

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
MEDICINE,)
)
Petitioner,)
)
vs.) Case No. 06-2094PL
)
ARNALDO CARMOUZE, P.A.,)
)
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, on October 4, 2006, in Miami, Florida, and on October 11, 2006, by video teleconference between Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Irving Levine
Matthew Casey
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For Respondent: Julie Gallagher, Esquire
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STATEMENT OF THE ISSUES

The issue in this case is whether Respondent, Arnaldo Carmouze, P.A., committed violations of Chapter 458, Florida Statutes (2001), alleged in an Administrative Complaint filed with Petitioner on February 25, 2004, in DOH Case Number 2002-16502, as amended; and, if so, what disciplinary action should be taken against his license to practice as a physician assistant in Florida.

PRELIMINARY STATEMENT

On or about February 25, 2004, an Administrative Complaint was filed with Petitioner Department of Health against Respondent Arnaldo Carmouze, P.A., an individual licensed to practice as a physician assistant in Florida, in which it is alleged that Mr. Carmouze committed violations of Subsections 458.331(1)(m), (t), (v), and (nn), Florida Statutes (2001)(All references to Florida Statutes and the Florida Administrative Code are to the 2001 versions, unless otherwise indicated). Respondent, through a Notice of Appearance and Election of Rights filed on his behalf by counsel, disputed the allegations of fact contained in the Administrative Complaint, expressed interest in attempting to resolve the dispute, and, upon failure of those efforts, a formal administrative hearing.

On June 15, 2006, the matter was filed with the Division of Administrative Hearings with a request that an administrative

law judge be assigned to conduct proceedings pursuant to Section 120.57(1), Florida Statutes (2006). The matter was designated DOAH Case Number 06-2094PL and was assigned to Administrative Law Judge Charles C. Adams. The case was subsequently transferred to the undersigned.

The final hearing was scheduled to be held on October 4 and 5, 2006, by Notice of Hearing entered July 5, 2006.

On September 21, 2006, a Joint Pre-Hearing Stipulation was filed by the parties containing certain stipulated facts. Those facts have been included in this Recommended Order.

On September 25, 2006, Petitioner's Motion to Amend the Administrative Complaint was filed. Petitioner sought to amend the Administrative Complaint by substituting the initials of patient "G.S." contained in the Administrative Complaint with "G.C." in the Amended Administrative Complaint. Petitioner also requested that paragraph 95 be amended by substituting "Rule 64B8-30.012, F.A.C." for "Rule 64B8-30.009, F.A.C.", and "Rule 64B8-12(2)(a)2, F.A.C." for "Rule 64B8-30.009(2)(a)2, F.A.C.." The Motion to Amend was considered during a motion hearing conducted by telephone on October 3, 2006, was granted, and was memorialized at the commencement of the final hearing on October 4, 2006.

Petitioner's Motion for Official Recognition and Respondent's Motion for Official Recognition were also

considered during the October 3, 2006, telephone motion hearing. Both were granted during the telephone motion hearing and subsequently memorialized at the commencement of the final hearing.

Petitioner's Motion to Impose Sanctions, to which a response had been filed by Respondent, was also considered during the telephone motion hearing. Petitioner sought in its Motion to prohibit Respondent from testifying in this matter and to exclude the opinion testimony of any expert witnesses offered by Respondent based upon statements, documents, facts, or other evidence obtained from Mr. Carmouze. The question of whether Mr. Carmouze should be prohibited from testifying was determined to be moot, based upon representations of counsel for Mr. Carmouze that he would not testify at the final hearing. As to the exclusion of expert opinions, a ruling was reserved until appropriate objections were made during the hearing to specific testimony.

At the final hearing conducted on October 4, 2006, Petitioner offered six Exhibits, which were admitted. Petitioner's Exhibit numbered 1 is a transcript of the deposition testimony of James L. Cary, P.A.-C, MHA, who is accepted as an expert witness. Mr. Cary's deposition was taken, not by Petitioner, but by Respondent. Respondent presented the testimony of Manuel Fernandez-Gonzalez, M.D. (accepted as an

expert in emergency medicine); and Julio Lora, M.D. (accepted as an expert in cardiology and internal medicine). Respondent had admitted three Exhibits.

The final hearing was continued to October 11, 2006, due to the unavailability of Respondent's final witness. That witness, Harry W. Lee, M.D. (accepted as an expert in emergency medicine), appeared by video teleconferencing. Petitioner's Exhibit number 4 was admitted at this portion of the final hearing.

The three-volume Transcript of the final hearing was filed on October 30, 2006. By Notice of Filing Transcript entered October 31, 2006, the parties were informed that the Transcript had been filed and that their proposed recommended orders were to be filed on or before November 9, 2006. The date for filing proposed recommended orders was extended to November 17, 2006, at the request of Respondent.

Both parties filed Proposed Recommended Orders on November 17, 2006. 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 and physician's assistants licensed to practice medicine in Florida. § 20.43 and Chs. 456 and 458, Fla. Stat.

