STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MEDICINE,	)	
Petitioner,	)	
vs.	)	Case No. 05-1640PL
PETER N. BRAWN, M.D.,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, in Key West, Florida, on July 27, 2005.

APPEARANCES

For Petitioner: Patrick L. Butler
Ephraim D. Livingston
Assistants General Counsel
Prosecution Services Unit
Office of General Counsel
Department of Health
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Tallahassee, Florida 32399-3265

For Respondent: Sean M. Ellsworth, Esquire
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Miami Beach, Florida 33139

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Peter N. Brawn, M.D., committed violations of Chapter 458, Florida Statutes, as alleged in an Administrative Complaint filed by Petitioner, the Department of Health, on January 21, 2004, in DOH Case Number 2002-15991; and, if so, what disciplinary action should be taken against his license to practice medicine in the State of Florida.

PRELIMINARY STATEMENT

On or about July 21, 2004, the Department of Health filed an Administrative Complaint against Peter N. Brawn, M.D., an individual licensed to practice medicine in Florida, before the Board of Medicine, in which it alleged that Dr. Brawn had committed violations of Sections 458.331(1)(m), (q), and (t), Florida Statutes (2001). Dr. Brawn disputed the allegations of fact contained in the Administrative Complaint and, on or about February 17, 2004, requested through counsel a formal administrative hearing pursuant to Section 120.569(2)(a), Florida Statutes (2004). On May 6, 2005, the matter was filed with the Division of Administrative Hearings with a request that an administrative law judge be assigned the case to conduct proceedings pursuant to Section 120.57(1), Florida Statutes (2004). The matter was designated DOAH Case Number 05-1640PL and was assigned to the undersigned.

The final hearing was scheduled by Notice of Hearing entered May 18, 2005, for July 13, 2005. By Order Granting Continuance and Re-Scheduling Hearing, Petitioner's ore tenus motion for a continuance of the final hearing was granted. The final hearing was rescheduled for July 27, 2005.

On July 14, 2005, a Joint Pre-Hearing Stipulation was filed by the parties. The Joint Pre-Hearing Stipulation contains, in relevant part, stipulated facts. Those facts have been included in this Recommended Order.

On July 20, 2005, a week before the hearing was scheduled to commence, Petitioner filed a Motion to Compel Response to Petitioner's Discovery and/or Restrict Respondent's Testimony. Argument on the Motion was heard at the commencement of the final hearing. That argument and the attendant rulings on the Motion are recorded in the Transcript of the final hearing.

At the final hearing, Petitioner presented the testimony of Keith Fisher, M.D., an expert in the medical specialty of pathology, and Evelyn Garrido-Morgan, an investigator for the Department of Health. Petitioner offered and had admitted Petitioner's Exhibits 2 through 4 and 6. Petitioner's Exhibit 5 was not admitted. Finally, a ruling was reserved on Petitioner's Exhibit 1, the Transcript of the July 12, 2005, deposition testimony of Douglas Lee Howard. The parties were

invited to address the admissibility of Petitioner's Exhibit 1 in their proposed orders. Petitioner's Exhibit 1 is admitted.

Petitioner also offered into evidence a single page from Respondent's prescription dispensing log. The page listed drugs dispensed on May 14, 2002. Rather than accept the document in evidence, which would have required that much of it be redacted to protect the confidentiality of patients, it was suggested that the parties stipulate that the log shows that Carisoprodol was dispensed by Dr. Brawn on May 14, 2002, to an individual by the name of J.T., whose last name ends in "r." Petitioner specifically agreed, while Respondent remained silent. Respondent's silence was taken as a tacit approval of the alternative to actually making the May 14, 2002, page of the log an exhibit. Should Respondent subsequently object to this treatment of the log, then the log should be accepted as Petitioner's Exhibit 6.

Respondent offered and had admitted one exhibit, his response to Petitioner's request for admissions.

A Notice of Filing of Transcript was issued August 8, 2005, informing the parties that the Transcript of the final hearing had been filed with the Division of Administrative Hearings on August 5, 2005, and that they had until August 19, 2005, to file proposed recommended orders. Petitioner filed a Proposed Recommended Order on August 19, 2005. Respondent filed his

Proposed Recommended Order on August 22, 2005. It appearing that Petitioner has not been prejudiced by Respondent having filed his proposed order three days late, the proposed orders of both parties have been fully considered in rendering this Recommended Order.

