

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, )  
BOARD OF MEDICINE, )  
 )  
Petitioner, )  
 ) Case No. 06-1475PL  
vs. )  
 )  
CRANFORD RICHARD POWELL, )  
 )  
Respondent. )  
\_\_\_\_\_ )

RECOMMENDED ORDER

Notice was provided and on June 20, 2006, a formal hearing was held in this case pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2005). The hearing commenced at 10:00 a.m. The hearing location was City Hall, Commission Chambers, 10 North Grove Street, Eustis, Florida. Charles C. Adams, Administrative Law Judge, conducted the hearing.

APPEARANCES

For Petitioner: April Dawn Skilling, Esquire  
Carol Gregg, 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,  
Graham & Ford, P.A.  
Post Office Box 2753  
Orlando, Florida 32802-2753

STATEMENT OF THE ISSUE

Should discipline be imposed by the State of Florida, Board of Medicine (the Board), against Respondent's physician assistant's license for alleged inappropriate conduct in relation to Patient T.S.?

PRELIMINARY STATEMENT

On July 18, 2005, an Administrative Complaint was signed before the State of Florida, Department of Health (the Department), naming the Department as Petitioner in an action against Respondent, Case No. 2004-42014. The Department's Administrative Complaint noticed Petitioner of his rights to request a hearing to be conducted in accordance with Sections 120.569 and 120.57, Florida Statutes (2005). Respondent was also provided with a form to elect the right, among other options, to dispute the underlying allegations of fact in the Administrative Complaint and request a formal hearing in accordance with Sections 120.569(2)(a) and 120.57(1), Florida Statutes (2005), before an Administrative Law Judge with the Division of Administrative Hearings (DOAH). In accordance with that opportunity, Respondent executed that election by a notarized signature on the form.

The gravamen of the Administrative Complaint is set out where it says:

11. On or about November 26, 2004, Patient T.S. presented herself unattended to Care First with complaints of coughing and chest congestion.

12. Respondent met with Patient T.S. in an examination room with no other persons present.

13. During the examination, Respondent asked Patient T.S. about her relationship with Patient R.P., and Patient T.S. explained their relationship to Respondent.

14. At the end of the examination, Respondent unexpectedly approached Patient T.S. and, without her consent, gave her a full, frontal hug, telling her "I love you."

15. Respondent then kissed Patient T.S. full on the lips, without her consent, and exited the room.

On April 25, 2006, the case was forwarded to DOAH for assignment of an administrative law judge to conduct a formal hearing. Notice was provided and the hearing proceeded on the aforementioned date.

The Department filed a written notice of scrivener's error indicating that the reference within the Administrative Complaint to November 17, 2004, should be corrected to reflect November 16, 2004. That notice and request were not opposed. The request to change the date was granted at hearing. In addition, Petitioner by a stipulation requested that the statutory citation within the Administrative Complaint reflecting the year 2003 be changed to 2004. That stipulation

was accepted. Discussion in the Recommended Order concerning the Florida Statutes will refer to the substantive law within Chapters 456 and 458 in effect in 2004.

Petitioner requested that official recognition be provided to Sections 456.063(1), 456.072(1)(u), 458.329, 458.331(1)(j), and (t) and 458.347(7)(g), Florida Statutes (2004). That request was granted.

Petitioner called Patient T.S and Patient R.P. as its witnesses. Respondent testified in his own behalf and presented Dr. William Weaver and Llara Weaver as his witnesses. Petitioner presented Patient T.S. as a rebuttal witness. Joint Exhibit numbered 1, Joint Composite Exhibit numbered 2, and Joint Exhibit numbered 3 were admitted. Petitioner's Exhibits numbered 1 through 3 were admitted. Petitioner's Exhibit numbered 1 is a copy of Florida Administrative Code Rule 64B-8.006. Petitioner's Exhibit numbered 2 is constituted of Respondent's answers to Petitioner's first set of interrogatories. Petitioner's Exhibit numbered 3 was admitted, limited to its use for impeachment purposes in relation to the exhibit, the deposition of Dr. William Weaver given June 14, 2006, compared to his testimony at hearing. Respondent's Exhibit numbered 1 was admitted.

Consistent with an order requiring the parties to file a prehearing stipulation, the parties filed a statement of facts

admitted and requiring no proof. The factual stipulations are set forth in the findings of fact to the Recommended Order.

On July 11, 2006, a hearing transcript was filed. Petitioner and Respondent filed proposed recommended orders which have been considered in preparing the Recommended Order.

#### FINDINGS OF FACT

##### Stipulated Facts:

1. Petitioner is the state department charged with regulating the practice of medicine pursuant to Section 20.43, Florida Statutes; Chapter 456, Florida Statutes; and Chapter 458, Florida Statutes.

