

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
CHIROPRACTIC MEDICINE,)
)
Petitioner,)
)
vs.) Case No. 06-0664PL
)
JAMES HETHER, D.C.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on April 20, 2006, in Orlando, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Tobey Schultz, Esquire
J. Blake Hunter, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Michael R. D'Lugo, Esquire
Wicker, Smith, O'Hara, McCoy,
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STATEMENT OF THE ISSUES

Whether Respondent violated Subsections 460.413(1)(ff) and 456.072(1)(u), and Section 460.412, Florida Statutes (2002),¹ and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

On October 12, 2005, Petitioner, Department of Health, Board of Medicine (Department), filed an Administrative Complaint against Respondent, James E. Hether, D.C. (Dr. Hether), alleging that he violated Subsection 460.413(1)(ff), Florida Statutes, by violating Subsection 456.072(1)(u), Florida Statutes, or by violating Section 460.012, Florida Statutes. Dr. Hether requested an administrative hearing, and the case was forwarded to the Division of Administrative Hearings on February 17, 2006.

The parties filed an Amended Joint Pre-Hearing Stipulation, in which they agreed to certain facts as stated on pages four and five of the Amended Joint Pre-Hearing Stipulation. To the extent relevant, those facts are incorporated in this Recommended Order.

Dr. Hether filed a Motion to Strike the Department's Expert Witness, Deborah Day, Psy.D., or, in the Alternative, Motion to Limit her Testimony and a Motion in Limine Regarding Dr. Watson. The motion to strike Dr. Day as an expert witness for the Department was GRANTED. The Department proffered the testimony

of Dr. Day. The Motion in Limine Regarding Dr. Watson was DENIED, and Dr. Watson's deposition was admitted in evidence.

At the final hearing, the Department called C.B. as its witness. Petitioner's Exhibits 1 and 2 were admitted in evidence. Petitioner's Exhibit 3 was proffered. Dr. Hether testified in his own behalf and called Kathe Hether and Chase Hether as his witnesses. Respondent's Exhibits 1 through 3 were admitted in evidence. Joint Exhibits 1 and 2 were also admitted in evidence.

The one-volume Transcript was filed on June 6, 2006. The parties timely filed their Proposed Recommended Orders, which have been considered in rendering this Recommended Order.

FINDINGS OF FACT

1. At all times material to this proceeding, Dr. Hether was a licensed chiropractic physician within the State of Florida, having been issued license number CH 2601 on or about April 16, 1977. Other than the instant Administrative Complaint, Dr. Hether has had no disciplinary action taken against his license.

2. In April 2003, Dr. Hether had two chiropractic offices, one in Port Orange, Florida, and one in Deland, Florida. On or about April 8, 2003, C.B., a 29-year-old female, presented herself to Dr. Hether's office in Port Orange, Florida, in order

to receive chiropractic treatment for injuries she sustained in an automobile accident.

3. C.B. began receiving treatments in the Port Orange Office, but switched her appointments to the Deland office on or about May 8, 2003. The remainder of her treatments was given at the Deland office. Her treatments included chiropractic adjustments and massages. The chiropractic adjustments were performed by Dr. Hether and other physicians who worked for Dr. Hether; however, the majority of the chiropractic adjustments were performed by Dr. Hether. Until C.B.'s visit on June 11, 2003, all the massages had been performed by licensed massage therapists who worked for Dr. Hether. From on or about April 8, 2003, up to June 11, 2003, C.B. received various chiropractic treatments at Dr. Hether's offices without incident.

4. On June 11, 2003, C.B. presented herself to Dr. Hether's office to receive her usual chiropractic treatment, including a massage. Dr. Hether, his son, and another male were in the office. Dr. Hether offered to perform the massage on C.B. because the regular massage therapist was not present, and C.B. accepted.

5. C.B. went into the massage room, undressed to her underwear, and lay face down on the table with a sheet draped over her. Dr. Hether came into the massage room and began to

massage C.B. Dr. Hether and C.B. were the only persons in the room during the massage.

