STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

AARON B. ROUSH, M.D.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 02-0145
	)	
DEPARTMENT OF HEALTH, BOARD OF MEDICINE,	)	
	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the administrative hearing of this case on March 20, 2002, in Winter Haven, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: J. Davis Connor, Esquire
Peterson & Myers, P.A.
Post Office Drawer 7608
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For Respondent: Lee Ann Gustafson, Esquire
Office of the Attorney General
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STATEMENT OF THE ISSUE

The issue in the case is whether the conditions that Respondent imposed on Petitioner's license as a physician violate Sections 458.301, 458.311(5) and (8), and 458.331(1)(c),

(s), and (2), Florida Statutes (2001). (All section references are to Florida Statutes (2001) unless otherwise stated.)

PRELIMINARY STATEMENT

On December 18, 2001, the Department of Health, Board of Medicine ("the Board"), issued its Order licensing Petitioner to practice medicine in the state. However, the Board imposed certain conditions on the license that require Petitioner to undergo psychiatric monitoring, counseling, and treatment for two years pursuant to a mandatory Physician's Recovery Network (PRN) contract. Petitioner timely requested an administrative hearing to challenge the imposition of conditions on his license.

At the hearing, Petitioner presented the testimony of eight witnesses and submitted one exhibit for admission into evidence. Respondent presented the testimony of one witness and submitted one joint composite exhibit with Petitioner for admission into evidence. The identity of the witnesses and exhibits, and any attendant rulings, are set forth in the Transcript of the hearing filed on April 4, 2002.

On April 2, 2002, Petitioner filed and served his request for official recognition of certain excerpts of the Florida Administrative Weekly relating to noticed meetings of the Board. The request for official recognition is granted.

By Order dated April 15, 2002, the ALJ granted an Agreed Motion for Extension of Time to File Proposed Recommended Orders by May 1, 2002. Petitioner timely filed his Proposed Recommended Order (PRO) on April 17, 2002. Respondent timely filed its PRO on May 1, 2002.

FINDINGS OF FACT

1. Petitioner is a licensed physician in Florida. The Board licensed Petitioner on December 20, 2001.

2. The Board imposed several conditions on Petitioner's license pursuant to a mandatory PRN contract. In relevant part, the conditions require Petitioner to undergo psychiatric monitoring, counseling, urinalysis, and treatment for two years.

3. The Board must exercise any specific statutory authority to impose conditions on Petitioner's license in a manner that implements the legislative purpose and intent for the act expressed in Section 458.301. Section 458.301 provides, in relevant part:

> The Legislature recognizes that the practice of medicine is potentially dangerous to the public if conducted by unsafe and incompetent practitioners. . . . The primary legislative purpose in enacting this chapter is to ensure that every physician practicing in this state meets minimum requirements for safe practice. It is the legislative intent that physicians who fall below minimum competency or who otherwise present a danger to the public shall be prohibited from practicing in this state.

4. Section 458.301 essentially prescribes two purposes for the imposition of conditions on Petitioner's license. The conditions must address either the minimum requirements for competency or some danger to the public.

5. Respondent does not contend that Petitioner is incompetent or falls below the minimum competency required to practice medicine in the state. Respondent stipulates that Petitioner meets the minimum competency requirements for licensure.

6. The conditions imposed by the Board on Petitioner's license must implement the remaining legislative purpose in Section 458.301. The conditions must ensure that Petitioner is not a danger to the public.

7. If Petitioner were a person "who otherwise present[s] a danger to the public," irrespective of the conditions on his license, Section 458.301 does not state that the legislature intends for the Board to impose conditions on Petitioner's license. Rather, Section 458.301 provides that Petitioner "shall be prohibited from practicing in this state." (emphasis supplied) Therefore, the conditions imposed on Petitioner's license must be reasonably necessary to ensure that Petitioner is not a danger to the public.

8. Petitioner may prevail in this case through two alternative courses. Petitioner may show that he is not a

danger to the public and that the conditions imposed on his license do not implement any relevant legislative purpose in Section 458.301. If Petitioner were unable to show that he is not a danger to the public in the absence of a conditional license, Petitioner may prevail by showing that the specific conditions imposed on his license are not rationally related to the potential danger and, therefore, do not implement any relevant legislative purpose in Section 458.301.