FINDINGS OF FACT

A. The Parties.

1. Petitioner, the Department of Health (hereinafter referred to as the "Department"), is the agency of the State of Florida charged with the responsibility for the investigation and prosecution of complaints involving physicians licensed to practice medicine in Florida. § 20.43 and Chs. 456 and 458, Fla. Stat. (2005).

2. Respondent, Peter N. Brawn, M.D., is, and was at the times material to this matter, a physician licensed to practice medicine in Florida, having been issued license number ME 75202.

3. Dr. Brawn is board-certified in pathology.

4. Dr. Brawn has not previously been the subject of a disciplinary proceeding in Florida.

5. Dr. Brawn's address at the times relevant to this proceeding was 525 Caroline Street, Key West, Florida 33040. His telephone number was (305) 292-1917.

B. Dr. Brawn's Prescription Dispensing Log of May 14, 2002.

6. Dr. Brawn's prescription dispensing log for May 14, 2002, indicates that Carisoprodol was dispensed to an individual whose initials are J.T. This individual's name is identical, except for the last letter of his last name, to Patient J.T., the patient at issue in the Administrative Complaint. The last letter of the individual listed in the log is "r" (hereinafter referred to as "J.Tr"), while the last letter of the patient in the Administrative Complaint is a "z" (hereinafter referred to as "J.Tz").

C. The Events of May 17, 2002.

7. On or about May 17, 2002, Douglas Lee Howard, a police officer with the police department of the City of Tustin, Orange County, California, was serving as a resource officer at Tustin High School.

8. Officer Howard was summoned to the assistant principal's office at approximately noon. When he arrived, he observed a student, J.Tz, who had been removed from his classroom, leaning against the wall, falling asleep. J.Tz is the same individual identified in the Administrative Complaint as Patient J.T. J.Tz was 16 years of age at the time of this incident. Officer Howard told J.Tz to go into the assistant principal's office and sit down. J.Tz complied, running into a

lobby counter and the office doorjamb on the way. When he attempted to sit, he sat on the arm of the chair, nearly tipping the chair over.

9. When asked if he had taken any drugs, J.Tz produced a white plastic medicine bottle (hereinafter referred to as the "Medicine Bottle"), from his pants pocket. The permanent manufacturer's label on the Medicine Bottle indicates that it contained 100 350 mg tablets of Carisoprodol, commonly referred to as "soma." This is the same medication which Dr. Brawn dispensed on May 14, 2002, to J.Tr.

10. Carisoprodol is a legend drug which acts as a muscle relaxer and is used for muscle strains. Physiologically, it causes drowsiness, dizziness, and loss of coordination or ataxia, all symptoms that were exhibited by J.Tz on May 17, 2002.

11. The Medicine Bottle also contained a printed label (hereinafter referred to as the "Added Label") which had been pasted onto it which included the following information:

Peter Nelson Brawn, M.D.
525 Caroline St. Key West Florida 33040
305.292-1917 1-888-491-4545

Patient Name J[] T[]
Date Dispensed 5/14/02
Name & Strength of Drug
Directions for Use 1 tablet 4X/day

The "Patient Name," "Date Dispensed," and "Directions for Use" had been written in ink on the Added Label.

12. The last name of the patient name written on the Added Label can be read as either J.Tz or J.Tr.

13. Officer Howard confiscated the Medicine Bottle from J.Tz. Officer Howard and a school nurse counted 84 pills remaining in the Medicine Bottle.

14. Officer Howard, after asking J.Tz where he had obtained the pills, called the toll-free telephone number listed on the Added Label, a number listed next to Dr. Brawn's name and his address and phone number of record. He spoke to an individual who identified himself as Peter Brawn. The individual he spoke with indicated that, while he had no record of dispensing any medication to J.Tz, he did have a record of having dispensed Carisoprodol to J.Tr on the date in question. The individual Officer Howard spoke with also indicated that J.Tr had reported his age to be 18. The information disclosed to Officer Howard was medical information which would not have been generally known by anyone other than Dr. Brawn.

