STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MEDICINE,	)	
Petitioner,	)	
vs.	)	Case No. 01-3043PL
ZAFAR SYED SHAH, M.D.,	)	
Respondent.	)	

RECOMMENDED ORDER

A formal hearing was held before Daniel M. Kilbride, Administrative Law Judge, the Division of Administrative Hearings, on October 22, 2001, in Dade City, Florida.

APPEARANCES

For Petitioner: Robert C. Byerts, Esquire
Agency for Health Care Administration
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For Respondent: Jack D. Hoogewind, Esquire
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STATEMENT OF THE ISSUES

Whether Respondent violated Section 458.331(1)(j), Florida Statutes (2000), by exercising influence within a patient-physician relationship for purposes of engaging a patient in sexual activity, and, if so, what penalty should be imposed.

Whether Respondent violated Section 458.331(1)(x), Florida Statutes (2000), by engaging in a sexual relationship with patient, T. R., and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On May 4, 2001, the Department of Health filed an Administrative Complaint against Respondent, Zafar Shah, M.D. The Administrative Complaint alleges that Respondent violated Sections 458.331(1)(j) and (x), Florida Statutes, by engaging in a sexual relationship with Patient T. R. Respondent filed an election of rights disputing the allegations of fact contained in the Administrative Complaint and petitioning for a formal administrative hearing before an Administrative Law Judge (ALJ) appointed by the Division of Administrative Hearings (DOAH). The case was forwarded to the DOAH and Judge Susan Kirkland was initially assigned this cause. The case was set for hearing and discovery followed.

On September 10, 2001, Petitioner moved for a continuance of the hearing date, which the ALJ granted and a new date was set. This matter as then transferred to the undersigned ALJ for hearing.

On October 9, 2001, Petitioner moved for official Recognition of Sections 458.329 and 458.331, Florida Statutes, and Rules 64B8-9.008 and 64B8-8.001, Florida Administrative Code, and also moved for Official Recognition of the Final Order

in Department of Health v. Zafar S. Shah, M.D., Case No. 2000-00502, Final Order dated April 10, 2001, both motions were granted by Order dated October 18, 2001.

On October 17, 2001, Respondent filed a Motion to Dismiss, asserting that the allegations were based upon an unconstitutional rule, to which Petitioner responded on October 19, 2001.

The parties presented an oral Prehearing Stipulation immediately prior to the commencement of hearing. At the commencement of the hearing, argument regarding the Motion to Dismiss was heard and the ruling on the Motion was reserved, permitting the parties to present further argument in their proposed recommended orders, following the presentation of evidence. Subsequent to the hearing, Respondent filed a Petition to Challenge Existing Rule. Said case is designated Zafar Shah, M.D. vs. Department of Health, Board of Medicine, DOAH Case No. 01-4323RX. The Final Order in said cause has been issued on this date.

At the hearing, Joint Exhibit 1, patient medical records, was accepted by stipulation. Petitioner presented the testimony of Patient T. R. and of Maria Rodriguez. Respondent testified in his own behalf. At the conclusion of the hearing, the parties agreed to a deadline of 30 days after the filing of the transcript to file proposed recommended orders. The request was

granted. The Transcript was filed on January 7, 2002, and, after the Transcript was filed, Petitioner moved to extend the time to file proposed recommended orders and Respondent did not object. The motion was granted and March 4, 2002, was set for their submission. Petitioner filed its Proposed Recommended Order on March 4, 2002, and Respondent filed his proposals on March 5, 2002. Each have been given careful consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent is and has been at all times material hereto a licensed medical physician in the State of Florida, having been issued license number ME 0071706.

2. Respondent is Board-certified in Internal Medicine.

3. On or about October 20, 1996, Respondent began his employment at Midtown Clinic (Midtown) in Zephyrhills, Florida, as a physician. Another physician Dr. Ghani, owned and operated Midtown. At that time, Respondent and Ghani were the only physicians working at Midtown; there had been several other doctors employed at Midtown prior to Respondent's employment. An office administrator, medical assistants (MAs) and other staff also worked at Midtown in 1996.

4. T. R. worked as a medical assistant at Midtown, from 1994 until 1998. In 1996, T. R. was 28 years old, married, and the mother of five children.