6. While C.B. was lying face down, Dr. Hether slipped his hands under C.B.'s underwear on the left side of her buttocks and then placed his hand under her underwear on the right side of her buttocks. At Dr. Hether's instruction, C.B. turned over onto her back. Dr. Hether placed his hands under C.B.'s breast area and rubbed upward towards her cleavage. Dr. Hether then slid his hand down C.B.'s body toward her vaginal area, grabbed a part of C.B.'s vaginal area, and began to make grunting noises as if he were getting sexual pleasure from the touching.

7. While Dr. Hether was touching C.B.'s vaginal area, Chase Hether, Dr. Hether's son and office manager, knocked on the door to the massage room. Dr. Hether briefly stopped the massage to speak to his son. The door was partially open, but Chase Hether could not see inside the massage room.

8. After speaking to his son, Dr. Hether closed the door and walked back to the massage table, where he again placed his hand in C.B.'s vaginal area and slid his fingers back and forth. Dr. Hether then shoved his hand further down C.B.'s panties and repeatedly thumped C.B.'s vaginal area. While Dr. Hether was thumping her vaginal area with one hand, he grabbed C.B.'s ankle with the other hand, while using the full pressure of his body

weight on her body. Dr. Hether resumed making the grunting sounds and continued to make the sounds for a while.

9. C.B. had approximately 27 massages at Dr. Hether's offices from the time she began treatment in April 2003 until June 11, 2003. The massage therapists who gave her those massages did not touch C.B.'s pubic area or touch the areas around C.B. breasts.

10. After the massage, C.B. got dressed and went into another room to receive a chiropractic adjustment from Dr. Hether. Dr. Hether gave the chiropractic adjustment without any further inappropriate touching. After he concluded the chiropractic treatment, he asked C.B. personal questions about her living arrangements and occupation.

11. C.B. went into the reception area of the office to leave the building. She saw Chase Hether and another man in the reception area. C.B. did not tell either man what had happened nor did she tell them that she would not be back to Dr. Hether's office for treatment.

12. While Dr. Hether was touching C.B. inappropriately, she did not cry out, tell him to stop, or attempt to leave. When Chase Hether came to the door of the massage room, C.B. did not tell him what Dr. Hether was doing. C.B. did not try to stop the massage, leave Dr. Hether's offices, or tell others at Dr. Hether's office about the inappropriate touching because she

was afraid of Dr. Hether and did not know what else Dr. Hether might do to her. She felt like she was a "visitor in her own body" and had no control over what was being done to her. She did not report the incident to the police department because she felt that the police were ineffective.

13. C.B. did not go back to Dr. Hether's offices for treatment after the incident on June 11, 2003. She sought treatment from another chiropractic physician, Dr. Kimberly Watson, whom C.B. saw on June 23, 2003. C.B. told Dr. Watson what had happened to her at Dr. Hether's office. Dr. Watson advised C.B. that she could file a complaint with the Department of Health.

14. C.B. did send a complaint to the Department of Health in June 2003, but she sent it to the wrong address. She got the correct address from Dr. Watson and filed a complaint with the Department of Health in September 2003. A year passed, and she contacted the Department of Health, wanting to know the status of her complaint. C.B. was told to file another complaint, which she did.

15. Dr. Hether's wife, Kathe Hether, testified that she was at Dr. Hether's office the day of the incident and that as C.B. was leaving the office she spoke to C.B. for several minutes concerning her publishing business and that C.B. told her that she was going to another chiropractor that was nearer

to her home. Mrs. Hether's testimony is not credible. Her husband of 36 years did not advise her until two months before the final hearing, that an administrative complaint had been filed against him. It is inconceivable that two and one-half years after their conversation, Ms. Hether vividly remembers talking to C.B. when there had been no reason to remember the conversation. Additionally, Ms. Hether's explanation for C.B.'s failure to return to Dr. Hether for treatment because C.B. wanted to go to a chiropractor closer to her home is also not credible. C.B. chose to seek treatment from Dr. Watson, whose office was about the same distance from C.B.'s home as Dr. Hether's office. C.B. also told Dr. Watson about the incident with Dr. Hether, explaining the reason that she discontinued treatment with Dr. Hether.

16. C.B. has not brought a civil action against Dr. Hether for the incident on June 11, 2003. She filed the complaint with the Department so that Dr. Hether would not touch other patients inappropriately.

CONCLUSIONS OF LAW

17. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2005).

