STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MEDICINE,	)	
Petitioner,	)	
vs.	)	Case No. 05-4124PL
BILL BYRD, M.D.,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on January 19, 2006, by video teleconference, with the parties appearing in Orlando, Florida, before Patricia M. Hart, a duly-designated Administrative Law Judge of the Division of Administrative Hearings, who presided in Tallahassee, Florida.

APPEARANCES

For Petitioner: Lynne A. Quimby-Pennock, Esquire
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For Respondent: Michael R. D'Lugo, Esquire
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STATEMENT OF THE ISSUE

Whether the Petitioner committed the violations alleged in the Administrative Complaint dated September 10, 2004, as amended by Order entered January 11, 2006, and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

In a two-count Administrative Complaint dated September 10, 2004, the Department of Health ("Department"), Board of Medicine ("Board"), charged Bill Byrd, M.D., with violations of Section 458.331(1)(m) and (t), Florida Statutes (2000).[1] In Count I, the Department charged Dr. Byrd with having violated Section 458.331(1)(t) by failing "to practice medicine with that level of care, skill and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances." The Department alleged specifically that Dr. Byrd failed to assess Patient J.S.'s complaint adequately; failed to diagnose Patient J.S.'s condition accurately; and failed to refer Patient J.S. to a surgeon when warranted by clinical evidence. In Count II, the Department charged Dr. Byrd with having violated Section 458.331(1)(m), Florida Statutes, by failing to keep medical records as required by rule. The Department alleged specifically that Dr. Byrd failed to document Patient J.S.'s history and "the findings of physical examination," such that

"the records are insufficient to allow a reviewing clinician to reconstruct clinical findings, any conversation which may have been had with the patient, instruction to the patient, or other information which would make assessment of the patient's clinical course possible."

Dr. Byrd timely filed a Petition for Formal Hearing, and the Department forwarded the matter to the Division of Administrative Hearings for assignment of an administrative law judge. On January 9, 2006, the Department filed a Motion to Amend the Administrative Complaint with respect to the factual allegations in paragraph 5 of the Administrative Complaint. The motion was granted in an Order entered January 11, 2006. Pursuant to notice, the final hearing was held on January 19, 2006.

The parties filed a Joint Pre-Hearing Statement on January 10, 2006. At the hearing, Joint Exhibits 1A and B and 2A and B were offered and received into evidence. The Department presented the testimony of Patient J.S. and of George Wilson, M.D.; Petitioner's Exhibits 1 through 4 and 7a and b were offered and received into evidence. Dr. Byrd testified in his own behalf and presented the testimony of Finley W. Brown, M.D., by deposition; Respondent's Exhibits 1 through 3 were offered and received into evidence, Respondent's Exhibit 3 being the deposition transcript and videotape of the deposition of

Dr. Brown. At the request of the Department and without objection from Dr. Byrd, official recognition was granted to Section 458.331, Florida Statutes, and Florida Administrative Code Rule 64B8-8.001.

The one-volume transcript of the proceeding was filed with the Division of Administrative Hearings on March 29, 2006, and the parties timely submitted proposed findings of fact and conclusions of law. These submittals have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

Parties

1. The Department is the state agency responsible for the investigation and prosecution of complaints involving physicians licensed to practice medicine in Florida. See § 455.225, Fla. Stat. The Board is the entity responsible for regulating the practice of medicine in Florida and for imposing penalties on physicians found to have violated the provisions of Section 458.331(1), Florida Statutes. See § 458.331(2), Fla. Stat.

2. Dr. Byrd is, and was at the times material to this proceeding, a physician licensed to practice medicine in

Florida, having been issued license number ME 43323, and he is Board-certified in Family Practice. At the times material to this proceeding, Dr. Byrd conducted an office practice and saw approximately 20 patients each day, including those who had an appointment and those who walked in without an appointment. In addition to his private practice, Dr. Byrd was, at the times material to this proceeding, a full-time physician for the Brevard County Department of Corrections and was responsible for providing medical care for all prisoners in that system.

Facts underlying charges in Administrative Complaint

3. Patient J.S. was a patient of Dr. Byrd's from approximately 1999 until June 2001. Dr. Byrd treated Patient J.S. during that period primarily for general medical issues. Patient J.S.'s last visit to Dr. Byrd's office was June 11, 2001.

