Harris and Deputy Ball on August 6, 1999, and denied that she and Dr. Shah were engaged in sexual intercourse at the Rachel's home on August 6, 1999, when Tammy came into the living room or at any other time. However, T. H. admitted to having a sexual relationship with two young males prior to August 1999.

30. T. H.'s reason for not telling the truth in her recitation of the facts in her initial interview with Deputy Harris or her written voluntary statement to Deputy Harris or in her interview with Deputy Ball was that she was aware of Tammy's involvement with Dr. Shah and was attempting to make Tammy jealous because she was mad with Tammy due to their fight the previous evening and because of other problems that she was experiencing with Tammy. Additionally, T. H. had overheard a conversation between Tammy and Dr. Shah wherein Tammy was discussing divorcing Corey Rachel and marrying Dr. Shah, which upset T. H.

31. T. H. testified that sometime after she and Dr. Shah had gone to bed in their respective rooms, she went in the living room to talk to Dr. Shah about the situation between she and Tammy as she had on other occasions. During their conversation, T. H. was sitting close to Dr. Shah. As their

conversation progressed, T. H. became emotional and Dr. Shah "put his arm around her shoulder" to console her as he had on other occasions when she would discuss problems between her and Tammy. It was in this posture that Tammy found Dr. Shah and T. H. at approximately 1:00 a.m. on August 6, 1999.

32. There is insufficient evidence to establish facts to show that T. H. and Dr. Shah were engaged in sexual intercourse at the Rachel's home on August 6, 1999, or at any time previous to that date, notwithstanding: (a) Tammy's testimony to the contrary, which I find lacks credibility due to her demeanor at the hearing and her involvement with Dr. Shah; (b) T. H.'s admission that sexual intercourse had occurred, which T. H. later recanted under oath, and which she testified was only done for the purpose of making Tammy jealous; and (c) Dr. Shah's admission, while being interrogated, that consensual sex had occurred between he and T. H., which he later recanted under oath at the hearing.

CONCLUSIONS OF LAW

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

34. The burden of proof is on the party asserting the affirmative of an issue before an administrative tribunal, Florida Department of Transportation v. J.W.C. Company, Inc.,

396 So. 2d 778 (Fla. 1st DCA 1981). The Board has the burden of proof in this proceeding. To meet its burden, the Board must establish facts upon which its allegations are based by clear and convincing evidence. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern Company, 670 So. 2d 932 (Fla. 1996) and Sections 120.57(1)(j) and 458.331(3), Florida Statutes (2000).

35. Sections 458.331(1)(j),(t), and (x), and (2)(b),(c), (d), and (f), Florida Statutes, provide in pertinent part as follows:

Grounds for disciplinary action; action by the board and department.-

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

* * *

(j) Exercising influence within a patient- physician relationship for purposes of engaging a patient in sexual activity. A patient shall be presumed to be incapable of giving free, full, and informed consent to sexual activity with his or her physician.

* * *

(m) Failing to keep legible, as defined by department rule in consultation with the board, medical records that identify the licensed physician or the physician extender and supervising physician by name and professional title who is or are responsible for rendering, ordering, supervising, or billing for each diagnostic or treatment procedure and that justify 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.

* * *

(t) Gross or repeated malpractice or the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonable prudent similar physician as being acceptable under similar conditions and circumstances . . .

As used in this paragraph, . . . "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.

* * *

(x) 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

* * *

(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:

* * *

(b) Revocation or suspension of a license.

(c) Restriction of practice.

(d) Imposition of an administrative fine not to exceed \$10,000 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.

(Emphasis furnished.)

36. Section 458.329, Florida Statutes, provides as follows:

Sexual misconduct in the practice of medicine.-The physician-patient relationship is founded on mutual trust. Sexual misconduct in the practice of medicine means violation of the physician-patient relationship through which the physician uses said relationship to induce or attempt to induce the patient to engage, or to engage or attempt to engage the patient, in sexual activity outside the scope of the practice or the scope of generally accepted examination or treatment of the patient. Sexual misconduct in the practice of medicine is prohibited. (Emphasis furnished.)

37. Rule 64B8-9.008, Florida Administrative Code, provides in pertinent part as follows:

(1) Sexual contact with a patient is sexual misconduct and is violation of Sections 458.329 and 458.331(1)(j), Florida Statutes.

(2) For purposes of this rule, sexual misconduct between a physician and a patient includes, but is not limited to;

(a) Sexual behavior or involvement with a patient including verbal or physical behavior which

* * *

2. may reasonably be interpreted as intended for the sexual arousal or gratification of the physician, the patient or any third party; or

3. may reasonably be interpreted by the patient as being sexual. (Emphasis furnished.)

38. The Board has failed to demonstrate by clear and convincing evidence that Respondent is guilty of the

allegations contained in Counts 7-10 of the Administrative Complaint filed herein:

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is recommended that the Board enter a final order finding Dr. Shah not guilty of the charges outlined in Counts 7-10 of the Administrative Complaint and dismissing the charges outlined in Counts 7-10 of the Administrative Complaint.

DONE AND ENTERED this 31st day of August, 2001, in Tallahassee, Leon County, Florida.

WILLIAM R. CAVE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of August, 2001.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit 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.