15. Officer Howard had never spoken to Dr. Brawn and, therefore, could not have identified the individual he spoke to as Dr. Brawn through voice recognition.

16. Based upon the fact that the phone number Officer Howard called was listed on the Added Label next to Dr. Brawn's

name, address, and phone number, the fact that the individual identified himself as "Dr. Peter Brawn," and the fact that the individual disclosed medical information which Dr. Brawn was privy to, it is found that the individual Officer Howard spoke to was in fact Dr. Brawn.

16. Dr. Brawn explained to Officer Howard that he had prescribed the Carisoprodol to J.Tr after being contacted by him through two e-mails. Dr. Brawn admitted that he had not spoken to J.Tr and that he had not confirmed any medical history. Having not spoken to J.Tr, it is found that he also did not perform any physical examination of J.Tr.

17. Finally, given the foregoing, it is found that J.Tr and J.Tz are the same individual. It is, therefore, concluded that the J.Tr Dr. Brawn dispensed Carisoprodol to on May 14, 2002, is the Patient J.T. of the Administrative Complaint.

D. Medical Records.

18. Based upon the admissions against interest made by Dr. Brawn to Officer Howard during the May 17, 2002, telephone conversation Officer Howard testified about, it is found that Dr. Brawn, not having taken any medical history of J.Tr and not having given him an examination, did not make any medical record to support his dispensing Carisoprodol to Patient J.T. Without Dr. Brawn's admissions against interest, the evidence failed to prove that Dr. Brawn did not have medical records relating to

the medications he provided to J.Tr. No direct evidence, other than phone conversation, was presented that would support a finding that such records do not exist.

19. On or about February 27, 2003, the Department had served a subpoena on Dr. Brawn, through counsel, requesting the following:

> All medical records and reports for **J[] T[z], DOB . . .** including but not limited to, patient histories, examination results, treatments, x-rays, test results, records of drugs prescribed, dispensed, or administered, and reports of consultations and hospitalizations.

In the "Application Affidavit for Patient Records Subpoena Without Patient Release" which was used to get permission for serving the subpoena on Dr. Brawn, J.Tz is also referred to as "a/k/a Tr." Despite the Department's awareness of the possibility that J.Tz and J.Tr were the same individuals, the subpoena actually served on Dr. Brawn did not request any medical records or other information relating to J.Tr.

20. By letter dated March 12, 2003, Dr. Brawn, through counsel, informed the Department that he had "no medical records responsive to th[e] subpoena."

E. The Standard of Care.

21. Keith Fisher, M.D., accepted as an expert, testified convincingly and credibly that a reasonably prudent physician, similarly situated to Dr. Brawn, would, before dispensing

Carisoprodol, a legend drug: (a) obtain a complete medical history of the patient; (b) make a diagnosis, prepare a treatment plan for the patient, and keep a medical record for the patient; and (c) perform a physical examination of the patient to determine that the patient was truly in need of Carisoprodol.

22. Dr. Brawn failed to take any of the steps Dr. Fisher opined were necessary before dispensing Carisoprodol.

23. Dr. Brawn dispensed the Carisoprodol to Patient J.T. based upon two e-mails he received. He did not conduct any examination of Patient J.T. and he did not obtain a medical history of Patient J.T. These findings, again, are based upon the telephone conversation between Dr. Brawn and Officer Howard. Without those admissions, the evidence in this case failed to prove, however, that Dr. Brawn did not carry out the responsibilities described by Dr. Fisher when he dispensed Carisoprodol to who he believed was J.Tr, but was actually Patient J.T.

F. The Admissibility of Officer Howard's Deposition.

24. Officer Howard's deposition, Petitioner's Exhibit 1, was taken by telephone on July 12, 2002, just over two weeks before the final hearing. Officer Howard's deposition was taken by telephone because he works and resides in California. No

order was obtained from this forum or any court to take the deposition by telephone.

25. The Notice of Taking Deposition sent to Dr. Brawn scheduling Officer Howard's deposition indicates that it was to be taken by telephone. It also put counsel for Dr. Brawn on notice of the following: "This deposition is being taken for purposes of discovery, for use at an administrative hearing, or any other purpose for which it may be used under applicable laws of the State of Florida." [Emphasis added].