5. Employees at Midtown routinely received their primary medical care from one of the physicians employed at Midtown. Employees saw doctors at Midtown because they could not easily take time off to go elsewhere. Employees would see whichever doctor was not busy at the time. In addition, Midtown had an insurance plan for its employees and the doctors employed there could bill for their services.

6. As the newest physician, Respondent did not have as many patients as Dr. Ghani, so Respondent saw most new patients; and when Dr. Ghani was busy, Respondent saw employees who were generally treated by Dr. Ghani. Employees did not make appointments to be seen by a doctor at Midtown for medical care. However, employees had charts at Midtown, which contained information on medical care provided to them.

7. On October 31, 1996, the employees of Midtown dressed in Halloween costumes. T. R. dressed as a gypsy, with a red skirt, her hair pulled back in a red bandana, and carried a crystal ball. Respondent complimented T. R. several times, telling her that she looked good in red and that red was her color. In the following weeks, Respondent began to make special efforts to attract T. R.'s attention. In early December 1996, on a bet with another employee, T. R. approached Respondent in the office and she asked if he had feelings for her. Respondent replied in the affirmative.

8. After Respondent voiced his affection for T. R., they began to flirt with each other at the clinic. However, this conduct remained limited to the offices of Midtown and did not occur outside the clinic until February of 1997.

9. T. R. testified that her marriage was experiencing problems in late 1996 and early 1997; her husband often worked late at night and worked long hours in general. T. R. talked to Respondent about her marital problems and she found Respondent to be a good listener. Respondent made T. R. feel better in general and raised her self-esteem.

10. Although the witnesses' testimonies are conflicting, the most credible testimony is that T. R. and Respondent first had sex at his apartment shortly before Valentine's Day 1997. In the ensuing months, the relationship between Respondent and T. R. continued. Respondent and T. R. spent more time together, going shopping, going out to eat and playing tennis; and they frequently had sex during this period. The affair ended, sometime prior to August 20, 1997.

11. After the affair ended, Respondent began spending time with T. R.'s entire family, including her husband C. R. He and C. R. began playing tennis together. Respondent would visit the family in their home, and they would come to his home. Toward the end of 1997, the entire family would stay at his residence

in Tampa on weekends, and he would stay at their home on Thursday nights. This continued into 1998.

12. On or about August 20, 1997, T. R. came to the clinic feeling ill; either Dr. Ghani or Respondent ordered a complete blood count and laboratory studies for T. R. MAs at Midtown are not authorized to draw blood for lab tests without an order from a physician. Another MA, Maria Rodriguez, drew the blood from T. R. for submission to the lab. Prior to drawing the blood from T. R., Ms. Rodriguez confirmed from one of the doctors the doctor's order to draw the blood. Ms. Rodriguez sent the blood drawn from Patient T. R. to the lab. Respondent reviewed the report of the lab results when it came back the next day, and prescribed sample medications to treat Patient T. R.

13. On October 8, 1997, Patient T. R. presented to Respondent at Midtown. Respondent listened to her chest with a stethoscope and his preliminary diagnosis was that T. R. had a heart murmur. Respondent told Patient T. R. that he thought that she had Mitral Valve Prolapse. On October 8, 1997, Respondent ordered an echocardiogram (ECG) for Patient T. R. and wrote out and signed a prescription for her to receive it.

14. On October 9, 1997, Dr. Ahmed issued his report on the results of the ECG. Respondent reviewed the report, along with Dr. Ghani. Both physicians told Patient T. R. that she had Mitral Valve Prolapse.

15. There is no credible evidence that Respondent rendered medical services to T. R. prior to August 20, 1997.

16. The more persuasive evidence indicates that Dr. Ghani was T. R.'s primary care physician from 1994 until her termination at Midtown in 1998.

17. The evidence is not clear and convincing that Respondent exercised influence within a patient-physician relationship for the purpose of engaging a patient in sexual activity.

18. The evidence is not clear and convincing that Respondent violated a provision of Chapter 458, Florida Statutes, or a rule of the Board or Department by engaging in a sexual relationship with Patient T. R.

19. Respondent has been the subject of previous disciplinary action by the Florida Board of Medicine. In Department of Health v. Zafar S. Shah, M.D., Case No. 2000-00502, Final Order, dated April 10, 2001, the Board of Medicine revoked Respondent's license to practice medicine based upon Respondent's failure to practice medicine with that level of care, skill, and treatment which is recognized as being acceptable under similar conditions and circumstances. This case has recently been remanded to the Board following an appeal to the First District Court of Appeal.

CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction of the parties and the subject matter pursuant to Sections 120.569 and 120.57(1), Florida Statutes, and Section 456.073, Florida Statutes.

21. Petitioner has jurisdiction over Respondent's license pursuant to Section 20.43 and Chapters 456 and 458, Florida Statutes.

22. The burden of proof in this matter 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). Petitioner, having filed the Administrative Complaint, has the burden of proof in this proceeding. To meet its burden, Petitioner 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).

23. Section 458.331(1)(j) and (x), Florida Statutes, provides in pertinent part, as follows:

> 458.331 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.

* * *

(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 or failing to comply with a lawfully issued subpoena of the department.

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

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 outside the scope of generally accepted examination or treatment of the patient. Sexual misconduct in the practice of medicine is prohibited.

25. Rule 64B8-9.008, Florida Administrative Code, provides in pertinent part:

64B8-9.008 Sexual Misconduct--

(1) Sexual contact with a patient is sexual misconduct and is a 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 it is not limited to:

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

1. may reasonably be interpreted as romantic involvement with a patient regardless of whether such involvement occurs in the professional setting or outside of it;

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.

26. Section 458.331(1)(j), Florida Statutes, contains a statutory presumption. Therefore, the Florida Evidence Code is applicable.

27. Section 90.301(2), Florida Statutes, provides: "Except for presumptions that are conclusive under the law from which they arise, a presumption is rebuttable." Rebuttal presumptions are classified in Section 90.302, Florida Statutes, as either:

(1) A presumption affecting the burden of producing evidence and requiring the trier of fact to assume the existence of the presumed fact, unless credible evidence sufficient to sustain a finding of nonexistence of the presumed fact is introduced, in which event, the existence or nonexistence of the presumed fact shall be

> determined from the evidence without regard to the presumption, or
>
> (2) A presumption affecting the burden of proof that imposes upon the party against whom it operates the burden of proof concerning the nonexistence of the presumed fact.

28. Section 90.303, Florida Statutes, provides:

> In a civil action or proceeding, unless otherwise provided by statute a presumption established primarily to facilitate the determination of the particular action in which the presumption is applied, rather than to implement public policy, is a presumption affecting the burden of producing evidence.

29. Section 90.304, Florida Statutes, provides: "In civil actions, all rebuttal presumptions which are not defined in s. 90.303 are presumptions affecting the burden of proof."

30. The statutory presumption contained in Section 458.331(1)(j), Florida Statutes, involves a statement of public policy which is further expressed in Section 458.329, Florida Statutes, above quoted. Therefore, it is the type of presumption described in Section 90.304, Florida Statutes, viz., a statutory presumption affecting the burden of proof. As stated by the court in Department of Agriculture and Consumer Services v. Bonnano, 568 So. 2d 24, 31 (Fla. 1990):

> When a presumption shifts the burden of proof, the presumption remains in effect even after evidence rebutting the presumption has been introduced and the jury must decide if the evidence is sufficient to

> overcome the presumption. (citation omitted.) Presumptions which shift the burden of proof in civil proceedings are primarily expressions of public policy.

The rebuttable presumption imposes upon the party against whom it operates the burden of proof concerning the nonexistence of the presumed fact. Section 90.304, Florida Statutes, and Jennings v. Dade County, 589 So. 2d 1337 (Fla. 3rd DCA 1991).

31. In Bonnano the court cited with approval Caldwell v. Division of Retirement, 372 So. 2d 438 (Fla. 1979), which involved a statutory presumption that the disability occasioned to a firefighter, who suffered a heart attack while on duty, was incurred in the line of duty. In Caldwell the court stated at 372 So. 2d 441:

> The statutory presumption is the expression of a strong public policy which does not vanish when the other party submits evidence. Where the evidence is conflicting, the quantum of proof is balanced and the presumption should prevail. This does not foreclose the employer from overcoming the presumption. However, if there is evidence supporting the presumption the employer can overcome the presumption only by clear and convincing evidence.