18. The Department has the burden to establish the allegations in the Administrative Complaint by clear and

convincing evidence. Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996). In Slomowitz v. Walker, 429 So. 2d 797 (Fla. 4th DCA 1983), the court developed a working definition of "clear and convincing evidence," which has been adopted by the Florida Supreme Court in In re Davey, 645 So. 2d 398 (Fla. 1994). The court in Slomowitz stated:

[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 testimony 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 a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

Slomowitz, 429 at 800.

19. The Department alleged that Dr. Hether violated Subsection 460.413(1)(ff), Florida Statutes, which provides that disciplinary action may be taken against a chiropractic physician for violating any provision of Chapters 460 and 456, Florida Statutes, or any rules promulgated pursuant to those chapters. The Department alleged that Dr. Hether violated Subsection 456.072(1)(u), Florida Statutes, which provides that disciplinary action may be taken for "[e]ngaging or attempting

to engage in sexual misconduct as defined and prohibited in s. 456.063(1)." Subsection 456.063(1), Florida Statutes, states:

Sexual misconduct in the practice of a health care profession means violation of the professional relationship through which the health care practitioner uses such relationship to engage or attempt to engage the patient or client, or an immediate family member, guardian, or representative of the patient or client in, or to induce or attempt to induce such person to engage in, verbal or physical sexual activity outside the scope of the professional practice of such health care profession. Sexual misconduct in the practice of a health care profession is prohibited.

20. The Department also alleged that Dr. Hether violated Section 460.412, Florida Statutes, which provides:

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

21. The Department has established by clear and convincing evidence that Dr. Hether violated Subsections 416.413(1)(ff) and 456.072(1)(u), and Section 460.412, Florida Statutes. In the setting of a patient-physician relationship, Dr. Hether

inappropriately touched C.B. in the area of her vagina and breasts during a massage he was giving C.B. The purpose of the touching was not therapeutic, but was for Dr. Hether's own sexual gratification. The testimony of C.B. was believable. She recalled the events with clarity. Her description of Dr. Hether's actions has been consistent, precise, and explicit. She never returned to Dr. Hether's office after June 11, 2003, but changed chiropractic physicians and told her subsequent treating physician of Dr. Hether's inappropriate actions within two weeks of the incident.

22. Florida Administrative Code Rule 64B2-16.003(1)(h), provides that the range of penalties for a violation of Section 460.412, Florida Statutes, is a minimum of a one-year suspension followed by two years' probation under terms and conditions set by the Board of Chiropractic Medicine, including supervision and a fine of not less than \$1,000 per violation to permanent revocation. Florida Administrative Code Rule 64B2-16.003(1)(nn), provides that a range of penalties for violating Subsection 460.413(1)(ff), Florida Statutes, is from a minimum fine of \$1,000 and/or a letter of concern up to a maximum fine of \$5,000 and/or suspension for two years followed by two years' probation. Florida Administrative Code Rule 64B2-16.003(1)(uu), provides that the range of penalties for a violation of Subsection 456.072(1)(u), Florida Statutes,

is a minimum letter of concern and/or a PRN referral for evaluation up to a maximum fine of \$10,000 and/or revocation.

23. Florida Administrative Code Rule 64B2-16.003(2) provides that certain factors may be taken into consideration in determining the appropriate disciplinary action to be taken and in going outside the disciplinary guidelines. Some of the factors include the length of time the licensee has been practicing his profession and prior discipline imposed upon the licensee. Dr. Hether has been a practicing physician for over 29 years and has had no prior disciplinary action.

RECOMMENDATION

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

RECOMMENDED that a final order be entered finding that James Hether, D.C., violated Subsection 460.413(1)(ff), Florida Statutes, by violating Subsection 456.072(1)(u) and Section 460.412, Florida Statutes; issuing a reprimand; imposing a \$2,500 administrative fine; requiring a psychological evaluation by the professional resource network; and placing him on probation for two years, the terms of which would include a practice restriction prohibiting him from treating female patients without another certified health care professional in the room.

DONE AND ENTERED this 28th day of July, 2006, in
Tallahassee, Leon County, Florida.

Susan B. Harrell

SUSAN B. HARRELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 28th day of July, 2006.

ENDNOTE

1/ Unless otherwise provided, references to the Florida
Statutes are to the 2002 version.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.