26. At no time before or during the deposition was any objection made by counsel for Dr. Brawn to the manner in which the deposition was taken. In particular, no objection was made to taking the deposition by telephone. By his silence, Dr. Brawn gave tacit agreement to the taking of Officer Howard's deposition by telephone.

27. In addition to the foregoing, the Joint Pre-Hearing Stipulation filed by the parties only two days after Officer Howard's deposition was taken does not list Officer Howard as a witness, and the transcript of Officer Howard's deposition is listed as a potential Petitioner's exhibit. Given these facts and the fact that Dr. Brawn was aware that Officer Howard works and resides in California, it is inferred that Dr. Brawn knew or should have known that the deposition would be offered in lieu of Officer Howard's appearance and testimony at hearing. Yet,

counsel for Dr. Brawn waited until hearing to raise any objection to the admissibility of Officer Howard's deposition testimony.

28. While part of Officer Howard's testimony constitutes hearsay testimony, in particular, comments made to him by J.Tz, no finding of fact has been based upon such testimony. For example, while Officer Howard testified that J.Tz told him who he obtained the pills from and how, that testimony has not been relied upon to make a finding as to how J.Tz got the pills.

29. During Officer Howard's testimony, he referred to seven photographs which he had taken of the Medicine Bottle. Those photographs were taken by Officer Howard on May 17, 2002. While Dr. Brawn objected during the deposition to their admissibility, he did not state the basis of his objection. At hearing, Dr. Brawn objected to the admissibility of not only the photographs, but also to the entire deposition, suggesting that he had not been able to effectively cross examine Officer Howard about the photographs because he did not have them before him while the deposition was being taken. Officer Howard, however, used the photographs to refresh his memory and described adequately what they depicted. His testimony alone, without regard to any consideration of the photographs, supports the findings made herein. Additionally, the Department's file on Dr. Brawn, which had been provided to Dr. Brawn, contained a

single-page copy of an e-mail with all the photographs testified to by Officer Howard. Those smaller photographs, which were available during the deposition, and Officer Howard's description of the Medicine Bottle and its labels, were adequate to eliminate any prejudice to Dr. Brawn.

CONCLUSIONS OF LAW

A. Jurisdiction.

30. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569, 120.57(1), and 456.073(5), Florida Statutes (2005).

B. The Charges of the Administrative Complaint.

31. Section 458.331(1), Florida Statutes, authorizes the Board of Medicine (hereinafter referred to as the "Board"), to impose penalties ranging from the issuance of a letter of concern to revocation of a physician's license to practice medicine in Florida if a physician commits one or more acts specified therein.

32. In its Administrative Complaint in this case, the Department has alleged that Dr. Brawn has violated Sections 458.331(1)(m), (q), and (t), Florida Statutes (2001).

C. The Burden and Standard of Proof.

33. The Department seeks to impose penalties against Dr. Brawn through the Administrative Complaint that include

suspension or revocation of his license and/or the imposition of an administrative fine. Therefore, the Department has the burden of proving the specific allegations of fact that support its charge that Dr. Brawn violated Sections 458.331(1)(m), (q), and (t), Florida Statutes, by clear and convincing evidence. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998); and Section 120.57(1)(j), Florida Statutes (2005)("Findings of fact shall be based on a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute.").

34. What constitutes "clear and convincing" evidence was described by the court in Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), as follows:

> . . . [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

> Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

See also In re Graziano, 696 So. 2d 744 (Fla. 1997); In re Davey, 645 So. 2d 398 (Fla. 1994); and Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652 (Fla. 5th DCA 1998)(Sharp, J., dissenting).

D. The Department's Proof.

35. In order to find that Dr. Brawn has committed the alleged violations contained in the Administrative Complaint, the Department was required to present competent substantial evidence sufficient to prove the allegations of fact contained in the Administrative Complaint. See §120.57(1)(c) and (l), Fla. Stat. (2005); and Bowling v. Department of Insurance, 394 So. 2d 165 (Fla. 1st DCA 1981).