9. Respondent relies on Sections 458.311(5) and 458.331(2) as the specific statutory authority to impose conditions on Petitioner's license. For reasons stated in the Conclusions of Law, Section 458.311(5) is the relevant legal authority for the conditions at issue in this case.

10. Respondent relies on the last sentence of Section 458.311(5) and Section 458.311(8) to impose conditions on Petitioner's license. The last sentence in Section 458.311(5) states:

> When the board finds that an individual has committed an act or offense in any jurisdiction which would constitute the basis for disciplining a physician pursuant to s. 458.331, then the board may enter an order imposing one or more of the terms set forth in subsection (8).

Section 458.311(8)(c), in relevant part, authorizes the Board to impose:

> . . . such conditions as the board may specify, including, but not limited to, requiring the physician to submit to treatment . . . .

11. Respondent alleges that Petitioner committed an act or offense that constitutes a basis for disciplining Petitioner pursuant to Section 458.331(1)(c) and (s). Section 458.331(1) provides, in relevant part, that the following acts constitute grounds for disciplinary action:

> (c) Being convicted or found guilty of, or entering a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which directly relates to the practice of medicine or to the ability to practice medicine.
>
> * * *
>
> (s) Being unable to practice medicine with reasonable skill and safety to patients by reason of illness or use of alcohol . . . or as a result of any mental . . . condition.

12. On June 1, 1997, a law enforcement officer arrested Petitioner in the Ybor City district of Tampa, Florida, for driving under the influence of alcohol (DUI). On November 23, 1997, law enforcement personnel charged Petitioner with misdemeanor assault in Hillsborough County. The Hillsborough County State Attorney dismissed the DUI charge, and the court found Petitioner guilty of assault.

13. Neither the DUI charge nor the assault conviction are directly related to either the practice of medicine or the ability to practice medicine within the meaning of Section 458.331(1)(c). Neither incident has adversely affected Petitioner's treatment of his patients.

14. Petitioner entered the residency program in general surgery at the University of South Florida College of Medicine (USF) on July 1, 1996, and completed the program on June 30, 2001. The DUI charge and assault conviction occurred approximately 12 and 17 months, respectively, after Petitioner entered the residency program. After the last incident on November 23, 1997, Petitioner successfully completed the remaining 43 months of the five-year residency program at USF. Of the six medical graduates who entered the residency program on July 1, 1996, Petitioner was the only entrant to successfully complete the program. During the residency program, Petitioner worked between 100 and 164 hours a week and safely completed approximately 1,336 operative procedures without endangering any of his patients. After successfully completing the residency program and obtaining his license to practice, Petitioner has worked at the Gessler Clinic in Winter Haven, Florida. Petitioner has safely completed an average of 100 surgeries a week without endangering any of his patients.

15. The DUI charge and assault conviction are isolated incidents. The surrounding facts and circumstances do not show that either incident is directly related to either the practice of medicine or the ability to practice medicine.

16. The arresting officer in the DUI charge failed to procure any sample of either breath or blood to indicate Petitioner's blood alcohol level. Petitioner requested law enforcement personnel to test his blood alcohol level. The Hillsborough County State Attorney's office dismissed the case by Nolle Prosequi.

17. Respondent stipulates that Petitioner is not a substance abuser. The requirement in the PRN for urinalysis is not rationally related to any potential danger to the public from substance abuse and therefore exceeds the scope of legislative intent in Section 458.301.

18. On November 23, 1997, law enforcement personnel charged Petitioner with misdemeanor assault in Hillsborough County. The charge arose out of a verbal altercation between Petitioner and another motorist in Tampa, Florida, approximately six months earlier in May, 1997. The motorist "cut-off" Petitioner on his motorcycle while Petitioner was on a date with his girlfriend. At the next intersection, Petitioner and the motorist exchanged loud verbal insults. No physical violence

was involved, and the participants were separated at all times by a lane of traffic.

19. Petitioner appeared for trial of the assault charge on March 4, 1998, without a lawyer. Petitioner failed to call his principal witness, lost the case, and was convicted of misdemeanor assault. The court placed Petitioner on probation for a period of three months. Petitioner successfully completed the probation on June 1, 1998.