4. The office visits material to this proceeding occurred on December 27, 2000; January 29, 2001; and June 11, 2001.

5. Beginning when she was approximately 20-to-21 years of age, Patient J.S. routinely performed breast self-examinations once or twice a month. She performed a self-examination a few days before Christmas 2000, while she was visiting in New Jersey, and believed she felt a lump in her right breast. She drove home the day after Christmas and telephoned Dr. Byrd's

office. She told the person she spoke with that she had found a lump in her breast.

6. The record of Patient J.S.'s December 27, 2000, contact with Dr. Byrd's office was inserted into a form that had been completed for an office visit on November 15, 2000. The date "12.27.00" appears approximately mid-way down the page, with a diagonal line drawn underneath. Below the diagonal line was written "Mammo & ultrasound script given[.] Pt feels she may have a lump in Breast." What appear to be the initials "DS" are included beneath the notation, and the handwriting in this notation is that of Dr. Byrd's medical assistant.

7. Dr. Byrd did not examine or speak to Patient J.S. on December 27, 2000, and he relied on the information conveyed to him by his medical assistant in making the decision to write a prescription for Patient J.S. to obtain an ultrasound and a mammogram.[2]

8. Dr. Byrd's staff scheduled an appointment with Boston Diagnostic Imaging for Patient J.S., and she had a bilateral film mammogram and an ultrasound of her right breast done on January 3, 2001.[3]

9. In the report of the January 3, 2001, bilateral mammography examination, which was dictated January 3, 2001, the radiologist stated:

> CLINICAL INDICATIONS: Diagnostic mammography. The patient reports a palpable abnormality within the upper outer quadrant of the right breast. This site was marked with triangular marker.
>
> FINDINGS: There is a 2 cm asymmetric area of parenchymal density within the upper outer quadrant of the right breast at the approximately 12 o'clock position. This appears fairly distant from the palpable marker. I would recommend additional cone compression views of the right breast at this time. Some small subcentimeter nodular parenchymal densities are scattered through both breasts. No discreet [sic] mass is noted underlying the region of palpable area of clinical concern. Any clinically suspicious palpable abnormality should be aspirated and biopsied. Some benign microcalcifications are noted bilaterally.
>
> * * *
>
> IMPRESSION:
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> 1. NUMEROUS SUBCENTIMETER NODULAR DENSITIES SCATTERED THROUGHOUT BOTH BREASTS. GIVEN THE MULTIPLICITY OF FINDINGS THESE ARE LIKELY BENIGN. I WOULD RECOMMEND COMPARISON WITH PRIOR MAMMOGRAPHIC STUDY TO DETERMINE STABILITY.
>
> 2. ASYMMETRIC 2 CM NODULAR DENSITY LOCATED IN THE 12 O'CLOCK POSITION OF THE RIGHT BREAST POSTERIORLY. I WOULD RECOMMEND CORRELATION WITH PRIOR STUDY OR ADDITIONAL CONE COMPRESSION VIEWS OF THE RIGHT BREAST AT THIS TIME.[4]

10. Dr. Byrd received a copy of this report from Boston Diagnostic Imaging, signed it, and made a notation on the report to "give ptn copy." He assumes that his staff followed his instructions and gave Patient J.S. a copy of the report, but

Dr. Byrd does not recall discussing this report with Patient J.S.

11. The report of the January 3, 2001, bilateral mammography examination showed an abnormality in Patient J.S.'s right breast. Dr. Byrd did not, however, order a cone compression view of the right breast or any other diagnostic test as a result of the report. Rather, Dr. Byrd waited for the Boston Diagnostic Imaging radiologist to do a comparison study of the January 3, 2001, mammography results and the results of any prior mammographic study that the radiologist might locate.

12. A second report of the results of the January 3, 2001, examinations was issued by Boston Diagnostic Imaging, the substance of which is a more comprehensive report of the results of the ultrasound examination of Patient J.S.'s right breast.[5] In this second report, which was captioned "Bilateral Film Mammography" and dictated on or about January 5, 2001, the radiologist stated:

> CLINICAL INDICATIONS: Diagnostic breast ultrasound. Palpable lesion in the upper outer quadrant of right breast.
>
> FINDINGS: Sonographic evaluation of the 9-12 o'clock position of the right breast was performed at the site of the patient's reported palpable abnormality. At the 10-11 o'clock position in the right breast at the patient's site of reported abnormality, no discrete solid or cystic nodules are noted by ultrasound. There are two small hypoechoic solid nodules noted at