36. The competent substantial evidence presented by the Department in this case consisted primarily of Dr. Brawn's prescription dispensing log for May 14, 2002, (to the extent stipulated to by the parties) and Officer Howard's testimony.

37. Much of Officer Howard's testimony has not been relied upon to make findings of fact in this case. Officer Howard's testimony concerning what Patient J.T. told him on May 17, 2002, constituted hearsay. As such, it cannot and did not form the basis of any finding of fact. See §§ 90.801 and 90.802, Fla. Stat. (2005).

38. Most significant to the ultimate outcome of this case is the fact that the only evidence as to any direct involvement between Patient J.T. and Dr. Brawn, consisted of the testimony of Officer Howard concerning a telephone conversation he had with an individual who identified himself as Dr. Brawn. If this conversation is not taken into account, then the Department has failed to prove facts crucial to the charges they have brought against Dr. Brawn. In particular, without consideration of the telephone conversation, the Department failed to prove the following allegations of fact contained in the Administrative Complaint:

> 5. In or about May 2002, Patient J.T., a 16 year-old male wrote Respondent via the internet, described his symptoms (of falling and straining muscles in his upper body) and sent Respondent a money order for medication.
>
> . . . .
>
> 9. Respondent did not conduct a physical examination of Patient J.T. prior to prescribing Carisoprodol.
>
> 10. Respondent did not obtain a complete history prior to prescribing Carisoprodol for Patient J.T.
>
> 11. Respondent did not make a diagnosis or treatment plan for Patient J.T. prior to prescribing Carisoprodol.
>
> . . . .

39. The Department takes the position that, although Officer Howard's testimony constitutes hearsay as to what Dr. Brawn told him over the telephone, it is admissible as an admission against interest and, therefore, is admissible as an exception to the hearsay rule. See § 90.803(18), Fla. Stat. (2005). It must, however, first be concluded that the telephone conversation constitutes competent substantial evidence that the person to whom Officer Howard spoke to was indeed Dr. Brawn.

40. Dr. Brawn has argued that Officer Howard's telephone conversation on May 17, 2002, is not competent substantial evidence, and that it cannot be found as a matter of fact that it was Dr. Brawn that Officer Howard spoke to. Dr. Brawn cites Hargrove v. State, 530 So. 2d 441 (Fla. 4th DCA 1988), in support of this argument. The court in Hargrove stated the following:

> Appellant's next contention involves another witness, Leroy Martin, who was allowed over objection to testify to a telephone conversation he received in which the caller identified himself as "Panna Cat" (Hargrove's nickname). Martin testified that the caller first claimed he had not shot anyone, but then stated, "I thought I shot him in the leg because when I left he was standing." The state contends this statement was admissible as an admission against interest and well it might be if Hargrove made it. However, the record is woefully weak in establishing the identity of the caller. First of all, the call was initiated by a third person. Martin testified, "I received a phone call

> supposedly been from Panta Cat [sic]. I can't swear to him [sic] it was him because I get crank calls all the time." He stated further that he had never spoken to Hargrove on the phone and that he had only heard Hargrove's voice "a couple of times in my lifetime of growing up." "I would say it sounded somewhat like it-I can't guarantee it. I won't swear to it." Finally, on cross-examination, Lawson admitted he could not describe Hargrove's voice because he really was not sure he ever heard his voice. By failing to properly connect the appellant's voice to that of the caller, the prosecution did not lay a proper predicate for the admissibility of the telephone communication and its admission into evidence was error. Manuel v. State, 524 So. 2d 734 (Fla. 1st DCA 1988).

Id. At 442-443.

41. Dr. Brawn suggests that, like Leroy Martin, Officer Howard had no way of knowing who the individual was whom he spoke to. While the individual identified himself as Dr. Brawn, the individual could have simply lied. Officer Howard had never spoken to Dr. Brawn and, therefore, would not have been able to identify precisely who he was speaking to.

42. Unlike the circumstances in the Hargrove case, Officer Howard initiated the telephone call to a number listed under Dr. Brawn's name and next to his address and local telephone number, the person Officer Howard spoke to identified himself as Dr. Brawn and, most importantly, the individual disclosed information which would have been known to Dr. Brawn and, as far as this records proves, only Dr. Brawn. The information which

was disclosed concerned the fact that there was no record of dispensing Carisoprodol to J.Tz but there was a record of dispensing Carisoprodol to J.Tr, who it has been concluded is one and the same individual.