2. At all times material to this Complaint, Respondent was a licensed physician assistant within the State of Florida, having been issued license number PA 3346 on May 28, 1997.

3. Respondent's address of record is 2608 Maywood Street, Eustis, Florida 32726-2063.

4. Respondent is a physician assistant at Care First of Central Florida (hereinafter "Care First"), 15050 U.S. Highway 441, Eustis, Florida 32726.

5. Patient T.S., (a.k.a. T.B.), and her daughters had been patients of Care First for several years for various family medical matters.

6. On or about November 16, 2004, Patient T.S. met Respondent for the first time when Patient T.S. accompanied

Patient R.P., her significant other, to Patient R.P.'s appointment with Respondent at Care First.

7. During Patient R.P.'s appointment, Patient T.S. discussed a problem she was experiencing with fibromyalgia (a condition that causes widespread muscle and soft tissue pain and tenderness, especially in the trunk, neck, and shoulders).

8. Respondent suggested Patient T.S. make an appointment with him for a checkup of her condition.

9. Patient T.S. made the appointment for the following day, November 17, 2004, and attended her appointment accompanied by Patient R.P.

10. Respondent thoroughly and appropriately examined Patient T.S. on November 17, 2004.

11. On or about November 26, 2004, Patient T.S. presented herself unattended to Care First with complaints of coughing and chest congestion.

12. Respondent met with Patient T.S. in an examination room with no other persons present.

13. Respondent returned to the examination room, gave Patient T.S. some medication for her condition, and exited the room.<sup>1/</sup>

Prior Disciplinary History:

14. There was no indication that Respondent had been accused of any prior wrongdoing involving his practice as a physician assistant.

CONCLUSIONS OF LAW

15. DOAH has jurisdiction over the subject matter and the parties in this case in accordance with Sections 120.569, 120.57(1) and 456.073(5), Florida Statutes (2005).

16. The Department by the Administrative Complaint has made accusations against Respondent, calling for discipline to be imposed by the Board for violations set out in two separate counts to the Administrative Complaint. They involve the contention that Respondent intended to engage in sexual misconduct with Patient T.S., as evidenced by: (a) engaging Patient T.S. in full, frontal hug and (b) kissing Patient T.S. on her lips. Mention is also made of an alleged remark to Patient T.S., "I love you."

17. Recognizing the nature of this case, Petitioner bears the burden to prove the allegations in the Administrative Complaint by clear and convincing evidence. See § 120.57(1)(j), Fla. Stat. (2005); see also Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

18. The meaning of clear and convincing evidence is explained in the case In re: Davey, 645 So. 2d 398 (Fla. 1994), quoting, with approval from Slomowitz v. Walker, 429 So. 2d 797 (Fla. 4th DCA 1983).

19. Respondent is a "health care practitioner" and "licensee" within the definitions set forth in Section 456.001(4) and (6), Florida Statutes (2004), respectively. As such, he is subject to disciplinary provisions that are set out in Chapter 456, Florida Statutes (2004). Furthermore, the Board may impose any of the penalties authorized under Sections 456.072 and 458.331(2), Florida Statutes (2004), upon Respondent as a physician assistant.

20. The prior disciplinary provisions are made applicable to the Respondent as a physician assistant under authority set forth in Section 458.347(7)(g), Florida Statutes (2004), which states:

The Board of Medicine may impose any of the penalties authorized under ss. 456.072 and 458.331(2) upon a physician assistant if the physician assistant . . . has been found guilty of or is being investigated for any act that constitutes a violation of this chapter or chapter 456.

21. Physicians and physician assistants are held accountable under Section 458.329, Florida Statutes (2004), which states:

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

22. Florida Administrative Code Rule 64B8-9.008, related to Respondent as a physician assistant, in pertinent part defines sexual misconduct where it states:

(1) Sexual contact with a patient is sexual misconduct and is a violation of Sections 458.329 and 458.331(1)(j), F.S.

(2) For purposes of this rule, sexual misconduct between a physician and a patient includes, but is not limited to:

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

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

2. May reasonably be interpreted as intended for the sexual arousal or gratification of the physician, the patient or any third party; or

3. May reasonably be interpreted by the patient as being sexual.

\* \* \*

(7). A patient's consent to, initiation of, or participation in sexual behavior or involvement with a physician does not change the nature of the statutory prohibition.

\* \* \*

(9). Upon a finding that a physician has committed unprofessional conduct by engaging in sexual misconduct, the Board will impose such discipline as the Board deems necessary to protect the public. The sanctions available to the Board are set forth in Rule 64B8-8.001, F.A.C., and include restriction or limitation of the physician's practice, revocation or suspension of the physician's license.