> the 12 o'clock position of the right breast measuring 8 x 6 mm. in aggregate size. This is nonspecific and may represent small fibroid adenomas. No dominant solid or cystic nodules are noted by ultrasound in the 12 o'clock position of the right breast to correspond to 2 cm. asymmetric parenchyma density noted on the mammography. Recommend additional cone compression views of the right breast at this time.[6] No simple cyst is noted within the upper outer quadrant.
>
> IMPRESSION:
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> 1. TWO SMALL SUBCENTIMETER HYPOECHOIC NODULES NOTED AT THE 12 O'CLOCK POSITION IN THE RIGHT BREAST. THIS IS FAIRLY DISTANT FROM THE REGION OF THE PATIENT'S PALPABLE ABNORMALITY. CONSIDER SHORT TERM FOLLOWUP EXAMINATION. CONSIDER FOLLOWUP RIGHT BREAST ULTRASOUND EXAMINATION IN 6 MONTHS TO EVALUATE FOR STABILITY.
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> 2. NO DISCRETE SOLID OR CYSTIC NODULE IS NOTED IN THE 9-11 O'CLOCK [POSITION] IN THE RIGHT BREAST AT THE SITE OF THE PATIENT'S REPORTED PALPABLE ABNORMALITY. ANY CLINICALLY SUSPICIOUS PALPABLE ABNORMALITY SHOULD BE ASPIRATED BY BIOPSY.
>
> 3. NO DOMINANT 2 CM. SOLID OR CYSTIC MASS IS NOTED AT THE 12 O'CLOCK POSITION OF THE RIGHT BREAST BY ULTRASOUND.

13. A "Corrected Copy" of the second report contained the following changes: (1) The heading of the corrected report was changed to "RIGHT BREAST ULTRASOUND" examination; (2) the corrected report stated that the technique involved "[u]sing hand-held sonographic technique, breast was scanned"; and (3) the corrected report indicated that the results of the test were compared with the bilateral mammography of January 3, 2001. In

all other respects, the "Corrected Copy" of the report was identical to the second report.[7]

14. Dr. Byrd did not receive the Corrected Copy of the report of the ultrasound examination of the right breast. He did, however, receive a copy of the second report. Dr. Byrd signed his copy of the second report, and made the following notation: "Patient aware to follow up in six months with ultrasound." Dr. Byrd did not recall speaking with Patient J.S. about the second report, but he assumed from this note that he did speak with her, probably by telephone.

15. Dr. Byrd did not order a cone compression view of Patient J.S.'s right breast, nor did he schedule a short-term follow-up examination.

16. Boston Diagnostic Imaging issued a fourth report, dictated on January 16, 2001, which was entitled an "Addendum" to the report of Patient J.S.'s January 3, 2001, bilateral mammography examination.[8] In the Addendum, the radiologist stated:

> FINDINGS: Study done here 01/03/01 is compared with exam of 03/02/95. Multiple nodular densities were noted on the previous study. Now that old films available, three area[s] of densities, two in left breast and one in the right breast, are significantly larger than they were then. Ultrasound is recommended for further evaluation. The largest of these is on the right [breast] at 12 o'clock and measures 2 cm. Second of these is in the left breast, slightly

> superior and slightly lateral to the nipple and contains a single calcification. It is probably 1 cm in maximal diameter and these two side by side lesions are seen on the oblique lateral view of left breast superior aspect. One of these twin densities lies medial to the nipple and measures approximately 14 mm while the other of these twin lesions probably lies slightly lateral to the nipple. No skin thickening, nipple retraction, hypervasculature or microcalcifications can be seen.
>
> IMPRESSION:
>
> 1. BILATERAL BREAST ULTRASOUND IS RECOMMENDED TO EVALUATE A 2 CM LESION AT 12 0'CLOCK IN RIGHT BREAST AND TO EVALUATE THREE NODULAR MASSES IN LEFT BREAST, ALL OF WHICH ARE SLIGHTLY LARGER IN SIZE THAN THEY WERE ON THE 03/02/95 STUDY. ULTRASOUND SHOULD BE DONE AS SOON AS CAN BE SCHEDULED.