20. Neither the DUI charge nor the assault conviction evince a potential danger to the public from the practice of medicine within the meaning of Section 458.301. Any condition on Petitioner's license based on the DUI charge and assault conviction exceed the scope of legislative intent in Section 458.301.

21. Neither the DUI charge nor the assault conviction is an act or offense which would constitute the basis for disciplining Petitioner within the meaning of Section 458.311(5). Neither incident is directly related to the practice of medicine or the ability to practice medicine within the meaning of Section 458.331(1)(c).

22. Respondent alleges that Petitioner is unable to practice medicine with reasonable skill and safety to patients within the meaning of Section 458.331(1)(s). Respondent stipulates that Petitioner is not an alcohol or substance

abuser, but claims that Petitioner has a mental condition that renders him unable to practice medicine with reasonable skill and safety to patients.

23. Petitioner does not have a mental condition that renders him unable to practice medicine with reasonable skill and safety to patients within the meaning of Section 458.331(1)(s). As previously found, Petitioner was the only one of six entrants to successfully complete the USF residency program. During that time, Petitioner safely completed approximately 1,336 operative procedures and, in private practice, now safely completes approximately 100 operative procedures each week.

24. As part of the PRN contract, Dr. James Edgar performed a psychiatric evaluation of Petitioner and issued a written report to Dr. Raymond Pomm, M.D., Director of the PRN program, on October 15, 2001. Petitioner is "capable of practicing with reasonable skill and safety from a psychiatric perspective." Petitioner "shows no evidence of an Axis I psychiatric disorder, no cognitive impairment and no gross problem with reality testing, no sense of delusional thinking, excessive self-absorption, etc."

25. The most striking findings of the clinical examination and psychological testing by Dr. Edgar are rather strong narcissistic and histrionic traits. Although these traits

exhibit psychological dysfunction of a mild to moderate severity, the traits do not reach the level of a narcissistic or histrionic personality disorder. There is no adequate basis to recommend psychotherapy for Petitioner.

26. The PRN contract requires Petitioner to attend regular sessions of psychotherapy with Dr. Kevin Kindelan, a professional psychologist. Dr. Kindelan testified at the administrative hearing. There is no reason for the psychotherapy that Dr. Kindelan provides. Petitioner has no psychological problems.

27. Dr. Pomm is the Director of the PRN program. He is responsible for its successful implementation. Dr. Pomm testified at the administrative hearing.

28. Dr. Pomm concluded that Petitioner is a "disruptive physician." The PRN contract that is a condition of Petitioner's license is a "disruptive physician" contract.

29. The term "disruptive physician" is not defined by statute or any rule that the Board has adopted in accordance with the rulemaking procedures prescribed in Section 120.54. However, the Board's use of the term as a basis for imposing conditions on physician licenses satisfies the statutory definition of a rule in Section 120.52(15).

30. The Board's use of the term "disruptive physician" as a ground for imposing conditions on physician licenses is an

agency statement. The substance of the statement is that disruptive physicians have a mental condition, within the meaning of Section 458.331(1)(s), that renders them unable to practice medicine with reasonable skill and safety to patients and requires the imposition of conditions on their license authorized in Section 458.311(5) and (8).

31. The agency statement satisfies the statutory requirement in Section 120.52(15) for general applicability. Since 1998, the Board has consistently applied the agency statement in approximately 200 cases, with the force and effect of law, as the sole basis for placing physicians under PRN contracts as "disruptive physicians." The Board has applied the agency statement concerning "disruptive physicians" in every case in which the physician has no chemical dependency or Axis I diagnosis but exhibits behavior that others have found problematic. In each case when a PRN contract has been required, the PRN program has obtained an evaluation from a competent evaluator such as Dr. Edgar.

32. The agency statement concerning "disruptive physicians" implements, interprets, or prescribes the law enacted by the legislature in Section 458.331(1)(s). The Board interprets and implements the term "mental condition" in Section 458.331(1)(s) to mean "disruptive physician." The agency statement does not satisfy the requirements for any of the

exceptions to the definition of a rule in Section 120.52(15)(a)-(c).