43. After consideration of the foregoing, it has been concluded that Officer Howard's testimony concerning his telephone conversation constitutes competent substantial evidence of a telephone conversation with Dr. Brawn. Although Dr. Brawn's statements to Officer Howard are hearsay, they are admissible as admissions against interest. See § 90.803(18), Fla. Stat. (2005).

E. Count I: Section 458.331(1)(t), Florida Statutes (2001); The Standard of Care.

44. In Count I of the Administrative Complaint it is alleged that Dr. Brawn violated Section 458.331(1)(t), Florida Statutes (2001), which defines the following disciplinable offense:

> (t) . . . [T]he 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. . . .

45. In the Administrative Complaint, the Department has alleged that Dr. Brawn violated the foregoing provision

(hereinafter referred to as the "Standard of Care"), by "doing one or more of the following":

> (a) Failing to perform a physical examination of Patient J.T. prior to prescribing Carisoprodol;
>
> (b) Failing to obtain a complete history on Patient J.T. prior to prescribing Carisoprodol; or
>
> (c) Failing to make a diagnosis or treatment plan for Patient J.T. prior to prescribing Carisoprodol.
>
> (d) Failing to maintain Patient J.T.'s medical records with sufficient detail to demonstrate Patient J.T.'s condition, history, diagnosis and/or treatment plan such to warrant the prescription of Carisoprodol.

46. The evidence has clearly and convincingly proved that Dr. Brawn has violated the Standard of Care as alleged in the Administrative Complaint.

F. Count II: Section 458.331(1)(m), Florida Statutes (2001); Medical Records.

47. In Count II of the Administrative Complaint it is alleged that Dr. Brawn violated Section 458.331(1)(m), Florida Statutes (2001), which defines the following disciplinable offense:

> (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.

48. The Administrative Complaint alleges that Dr. Brawn's medical records were inadequate because Dr. Brawn failed:

> to keep written medical records justifying the course of treatment of Patient J.T., in that Respondent has failed to provide any medical records that document an adequate medical history on the patient or that justify the treatment of Patient J.T. with Carisoprodol.

49. Although the Department never requested medical records for J.Tr from Dr. Brawn, based upon the findings concerning what steps Dr. Brawn took, or, more importantly, did not take before sending the Carisoprodol to Patient J.T., it is concluded that Dr. Brawn failed to keep adequate medical records in violation of Section 458.331(1)(m), Florida Statutes (2001).

G. Count III: Section 458.331(1)(q), Florida Statutes (2001); Legend Drugs.

50. In Count III of the Administrative Complaint it is alleged that Dr. Brawn violated Section 458.331(1)(q), Florida Statutes (2001), which defines the following disciplinable offense:

> (q) Prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug, including any controlled substance, other than in the course of the physician's professional practice. For the purposes of this paragraph, it shall be legally presumed that prescribing, dispensing, administering, mixing, or otherwise preparing legend drugs, including all controlled substances, inappropriately or in excessive or inappropriate quantities is not in the best interest of the patient and is not in the course of the physician's professional practice, without regard to his or her intent.

51. The Administrative Complaint alleges that Dr. Brawn violated Section 458.331(1)(q), Florida Statutes (2001), with regard to Patient J.T. in that he "inappropriately prescribed and/or dispensed Carisoprodol to Patient J.T., a sixteen year-old male via a single Internet exchange." Although the evidence proved that Dr. Brawn actually received two e-mails from Patient J.T., rather than one, his failure to conduct a physical examination, to take any history, or to do anything other than send Carisoprodol to Patient J.T. after receiving payment, constituted a violation of Section 458.331(1)(q), Florida Statutes (2001).

H. The Appropriate Penalty.

52. In determining the appropriate punitive action to recommend to the Board in this case, it is necessary to consult the Board's "disciplinary guidelines," which impose restrictions

and limitations on the exercise of the Board's disciplinary authority under Section 458.331, Florida Statutes (2001). See Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231 (Fla. 5th DCA 1999).