17. Dr. Byrd received and reviewed this Addendum report, circled "BILATERAL BREAST ULTRASOUND IS RECOMMENDED," signed and noted "Done" on the first page of the report. Dr. Byrd did not discuss the results of the Addendum report with Patient J.S., did not schedule a follow-up appointment to discuss the report, and did not give Patient J.S. a copy of this report. Dr. Byrd felt that it was sufficient that he intended to order an ultrasound examination of Patient J.S.'s left breast.

18. Patient J.S. called Dr. Byrd's office and scheduled a follow-up appointment for January 29, 2001. She believed that the lump in her right breast was getting bigger.

19. Dr. Byrd saw Patient J.S. during an office visit on January 29, 2001, at which time he did a physical examination and an examination of her breasts. He was unable to find a lump in her right breast, which caused him to question whether Patient J.S. did, in fact, feel a lump. He noted that he found cystic structures in Patient J.S.' left breast.

20. Dr. Byrd also noted in the medical record of the January 29, 2001, office visit the plan to refer Patient J.S. for another ultrasound. Dr. Byrd did not, however, order a bilateral breast ultrasound as the radiologist recommended in the Addendum report; rather, he ordered only an ultrasound examination of Patient J.S.'s left breast because an ultrasound examination of the right breast had been done on January 3, 2001, and Dr. Byrd felt that no new information would be obtained from another ultrasound examination of Patient J.S.'s right breast. Dr. Byrd was also concerned that Patient J.S.'s insurance company might not pay for another ultrasound examination of her right breast and that she would have to pay for the examination.

21. Dr. Byrd did not include in the medical record of Patient J.S.'s January 29, 2001, office visit a notation that he performed an examination of Patient J.S.'s breasts. According to Dr. Byrd, one can infer that he examined Patient J.S.'s breasts from the notation on the record that he detected cystic

structures on her left breast and from the fact that Patient J.S.'s complaint was noted on the medical record as pain in her right breast. The only notation on the medical record regarding Patient J.S.'s complaint of a lump in her right breast was "Large mass ?". There is no mention in the medical records of the January 29, 2001, office visit that Dr. Byrd discussed with Patient J.S. the results of the mammogram, ultrasound of the right breast, or the addendum to the mammogram.

22. Dr. Byrd did not recall Patient J.S. requesting at the January 29, 2001, office visit a referral for a biopsy, but he did recall that Patient J.S. was very anxious about what she perceived as a lump in her right breast. Even though he could not palpate a lump in the location indicated by Patient J.S., in light of the suspicions in the report of the January 3, 2001, mammogram examination of the right breast and in the addendum to this report, Dr. Byrd would "probably" have referred her for a biopsy on January 29, 2001, if she had asked him to do so.

23. In Dr. Byrd's opinion, however, there was no clinical indication in his physical examination of Patient J.S.'s breasts on January 29, 2001, or in the reports of the mammography examination and addendum or in the ultrasound examination of her right breast to indicate that he should refer Patient J.S. for a biopsy of her right breast.

24. The ultrasound examination of Patient J.S.'s left breast was done by Boston Diagnostic Imaging on March 7, 2001, and the report was dictated on March 9, 2001. According to the report, the ultrasound examination of Patient J.S.'s left breast correlated with the results of the mammography examination and showed multiple cystic regions in Patient J.S.'s left breast, ranging in size from 1 mm to 3 mm. in diameter. The radiologist noted that the cysts were benign. Dr. Byrd received and initialed the report of the March 7, 2001, ultrasound, but he did not discuss the results of the ultrasound with Patient J.S.

25. Patient J.S. became concerned because the lump she felt in her right breast was getting bigger, and she called Dr. Byrd's office and scheduled another office visit for June 11, 2001. When she called to make the appointment, she told Dr. Byrd's nurse that the lump was getting bigger.

26. Dr. Byrd did not examine Patient J.S. during the June 11, 2001, office visit. Rather, Patient J.S. was seen by Dr. Byrd's physician's assistant, who noted on the medical record of the office visit that "Pt wants referral for breast Bx." Dr. Byrd's physician's assistant did not examine Patient J.S.'s breasts during the June 11, 2001, office visit, but Dr. Byrd, when he reviewed the physician's assistants notes of the June 11, 2001, office visit, approved a referral to a general surgeon for a breast biopsy.

27. Patient J.S. called Dr. Jeffrey Smith on Dr. Byrd's referral. Dr. Smith advised Patient J.S. to get an updated mammogram and ultrasound examination of her right breast. Before she obtained these tests, however, Dr. Smith performed a core needle biopsy of the mass in her right breast that produced a finding that the mass was benign.