33. The Board has not adopted its "disruptive physician" rule in accordance with the rulemaking procedures prescribed in Section 120.54. Agency action based on an unadopted rule concerning "disruptive physicians" determines the substantial interests of Petitioner.

34. Any agency action that relies on an unadopted rule to determine the substantial interests of a party must satisfy the requirements of Section 120.57(1)(e)2. In relevant part, the agency must demonstrate that the unadopted rule:

> c. Is not vague, establishes adequate standards for agency decisions, or does not vest unbridled discretion in the agency; [and]
>
> f. Is supported by competent and substantial evidence.

35. The unadopted rule is vague and fails to establish adequate standards for agency decisions within the meaning of Section 120.57(1)(e)2c. The Board has never defined the term "disruptive physician." Nor can the Board list any criteria to determine who is a "disruptive physician."

36. There is no psychiatric or psychological definition of the term "disruptive physician." Dr. Pomm actually coined the term. Dr. Pomm defines a "disruptive physician" as:

> One whose behavior has been such to interfere with a healthcare team's ability to safely afford medical care to patients.

The definition effectively equates behavior with the "mental condition" in Section 458.331(1)(s). Dr. Pomm has related this definition to the Board, and the Board concurs with it.

37. No written criteria exist for determining who falls under the Board's definition of "disruptive physician." Rather, the term describes a "general cadre of repetitive behaviors" or "behavior patterns." The Board cannot provide a complete list of behaviors. Moreover, it is not possible to state to what degree a certain behavior, i.e., yelling or arguing, must be demonstrated to satisfy the definition of a "disruptive physician." While "narcissistic personality traits" are associated with "disruptive physicians," those traits are not a sufficient indicator because they can also be associated with proper behaviors.

38. The lack of objective criteria and the resulting uncertainty surrounding the determination of who is, or is not, a "disruptive physician" leaves the ultimate determination largely to the discretion of Dr. Pomm as the Director of the PRN program. Dr. Pomm admitted that there is substantial imprecision and lack of specificity in defining the term "disruptive physician."

39. The agency statement that Petitioner is a "disruptive physician" is not supported by competent and substantial evidence within the meaning of Section 120.57(1)(e)2f. Even if it were determined that the agency statement is not a rule, within the meaning of Section 120.52(15), but is emerging agency policy, Respondent failed to explicate the emerging policy with competent and substantial evidence.

40. Dr. Pomm did not examine or evaluate Petitioner. Rather, Dr. Pomm relied on excerpts of the written report by Dr. Edgar, the DUI and assault incidents, and evaluations of Petitioner by the chief residents and attending physicians in the residency program at USF. However, Dr. Pomm testified that the DUI and assault incidents alone were inadequate to support a determination that Petitioner is a "disruptive physician."

41. As previously found, Petitioner has no psychiatric or psychological disorder that renders him unable to practice medicine with reasonable skill and safety to patients. However, Dr. Edgar stated in his written report to Dr. Pomm:

> The closest I can come to placing him in a category that PRN deals with regularly is possible "disruptive physician."

42. Dr. Pomm considered adverse evaluations from Petitioner's supervising physicians during the residency program at USF. Testimony at the hearing identified the physicians as: Drs. Back, Beaver, Carey, Cox, Fabri, Flint, Grossbard, Johnson,

Mendez, Novitsky, Rodriquez, Rosemurgy, and Wright. Although Petitioner successfully completed the residency program, Dr. Pomm considered the adverse evaluations as evidence that Petitioner's behavior interfered with the ability of the medical teams to safely afford medical care to patients.

43. On May 19, 1997, Petitioner rotated in the cardiac service and worked over 100 hours a week. Petitioner had a disagreement with two attending physicians as to the advisability of their patient orders. There was no violent or improper conduct associated with these disagreements, and the physicians did not complain about the disagreements.

44. Petitioner's advisor met with him in May 1997 to discuss poor evaluations of Petitioner on the cardiac service due to a "dustup" with two attending physicians. Petitioner's advisor explained that the perception by the attending physicians was that Petitioner was less than enthusiastic when he was on a service that he did not enjoy and that he needed to be more attentive to his responsibilities. On May 15, 1998, Dr. Wright noted that Petitioner needed to "work on his interpersonal skills."