See City of West Palm Beach v. Burbaum, 632 So. 2d 145 (Fla. 1st DCA 1994); Jones v. Crawford, 552 So. 2d 926 (Fla. 1st DCA 1989) (simply submitting evidence creating a conflict did not rebut the presumption).

32. The Florida Legislature has repeatedly demonstrated how it authorizes the use of presumptions in administrative proceedings when it intends a supervising agency to rely on legal presumptions as establishing grounds for disciplinary sanctions against a licensee. McDonald v. Department of Professional Regulation, Bd. of Pilot Com'rs, 582 So. 2d 660 (Fla. 1st DCA 1991)(citing, among other statutes, Section 458.331(1)(j), Florida Statutes). Such statutorily authorized presumptions may be applied in administrative proceedings to carry the agency's burden of proof, see, e.g., Caldwell v. Division of Retirement, 372 So. 2d 438 (Fla. 1979), and may be relied on in agency disciplinary cases to meet the clear and convincing evidence standard, see, e.g., Ayala vs. Department of Professional Regulation, 478 So. 2d 1116 (Fla. 1st DCA 1985).

33. Respondent asserts that Patient T. R. was Dr. Ghani's patient and was never his patient. He asserts that a patient-physician relationship never existed between him and Patient T. R. In Agency for Health Care Administration, Board of Medicine vs. Philip William Lortz, M.D., DOAH Case No. 96-0793 (Final Order dated October 30, 1996), the Board of Medicine adopted Judge Hood's conclusion that a physician/patient relationship is established when a physician reviews medical examination paperwork and performs a physical examination in a patient's home. In Department of Professional Regulation, Board

of Medicine vs. Archbold N. Jones, M.D., DOAH Case No. 90-3591 (Final Order dated November 29, 1990), the Board adopted Judge Parrish's conclusion that a physician practices medicine when he phones in a prescription for a patient.

34. As in Jones and Lortz, the evidence in this case establishes that Respondent: most likely ordered the blood test August 20, 1997, reviewed the report of the lab results the next day, and prescribed sample medications to treat Patient T. R. Respondent thereby engaged in the practice of medicine with Patient T. R. and established a physician-patient relationship with her at that time. In addition, Respondent examined Patient T. R. at Midtown on October 8, 1997; discovered a heart murmur; prescribed a diagnostic test to evaluate this condition; and evaluated the results of that test with Dr. Ghani, thereby engaging in the practice of medicine, and re-establishing Patient T. R. as a patient.

35. Petitioner's burden of proof in this case is to demonstrate, by clear and convincing evidence, that (Count One) Respondent exercised influence within a patient-physician relationship for purposes of engaging Patient T. R. in sexual activity and, that (Count Two) Respondent violated the physician-patient relationship by committing sexual misconduct, resulting in violation of Section 458.329, Florida Statutes, and the Board of Medicine Rule prohibiting sex with patients.

36. The evidence is clear and convincing that Respondent and Patient T. R. had sex beginning in February of 1997 and that the relationship terminated prior to August 20, 1997. The testimony of Patient T. R. and Maria Rodriguez is not credible that the sexual activity continued between Respondent and Patient T. R. after the physician-patient relationship was established. Since the evidence is not credible that sexual activity occurred between Respondent and Patient T. R. during the physician-patient relationship, the presumption that Patient T. R. was incapable of giving free, full, and informed consent to sexual activity with Respondent never arose, and, if it did arise, it has been overcome. City of Temple Terrace v. Barley, 481 So. 2d 49 (Fla. 1st DCA 1985). The evidence in clear and convincing that, under the facts and circumstances of this case, the sexual activity between Respondent and T. R. did not result from improper exploitation or abuse of authority and trust.

37. Further, Petitioner did not present clear and convincing evidence that Respondent used the physician-patient relationship to induce or attempt to induce T. R. to engage, or attempt to engage, in sexual activity outside the scope of the practice or to outside the scope of generally accepted examination or treatment of the patient, as required by Section 458.329, Florida Statutes.

RECOMMENDATION

Based upon the foregoing, it is hereby

RECOMMENDED that the Department of Health, Board of Medicine adopt the foregoing Findings of Fact and Conclusions of Law, and enter a final order dismissing the Administrative Complaint.

DONE AND ENTERED this 19th day of March, 2002, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
Administrative Law Judge
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Filed with the Clerk of the
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this 19th day of March, 2002.

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.