28. Mammography and ultrasound examinations of Patient J.S.'s right breast were performed at Boston Diagnostic Imaging on July 13, 2001, and both the mammogram and ultrasound indicated a mass in the upper outer quadrant of Patient J.S.'s right breast, at the 11:00 o'clock position, that was "highly suggestive of malignancy." The radiologist called his report in to Dr. Smith and strongly recommended a biopsy.

29. Dr. Smith performed a lumpectomy that produced a finding that the mass was malignant. Patient J.S. had a mastectomy of her right breast, followed by chemotherapy.

Standard of Care

30. Dr. Byrd was required to practice medicine in his care of Patient J.S. 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." Based on the credited opinions of George Wilson, M.D., Dr. Byrd's treatment and care of Patient J.S., violated the standard of care for the following reasons.

31. Even though a family practice physician is justified in relying on the findings, impressions, and recommendations of a radiologist, the standard of care applicable to family practice physicians under the circumstances presented in this case requires the physician to assess all of the information available to him or her and to refer the patient for further evaluation if medically indicated. Specifically, when a female patient presents with a complaint that she has felt, or even has possibly felt, a lump in her breast, the standard of care requires a family practice physician to rule out a malignancy.

32. In this case, at the time of Patient J.S.'s January 29, 2001, office visit, Dr. Byrd had available the information that Patient J.S. believed that she had detected a lump in her right breast and that she was experiencing pain in her right breast; the report of the January 3, 2001, bilateral mammography examination, in which the radiologist reported an abnormality in the form of an "asymmetric 2 cm nodular density located in the 12 o'clock position of the right breast posteriorly," the general area in which Patient J.S. had reported feeling a lump; and the Addendum report dictated on or about January 15, 2001, in which the radiologist reported that a comparison of the January 3, 2001, mammography examination and a 1995 mammography examination showed that the two-centimeter mass in Patient J.S.'s right breast, as well as two "densities" in

her left breast, were either "significantly" or "slightly" larger than they were in 1995.

33. Even though it was reasonable for Dr. Byrd to rely on the recommendations of the radiologist, there were inconsistencies in the recommendations included in the "FINDINGS" and "IMPRESSIONS" sections of the reports, though not in the substantive observations, of the radiologist's reports of the January 3, 2001, ultrasound and mammography examinations, as well as in the Addendum report. Dr. Byrd did not, however, contact the radiologist to clarify any of these inconsistencies when formulating his treatment plan for Patient J.S.

34. Nonetheless, the information available to Dr. Byrd in late January 2001, taken together, was sufficient to warrant the referral of Patient J.S. for further evaluation of her right breast, either to a radiologist for a mammography cone compression view focusing on the area in which the two centimeter mass appeared or to a general surgeon for a biopsy of the two centimeter mass. The evidence presented clearly and convincingly establishes that Dr. Byrd violated the standard of care applicable to family practice physicians under similar circumstances as those presented in this case because he failed to refer Patient J.S. for further evaluation of her right breast on the basis of her complaint and of the substantive information included in the mammography reports.

35. Dr. Byrd's care and treatment of Patient J.S. did meet the standard of care in the following respects, again based on the credited testimony of Dr. Wilson: Dr. Byrd's referral of Patient J.S. to Boston Diagnostic Imaging for bilateral mammography and an ultrasound examination of the right breast after her contact with his office on December 27, 2000, was consistent with the standard of care for family practice physicians under the circumstances. Likewise, Dr. Byrd did not deviate from the standard of care by making this referral without having conducted an examination of Patient J.S. and prior to referring Patient J.S. to a general surgeon for a biopsy. Finally, Dr. Byrd's failure to diagnose Patient J.S. as having a malignant mass in her right breast did not constitute a deviation from the standard of care applicable to family practice physicians because, under the applicable standard of care, a family practice physician is not expected to make such a diagnosis.