45. On February 3, 1999, Dr. Fabri, Chief of Surgery at the Tampa V.A. Hospital, advised Petitioner that, due to his failure to dictate two operative reports, Dr. Fabri would suspend Petitioner's operative privileges until Petitioner

dictated the reports. However, the threatened suspension never occurred. Rather, Dr. Fabri routinely used such notices to residents as a means of getting past-due operative reports dictated.

46. On April 2, 1999, Dr. Mendez observed that Petitioner needed to "learn to be more of a team player." Dr. Beaver observed that Petitioner was "[v]ery irreverent; actions unprofessional." Dr. Novitsky stated that Petitioner needed a lot of improvement "mainly in the attending-resident relationship." Dr. Novitsky gave as an example Petitioner leaving the OR during a heart surgery without the approval of the attending physician. However, no evidence showed that Petitioner's departure from the operating room interfered with the ability of the health team to safely afford medical care to a patient.

47. In July 1999, Petitioner's supervising physician advised him to meet with his advisors every four to six weeks. The directions constituted official policy. However, Petitioner failed to meet with his advisors for months.

48. The failure of Petitioner to meet with his advisors was not a volitional choice by Petitioner. Rather, the busy schedules followed by Petitioner and his advisors at several hospitals in the Tampa area prevented them from meeting with each other regularly. During the five-year residency program,

Petitioner performed approximately 1,336 surgical procedures; or approximately one surgical procedure every 1.3 days. During the same period, the chief residents that supervised Petitioner maintained a caseload of approximately 1,800 to 2,500 patients. The caseloads were spread between several area hospitals. Petitioner chose the residency program at USF based on his belief that the program provides the most extensive clinical and surgical experience available in a residency program.

49. An evaluation on August 16, 1999, includes the comment from Dr. Cox that Petitioner was, "[p]leasant, assertive, but sometimes misdirected. Asking questions before engaging in decisions would be well advised." An evaluation dated January 3, 2000, included comments by Dr. Back that Petitioner was "[u]nreliable, avoids responsibility, poor work effort . . . [Petitioner] should not be promoted further in this program." Dr. Mendez found that "[Petitioner] needs to work on organization, communication and accountability." Dr. Rodriquez noted that "[Petitioner] lacks judgment and common sense and is below part [sic] in fund of knowledge."

50. An evaluation dated October 2, 2000, contains several adverse comments. Dr. Fabri states that Petitioner, "Can be very good when he wants to be." Dr. Grossbard states, "I wish there were a way to redirect his energy into surgery which is clearly in second place." Dr. Mendez states, "[Petitioner]

. . . is lacking in organizational skills and does not seem to take ownership of the service." Dr. Rodriquez states, "[Petitioner] has shown some improvement but still has a long way to go." Dr. Back states, "Not present for most operative cases and not involved in details of patient care. He is not fulfilling duties of chief resident." Dr. Johnson states, "Should not be allowed to perform vascular surgery when he graduates."

51. On November 12, 2000, Petitioner's assessment of a patient with bowel obstruction was questioned by Dr. Flint, the attending physician. Dr. Flint accused Petitioner of misrepresenting an assessment. In response, Petitioner had his assessment verified by another attending physician. Dr. Flint became abusive of Petitioner and, during the incident, Petitioner yelled at the attending nurse.

52. In correspondence dated November 14, 2000, Dr. Flint reported that Petitioner had been angry and insubordinate. Dr. Flint also reported that Petitioner had been abusive to a nurse. Petitioner admits that he was insubordinate to Dr. Flint and yelled at the nurse. However, the actions were integral to the provision of safe medical care to a patient during exigent circumstances.

53. On November 21, 2000, Petitioner's advisor met with him to discuss his poor performance on the trauma service.

Dr. Rosemurgy advised Petitioner he was "held in low regard by many." Dr. Rosemurgy noted in his report that Petitioner did not appear to realize how others perceived him, and appeared to choose not to see the shortcomings perceived by others. In a handwritten addendum, Dr. Rosemurgy expressed concern that Petitioner did not "hear" him and doubted that he would improve.