53. The Board's guidelines are set out in Florida Administrative Code Rule 64B8-8.001, which provides the following "purpose" and instruction on the application of the penalty ranges provided in the Rule:

> (1) Purpose. Pursuant to Section 456.079, F.S., the Board provides within this rule disciplinary guidelines which shall be imposed upon applicants or licensees whom it regulates under Chapter 458, F.S. The purpose of this rule is to notify applicants and licensees of the ranges of penalties which will routinely be imposed unless the Board finds it necessary to deviate from the guidelines for the stated reasons given within this rule. The ranges of penalties provided below are based upon a single count violation of each provision listed; multiple counts of the violated provisions or a combination of the violations may result in a higher penalty than that for a single, isolated violation. Each range includes the lowest and highest penalty and all penalties falling between. The purposes of the imposition of discipline are to punish the applicants or licensees for violations and to deter them from future violations; to offer opportunities for rehabilitation, when appropriate; and to deter other applicants or licensees from violations.
>
> (2) Violations and Range of Penalties. In imposing discipline upon applicants and licensees, in proceedings pursuant to Section 120.57(1) and 120.57(2), F.S., the

> Board shall act in accordance with the following disciplinary guidelines and shall impose a penalty within the range corresponding to the violations set forth below. The verbal identification of offenses are descriptive only; the full language of each statutory provision cited must be consulted in order to determine the conduct included.

54. Florida Administrative Code Rule 64B8-8.001(2), goes on to provide, in pertinent part, the following penalty guidelines for the violations proved in this case:

a. For a violation of Section 458.331(1)(m), Florida Statutes (2001), a range of relevant penalties from a reprimand to two years suspension followed by probation, and an administrative fine from $1,000.00 to $10,000.00;

b. For a violation of Section 458.331(1)(q), Florida Statutes (2001), a range of relevant penalties from a one year probation to revocation, and an administrative fine from $1,000.00 to $10,000.00; and

c. For a violation of Section 458.331(1)(t), Florida Statutes (2001), a range of relevant penalties from two years probation to revocation, and an administrative fine from $1,000.00 to $10,000.00.

55. Florida Administrative Code Rule 64B8-8.001(3), provides that, in applying the penalty guidelines, the following aggravating and mitigating circumstances are to be taken into account:

(3) Aggravating and Mitigating Circumstances. Based upon consideration of aggravating and mitigating factors present in an individual case, the Board may deviate from the penalties recommended above. The Board shall consider as aggravating or mitigating factors the following:

(a) Exposure of patient or public to injury or potential injury, physical or otherwise: none, slight, severe, or death;

(b) Legal status at the time of the offense: no restraints, or legal constraints;

(c) The number of counts or separate offenses established;

(d) The number of times the same offense or offenses have previously been committed by the licensee or applicant;

(e) The disciplinary history of the applicant or licensee in any jurisdiction and the length of practice;

(f) Pecuniary benefit or self-gain inuring to the applicant or licensee;

(g) The involvement in any violation of Section 458.331, Florida Statutes, of the provision of controlled substances for trade, barter or sale, by a licensee. In such cases, the Board will deviate from the penalties recommended above and impose suspension or revocation of licensure;

(h) Any other relevant mitigating factors.

56. In its Proposed Recommended Order, the Department has requested that it be recommended that Dr. Brawn's license be

suspended for a period of two years and that he be required to pay an administrative fine of $15,000.00.

57. Having carefully considered the facts of this matter in light of the provisions of Florida Administrative Code Rule 64B8-8.001, it is concluded that the Department's suggested penalty is reasonable.

RECOMMENDATION

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

RECOMMENDED that the a final order be entered by the Board of Medicine finding that Peter N. Brawn, M.D., has violated Section 458.331(1)(m), (q), and (t), Florida Statutes (2001), as described in this Recommended Order; suspending his license for a period of two years from the date of the final order; and requiring that he pay an administrative fine of $15,000.00.

DONE AND ENTERED this 2nd day of September, 2005, in Tallahassee, Leon County, Florida.

LARRY J. SARTIN
Administrative Law Judge
Division of Administrative Hearings
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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 these cases.