Medical Records

36. The medical record of Patient J.S.'s contact with Dr. Byrd's office on December 27, 2001, does not meet Florida's standards for medical records. The entry for December 27, 2000, when Patient J.S. contacted Dr. Byrd's office complaining that she felt a lump in her right breast, was included only as a note inserted in the medical record of an office visit on

November 15, 2000. Although the note indicates that Patient J.S. was given a prescription for a mammogram and ultrasound, it cannot be determined from the note whether Patient J.S. visited Dr. Byrd's office on December 27, 2000; who she communicated with regarding her complaint; or whether she was examined or by whom.[9]

37. Although Dr. Byrd made a notation on the report of the January 3, 2001, bilateral mammography examination issued by Boston Diagnostic Imaging that Patient J.S. should be given a copy of the report, there is nothing in the medical records submitted into evidence documenting the actual transmittal of the report to Patient J.S. Similarly, although Dr. Byrd made a notation on the second report, which was misidentified as a report of the bilateral mammography examination, that Patient J.S. was "aware" that she should follow-up with an ultrasound examination in six months, there is nothing in the medical records submitted into evidence documenting how, when, and by whom Patient J.S. was made "aware" of the need for a follow-up examination or any instructions that were given to Patient J.S. for follow-up.

38. The medical record maintained by Dr. Byrd of Patient J.S.'s office visit on January 29, 2001, does not meet Florida's standards for medical records: Portions of the medical record are illegible. There is no clear indication that

Dr. Byrd conducted a breast examination during that office visit. Rather, Dr. Byrd testified that it must be inferred from the notations in the medical record that he did an examination of Patient J.S.'s right and left breasts. There is no indication in the medical record of the results of an examination of Patient J.S.'s right breast. The marks in the boxes by which the results of the "Health Examination" are recorded are sloppy; it is difficult to determine whether Dr. Byrd examined Patient J.S.'s "chest/lungs" or "heart" or both and whether the results were normal or abnormal; and Dr. Byrd admittedly erroneously indicated by a checkmark that he had examined Patient J.S.'s "genitals and anus" and that the results were abnormal.

39. Dr. Byrd's assessment of Patient J.S.'s condition at the January 29, 2001, office visit was "mastodynia," or pain in the breast, which merely confirmed Patient J.S.'s complaint, and there is no data in the medical record to support the assessment. There is no indication in the medical record that Dr. Byrd explored the possible cause of the breast pain by questioning Patient J.S. or by examination. Finally, there is no indication in the medical record for the January 29, 2001, office visit that Dr. Byrd discussed with Patient J.S. the results of the bilateral mammography examination, of the ultrasound examination of her right breast, or of the results of

the comparison of the 1995 and 2001 mammography examination results.

Prior disciplinary history

40. Two previous disciplinary actions have been filed against Dr. Byrd. In both cases, the actions were resolved without resort to an administrative hearing. The first action arose out of an Administrative Complaint in which Dr. Byrd was charged with having failed to practice medicine within the acceptable level of care; with failing to maintain appropriate medical records; with having inappropriately prescribed medication to a patient; and with delegating professional responsibilities to a person not qualified to perform the duties. A Final Order was entered on January 7, 1999, as a result of a Consent Order in which Dr. Byrd neither admitted nor denied the facts alleged in the Administrative Complaint. The Board reduced the fine specified in the Consent Order to $1,000.00; deleted in toto the suspension set forth in the Consent Order; and adopted the requirements in the Consent Order that Dr. Byrd attend a drug course and a medical records course and undergo a quality assurance review.

41. The second action arose out of an Administrative Complaint in which Dr. Byrd was charged with having failed to comply with the 1999 Final Order. A Final Order was entered in the second action on December 13, 2000, as a result of a Consent

Order in which Dr. Byrd neither admitted nor denied the facts alleged in the Administrative Complaint. The Board adopted the Consent Order in toto and required Dr. Byrd to appear before the Board and pay investigative costs in the amount of $415.96.

CONCLUSIONS OF LAW

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

43. Section 458.331(1), Florida Statutes, authorizes 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 in that section.

44. In its Administrative Complaint, as amended, the Department alleged that Dr. Byrd violated Section 458.331(1)(m) and (t), Florida Statutes, and it seeks to impose penalties against Dr. Byrd that include suspension or revocation of his license and/or the imposition of an administrative fine. Therefore, the Department has the burden of proving by clear and convincing evidence that Dr. Byrd committed the violations charged in the Administrative Complaint. 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.").

45. "Clear and convincing" evidence was defined 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).

A. Section 458.331(1)(t), Florida Statutes; Standard of Care.

46. In Count I of the Administrative Complaint, the Department alleged that Dr. Byrd is subject to discipline because he violated Section 458.331(1)(t), Florida Statutes, which provides that discipline may be imposed for, among other things, "the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances."