54. In an evaluation dated March 5, 2001, Drs. Fabri, Flint, Grossbard, Johnson, and Wright, rated Petitioner's communication skills as "below expectations." Drs. Back, Fabri, Flint, Grossbard, and Johnson rated Petitioner's interactions with staff as "below expectations." Drs. Back, Fabri, Flint, Grossbard, and Wright rated Petitioner's dependability as "below expectations."

55. On March 5, 2001, attending physicians made several negative comments in their evaluations. Dr. Flint stated Petitioner, "essentially abdicated the Chief resident function, misses rounds, avoid[s] the OR and does not teach." Dr. Back stated that Petitioner, "refuses to accept responsibility for patient care and management that is expected for residents at his level." Dr. Johnson stated that Petitioner, "should not practice Vascular surgery without supervision when he leaves this program." Dr. Fabri stated, "unfortunately, his personal interactions often get in the way."

56. The incidents underlying the evaluations of Petitioner during his residency program are competent and substantial evidence that Petitioner has narcissistic personality traits. Narcissistic personality traits include: self-absorption; haughtiness; arrogance; lack of empathy; lack of understanding actions towards others; and demanding and disrespectful behavior regardless of the impact on others.

57. The incidents underlying the evaluations of Petitioner during his residency program are not competent and substantial evidence that Petitioner satisfied Dr. Pomm's definition of a "disruptive physician." No evidence shows that Petitioner's behavior actually interfered with a healthcare team's ability to safely afford medical care to patients.

58. Dr. Pomm's definition of a "disruptive physician" does not identify a single behavior, in isolation, that interferes with the safe delivery of medical care. Rather, the continuum of behavior, or repetitive behavior is the safety issue. Therefore, in determining whether a physician's behavior impacts the safe delivery of medical care, it is important to view the individual's behavior over time. Over time and during stressful situations, narcissistic personality traits may manifest a cadre of behaviors that collectively interfere with the ability of a health care team to safely provide medical care to a patient.

59. When viewed over time, Petitioner's behavior has not interfered with the safe delivery of medical care to patients. The residency program at USF is one of the most stressful and difficult residency programs available. During the five-year residency program, Petitioner safely afforded medical care to patients in approximately 1,336 operative procedures. His behavior did not interfere with the ability of the chief residents in the program and attending physicians to maintain an average caseload of 1,800 to 2,500 patients and to safely deliver medical care to those patients. After leaving the residency program at USF, Petitioner has, over time, safely afforded medical care to patients in approximately 100 operative procedures each week.

60. There is competent and substantial evidence that the incidents underlying the adverse evaluations of Petitioner during the residency program represent either honest disagreement relating to patient care or ordinary academic discipline. While they may evince narcissistic personality traits by Petitioner, they do not evince behavior that interferes with the ability of health care teams to provide safe medical care to patients.

61. Several physicians who completed the residency program at USF testified at the hearing. The incidents underlying the adverse evaluations of Petitioner during the residency program

arose from difficulties inherent in the residency program itself and the conduct of chief residents and attending physicians toward residents. For example, Dr. Flint and certain other staff physicians in the residency program were generally disrespectful and abusive toward residents and other hospital staff.

62. Petitioner has been practicing general surgery in Winter Haven, Florida, with the Gessler Clinic. Petitioner's colleagues who practice regularly with him in surgery testified at the administrative hearing. Petitioner is not disruptive in his current practice. He does not engage in behavior that interferes with the ability of a health care team to safely afford medical care to patients.

63. The Board did not place any conditions on Petitioner's license as a result of the application submitted by Petitioner. However, Respondent's PRO raises certain issues surrounding the application that should be addressed in the interest of preserving a complete evidentiary record.

64. As Petitioner neared the successful completion of his residency, Petitioner filed his application for medical license with the Board on April 4, 2001. The Board made numerous requests for additional information. Petitioner answered all of those requests.

65. One of the questions answered by Petitioner during the application process was whether Petitioner had been placed on probation during any medical training program. Petitioner answered "No" to this question. Prior to providing the answer, Petitioner checked with administrators in the residency program who told Petitioner that the records did not disclose probation at any time during the residency program at USF. Personnel in the residency program confirmed to the Board that Petitioner had never been on probation. However, the information provided to both Petitioner and the Board was an administrative error. Petitioner was briefly on "academic probation" during the residency program.