23. Recognizing the previous statutory provisions and rule that have been referred to, Count I accuses Respondent of violating Section 456.063(1), Florida Statutes (2004), thereby subjecting him to discipline in accordance with Section 456.072(1)(u), Florida Statutes (2004).

24. Section 456.063(1), Florida Statutes (2004), 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 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.

25. Section 456.072(1)(u), Florida Statutes (2004), states:

(1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:

\* \* \*

(u) Engaging or attempting to engage in sexual misconduct as defined and prohibited in s. 456.063(1).

26. Count I also refers to a violation of Section 458.331(1)(j), Florida Statutes (2004), which states:

(1) The following acts constitute grounds for . . . disciplinary action, as specified in s. 456.072(2):

\* \* \*

(j) Exercising influence within a patient-physician relationship for purposes of engaging a patient in sexual activity. A patient shall be presumed to be incapable of giving free, full, and informed consent to sexual activity with his or her physician.

27. Count II to the Administrative Complaint refers to a violation of Section 458.331(1)(t), Florida Statutes (2004), in relation to the alleged sexual misconduct with Patient T.S. That provision states:

(1) The following acts constitute grounds for . . . disciplinary action, as specified in s. 456.072(2):

\* \* \*

(t) . . . the failure to practice medicine with that level of care, skill, and treatment which is recognized by a

reasonably prudent similar physician  
(physician assistant) as being acceptable  
under similar conditions and circumstances.

28. The Department has failed in its proof to show a violation of any statute or rule referred to in Count I and Count II to the Administrative Complaint. The proof concerning alleged misconduct was not clear and convincing.

RECOMMENDATION

Upon consideration of the facts found and the conclusions of law reached, it is

RECOMMENDED:

That a final order be entered which dismisses the Administrative Complaint.

DONE AND ENTERED this 11th day of August, 2006, in Tallahassee, Leon County, Florida.

**S**

---

CHARLES C. ADAMS  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675 SUNCOM 278-9675  
Fax Filing (850) 921-6847  
[www.doah.state.fl.us](http://www.doah.state.fl.us)

Filed with the Clerk of the  
Division of Administrative Hearings  
this 11th day of August, 2006.

ENDNOTE

1/ On November 26, 2004, when Patient T.S. was seen by the Respondent in the examining room with no one else present, Patient T.S. testified that she was sitting on the examining table, about to get up, sort of in a leaning position on the table, when she was approached by Respondent. According to Patient T.S., Respondent had written prescriptions for her and as he was handing them to her, he gave her a hug "with pressure", told her "I just love you" and kissed her on the lips. All those actions were unexpected by Patient T.S., as she explains. She felt they were unwarranted. As she described it, she felt "violated." She felt "shocked." She felt that she could no longer trust Respondent beyond that point with her care. More specifically she describes the kiss as Respondent pressing his lips firmly against hers, immediately before exiting the examining room. Patient T.S. describes the hug as "body to body contact." None of Respondent's actions, as Patient T.S. describes them, were deemed necessary to her treatment. In contrast, Respondent in his testimony denies any inappropriate conduct with Patient T.S. Specifically, he denies telling Patient T.S. "I just love you." He denies kissing Patient T.S. on the lips. He denies initiating a full frontal hug on Patient T.S. He admits to hugging patients at times, those that are more familiar to him than Patient T.S. appeared to be. He has no recollection of any form of hug given Patient T.S. on the date in question, as compared to a full frontal hug, which he denies all together. Respondent would agree that a kiss and hug were not necessary to treat Patient T.S. Other evidence was provided that would tend to address the alleged incident both before and after its occurrence, but there was no other eye-witness to the alleged incident and no persuasive corroboration for either version of the events, leaving the dispute unresolved, when recognizing the stringent requirement that clear and convincing evidence be presented before facts may be found that would support a violation of the applicable statutes and rule.

COPIES FURNISHED:

April Dawn Skilling, Esquire  
Carol L. Gregg, Esquire  
Department of Health  
4052 Bald Cypress Way, Bin C-65  
Tallahassee, Florida 32399-3265

Michael R. D'Lugo, Esquire  
Wicker, Smith, O'Hara, McCoy,  
Graham & Ford, P.A.  
Post Office Box 2753  
Orlando, Florida 32802-2753

Larry McPherson, Executive Director  
Board of Medicine  
Department of Health  
4052 Bald Cypress Way  
Tallahassee, Florida 32399-1701

Timothy M. Cerio, General Counsel  
Department of Health  
4052 Bald Cypress Way, Bin A02  
Tallahassee, Florida 32399-1701

R. S. Power, Agency Clerk  
Department of Health  
4052 Bald Cypress Way, Bin A02  
Tallahassee, Florida 32399-1701

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.