47. The Department alleged in paragraph 21 of the Administrative Complaint that Dr. Byrd violated the standard of care "by one or more of the following":

> (a) Failing to adequately assess Patient J.S.'s complaint;
>
> (b) Failing to accurately diagnose Patient J.S.'s condition;
>
> (c) Failing to refer Patient J.S. to a surgeon for treatment when sufficient clinical evidence warranted it.

48. The Department has proven by clear and convincing evidence that Dr. Byrd violated the standard of care as alleged paragraph 21(c) of the Administrative Complaint. The Department has failed, however, to establish that Dr. Byrd violated the standard of care as alleged in paragraph 21(a) and (b) of the Administrative Complaint.

B. Section 458.331(1)(m), Florida Statutes; Medical Records

49. In Count II of the Administrative Complaint, the Department alleged that Dr. Byrd is subject to discipline because he violated Section 458.331(1)(m), Florida Statutes, which provides that discipline may be imposed for the following offense:

> 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.

50. The Department has adopted Florida Administrative Code Rule 64B8-9.003, which defines "Standards for Adequacy of Medical Records." Rule 64B8-9.003 provides in pertinent part:

> (1) Medical records are maintained for the following purposes:
>
> (a) To serve as a basis for planning patient care and for continuity in the evaluation of the patient's condition and treatment.
>
> (b) To furnish documentary evidence of the course of the patient's medical evaluation, treatment, and change in condition.

(c) To document communication between the practitioner responsible for the patient and any other health care professional who contributes to the patient's care.

(d) To assist in protecting the legal interest of the patient, the hospital, and the practitioner responsible for the patient.

(2) A licensed physician shall maintain patient medical records in English, in a legible manner and with sufficient detail to clearly demonstrate why the course of treatment was undertaken or why an apparently indicated course of treatment was not undertaken.

(3) The medical record shall contain sufficient information to identify the patient, support the diagnosis, justify the treatment and document the course and results of treatment accurately, by including, at a minimum, patient histories; examination results; test results; records of drugs prescribed, dispensed, or administered; reports of consultations and hospitalizations; and copies of records or reports or other documentation obtained from other health care practitioners at the request of the physician and relied upon by the physician in determining the appropriate treatment of the patient.

51. The Department alleged in paragraph 25 of the Administrative Complaint that Dr. Byrd

failed to keep written medical records justifying the course of treatment of Patient J.S. in that Respondent failed to clearly document either historical information or the findings of physical examination. Even though Respondent kept records of Patient J.S.'s office visits, the records are insufficient to allow a reviewing clinician to reconstruct clinical

> findings, any conversations which may have been had with the patient, instruction to the patient, or other information which would make assessment of the patient's clinical course possible.

52. Based on the findings of fact herein, the Department has proven by clear and convincing evidence that Dr. Byrd failed to keep adequate medical records in violation of Section 458.331(1)(m), Florida Statutes.

C. Penalty

53. In determining the appropriate penalty 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. See Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231 (Fla. 5th DCA 1999).

54. The Board's guidelines are set forth in Florida Administrative Code Rule 64B8-8.001, which provides in pertinent part:

> (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.

55. 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, 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; and

b. For a violation of Section 458.331(1)(t), Florida Statutes, a range of relevant penalties from two years'

probation to revocation, and an administrative fine from $1,000.00 to $10,000.00.

56. 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;
>
> * * *
>
> (h) Any other relevant mitigating factors.

57. In its Proposed Recommended Order, the Department has suggested that the Board issue a reprimand; impose a $20,000.00 fine; suspend Dr. Byrd's license to practice medicine for one year followed by probation for two years; and require 250 hours of community service within three years of entry of the Final Order.

58. Having carefully considered the facts of this matter in light of the provisions of Florida Administrative Code Rule 64B8-8.001 and the penalties requested by the Department, it is recommended that the Board issue a reprimand to Dr. Byrd; impose a fine of $12,000.00, $10,000.00 for the violation of Section 458.331(1)(t), Florida Statutes, and $2,000.00 for the violation of Section 458.331(1)(m), Florida Statutes; place Dr. Byrd on probation for a period of two years under such terms and conditions as the Board shall deem appropriate; and require Dr. Byrd to complete a medical records course approved by the Board. The violations proven do not support suspension of Dr. Byrd's license; the Department has not explained why Dr. Byrd should be required to perform 250 hours of community service, and the facts do not support such discipline.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Medicine enter a final order finding the Bill Byrd, M.D., is guilty of having violated Section 458.331(1)(m) and (t), Florida Statutes, and

1. Issuing a reprimand to Dr. Byrd;

2. Imposing an administrative fine in the amount of $12,000.00;

3. Placing Dr. Byrd on probation for a period of two years under such terms and conditions as the Board shall deem appropriate; and

4. Requiring Dr. Byrd to complete a medical records course approved by the Board.

DONE AND ENTERED this 9th day of June, 2006, in Tallahassee, Leon County, Florida.