66. Based on the misdemeanor assault conviction and the erroneous information provided by Petitioner concerning academic probation, the Board ordered Petitioner to: (a) file a corrected application; (b) pay a new application fee; (c) pay an administrative fine of $1000; and (d) submit to evaluation by PRN. Petitioner complied with all of these conditions, including a psychiatric evaluation through PRN which was conducted on October 15, 2001. Respondent stipulated at the administrative hearing that the Board does not contend that it imposed any condition on Petitioner's license as a result of any misrepresentations of fact on Petitioner's application for a license to practice medicine.

67. There are certain procedural issues for which findings of fact may be appropriate. Based in part upon Dr. Edgar's report, Dr. Pomm rendered his written report to the Board on October 22, 2001. Dr. Pomm adopted Dr. Edgar's conclusion that Petitioner is capable of practicing with "reasonable skill and safety." However, Dr. Pomm recommended that the Board place Petitioner on a "disruptive physician contract" with PRN.

68. In his written report to the Board, Dr. Pomm related Dr. Edgar's conclusion that Petitioner has "narcissistic personality traits." However, Dr. Pomm failed to include in his report the remainder of Dr. Edgar's statement that Petitioner did not have any identifiable Narcissistic Personality Disorder. Nor did Dr. Pomm include the conclusion by Dr. Edgar that Dr. Edgar did not recommend any form of psychotherapy for the Petitioner.

CONCLUSIONS OF LAW

69. DOAH has jurisdiction over the parties and subject matter of this proceeding. Section 120.57(1). The parties received adequate notice of the administrative hearing.

70. The parties stipulated at the outset of the administrative hearing to several matters. First, the only issue for resolution in this proceeding is whether the Board is authorized by Sections 458.301, 458.311(5) and (8), and Sections 458.331(1)(c) and (s) to impose conditions on Petitioner's

license. Second, Petitioner has otherwise fulfilled each of the other requirements for receiving a medical license found in Section 458.311. Finally, the Board does not contend that the challenged condition on Petitioner's license was imposed due to any misrepresentations of fact on Petitioner's license application.

71. Petitioner has the burden of proof in this proceeding. Astral Liquors, Inc. v. State, Department of Business Regulation, Division of Alcoholic Beverages and Tobacco, 432 So. 2d 93, 95 (Fla. 3d DCA 1983); Florida Department of Transportation v. J.W.C. Co., Inc., 396 So. 2d 778, 787 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349-351 (Fla. 1st DCA 1977). Petitioner must show by a preponderance of the evidence that he is entitled to an unconditional license. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932, 934 (Fla. 1996); Espinoza v. Department of Business and Professional Regulation, 739 So. 2d 1250, 1251 (Fla. 3d DCA 1999).

72. Petitioner satisfied his burden of proof. The preponderance of evidence shows that Petitioner did not commit an act or offense which would constitute the basis for disciplining a physician pursuant to Section 458.331(1)(c) or (s). The DUI offense and assault conviction do not directly

relate to either the practice of medicine or the ability to practice medicine within the meaning of Section 458.331(1)(c). Similarly, the preponderance of evidence shows that Petitioner does not have a mental condition that renders Petitioner unable to practice medicine with reasonable skill and safety to patients within the meaning of Section 458.331(1)(s).

73. In the absence of an offense or violation under Section 458.331(1)(c) and (s), the Board has no statutory authority in Section 458.311(5) to impose conditions on Petitioner's license. In the absence of evidence that Petitioner is a potential danger to the public, the conditions imposed on Petitioner's license exceed the scope of legislative intent in Section 458.301.

RECOMMENDATION

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

RECOMMENDED that the Department of Health, Board of Medicine, enter a final order granting Petitioner's application for licensure to practice medicine without condition.

DONE AND ENTERED this 23rd day of May, 2002, in Tallahassee, Leon County, Florida.

DANIEL MANRY
Administrative Law Judge
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Filed with the Clerk of the
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this 23rd day of May, 2002.

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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.