PATRICIA M. HART
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of June, 2006.

ENDNOTES

[1]/ All references to Florida Statutes herein are to the 2000 edition unless otherwise indicated.

[2]/ There is a direct conflict between the testimony of Patient J.S. and of Dr. Byrd regarding the matter of the events of December 27, 2000. Patient J.S. testified that she had an appointment for an office visit, that she was seen by Dr. Byrd on that date, that she told Dr. Byrd she felt a lump in her right breast, that she requested a biopsy, that Dr. Byrd did not perform an examination of her breasts, and that Dr. Byrd did not respond to her request for a biopsy but, rather, recommended a mammogram and ultrasound. Dr. Byrd testified that he did not see Patient J.S. in his office on December 27, 2000, or have a conversation with her because, if he had, he would have followed his normal practice and filled out a separate "encounter form" documenting the conversation or visit. Having considered all of the testimony of Patient J.S. and of Dr. Byrd and the documentary evidence submitted, it is concluded that Dr. Byrd's testimony is more persuasive on this point than that of Patient J.S.

[3]/ A mammogram is essentially an X-ray of the breast tissue; an ultrasound uses sound waves to detect differentials in tissue density, that is, to differentiate liquid-filled areas such as cysts from normal breast tissue.

[4]/ See Joint Exhibit 2a at pages 98-99; Joint Exhibit 1a at pages 35 and 36. Although the ultrasound portion of this report was mistakenly included, see infra endnotes 5 and 7, this report was apparently the complete report of the January 3, 2001, bilateral mammography examination.

[5]/ See Joint Exhibit 2a at page 96 for page 1 of the second report and Joint Exhibit 1a at page 34 for page 2 of the second report.

[6]/ A cone compression view is a type of mammogram in which a particular area of the breast is magnified and is the focus of the study.

[7]/ See Joint Exhibit 1a at page 31 for page 1 of the corrected copy of the second report and Joint Exhibit 1a at page 34 for page 2 of the corrected copy of the second report. It is noted that the undersigned determined that page 34 of Joint Exhibit 1a reflects the radiologist's impressions of the ultrasound examination of Patient J.S.'s right breast done on January 3, 2001. Dr. Wilson, the Department's expert witness, testified that page 32 of Joint Exhibit 1a was the second page of the corrected copy of the second report, but this page is actually the second page of a fourth report, the Addendum to the bilateral mammography report. See Joint Exhibit 1b at pages 243-44. Page 34 of Joint Exhibit 1a, the second page of the second report, includes impressions that appear to relate to the ultrasound examination of Patient J.S.'s right breast, and Dr. Wilson testified that the corrected copy of the second report was identical to the second report except for the heading, technique, and comparison sections. If page 32 of Joint Exhibit 1a were the second page of the corrected copy of the second report, the report would not contain the impressions of the radiologist and would, therefore, be incomplete.

[8]/ See Joint Exhibit 1b at pages 243-44.

[9]/ The lack of documentation of Patient J.S.'s December 27, 2000, office visit resulted in totally inconsistent recollections of Patient J.S.'s contact with Dr. Byrd's office. Patient J.S. testified that she had an appointment with Dr. Byrd; was seen by Dr. Byrd, who did not examine her right breast; and requested that Dr. Byrd refer her for a biopsy but received no response. Dr. Byrd, on the other hand, testified that Patient J.S. never asked him for a biopsy because he would have immediately referred her to a general surgeon had she asked and that he did not see or communicate with Patient J.S. on December 27, 2000, because, if he had, he would have completed a new "office encounter" record rather than just writing a prescription for a mammogram and an ultrasound. Although the undersigned ultimately found Dr. Byrd's testimony more credible on these points than that of Patient J.S., any confusion would have been eliminated on these crucial points by an accurate and complete medical record documenting the contact.

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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.