2. Respondent, Arnaldo Carmouze, P.A., is, and was at the times material to this matter, a physician's assistant licensed to practice in Florida, having been issued license number PA 9100713.

3. Mr. Carmouze's address of record at all times relevant to this matter is 6545 Southwest 95th Avenue, Miami, Florida 33173.

4. No evidence that Mr. Carmouze has previously been the subject of a license disciplinary proceeding was offered.

B. Mr. Carmouze's Supervising Physician.

5. At the times relevant Mr. Carmouze worked under the supervision of Dr. Manuel Fernandez-Gonzalez, a physician licensed to practice medicine in Florida.

6. Dr. Fernandez-Gonzalez, who has practiced emergency medicine, holds Florida medical license number ME 17907.

7. Dr. Fernandez-Gonzalez currently practices family medicine at 9600 Southwest 8th Street, Miami, Florida.

8. Prior to April 2002, Dr. Fernandez-Gonzalez and Mr. Carmouze worked together in Miami, providing emergency room care and seeing patients at a nursing home. The emergency room services were provided pursuant to employment contracts that

both had entered into with a company providing emergency room services at the hospital in south Florida where Dr. Fernandez-Gonzalez and Mr. Carmouze provided services.

C. Mr. Carmouze's Assignment to Weems Memorial Hospital.

9. The company for which Mr. Carmouze was employed also provided emergency room services for Weems Memorial Hospital (hereinafter referred to as "Weems").

10. Weems is located in Apalachicola, Florida, located in the Florida Panhandle, approximately 520 miles from Miami.

11. Weems is a rural hospital, licensed under Chapter 395, Florida Statutes. It does not have 24-hour, on-site ancillary services such as X-ray, laboratory, and respiratory therapy. These services are available to the emergency room on an on-call basis after business hours.

12. At the times relevant, Malvinder Ajit, M.D., a Florida licensed physician, was the Director of the Emergency Department at Weems. Dr. Ajit has not provided any documentation to the Department indicating that he has ever acted as supervising physician of record for Mr. Carmouze.

13. Mr. Carmouze was assigned by the company by which he was employed to work in the emergency room at Weems in April 2002 and again in June 2002. He worked in the emergency room at Weems as a physician's assistant for part of April 2002, and

part of June 2002. While at Weems, Mr. Carmouze provided emergency room medical services to more than 100 patients.

14. While working at Weems, Dr. Fernandez-Gonzalez, who remained in Miami, continued to act as Mr. Carmouze's supervising physician.

15. Mr. Carmouze did not notify the Department that he was practicing as a physician's assistant at Weems in April or June 2002. The evidence, however, failed to prove that Mr. Carmouze was working for, and thus "employed," by anyone different from the employer that he worked for in Miami. The only evidence on this issue proved that Mr. Carmouze continued throughout the relevant period to work for Dr. Fernandez-Gonzalez and the company that provided emergency room services at Weems.

D. Dr. Carmouze's Treatment of Patient A.M.

16. On June 7, 2002, Patient A.M., an 84-year-old female, was brought to the emergency room (hereinafter referred to as the "ER"), at Weems by ambulance. She arrived at approximately 23:24 hours (11:24 p.m.).

17. A.M.'s medical history included congestive heart failure, coronary artery disease, and atrial fibrillation. She presented to Mr. Carmouze in apparent respiratory distress (respiratory rate of 36 to 40), had no measurable blood pressure, and a pulse rate of 100 to 108.

18. While being transported to the ER from her home, A.M. was given oxygen by rebreather mask. During her transport, her oxygen saturation level improved from 68% to 91%.

19. Mr. Carmouze assessed A.M.'s condition, obtained her medical history, ordered lab work and other tests, and ordered and initiated nebulizer treatments for her. She was alert, oriented and had a Glasgow score of 15/15, indicating she was responding to verbal and pain stimuli.

20. Mr. Carmouze ordered nebulizer treatments with albuterol and atrovent to assist her breathing. Additionally, A.M. received 100% oxygen through a nonrebreather mask.

21. Mr. Carmouze also determined that A.M. was "dry," meaning that her fluid volume was depleted and, therefore, she was dehydrated. As a result, her blood pressure was low. In an effort to treat this condition, Mr. Carmouze ordered an I.V. with 0.9 normal saline. He also ordered a Dopamine drip to increase A.M.'s heart rate in an effort to increase her blood pressure.

22. Mr. Carmouze appropriately denied a request from a nurse to administer Lasix to A.M., because A.M. was "dry." Lasix is a diuretic used to decrease fluid volume. It opens the arteries and reduces fluids, thereby lowering blood pressure. Lasix was contraindicated for A.M. and contrary to the

appropriate efforts initiated by Mr. Carmouze to treat A.M.'s low blood pressure.

23. Despite Mr. Carmouze's treatment of A.M., her condition continued to deteriorate.

24. At or near 23:50 hours (11:50 p.m.), approximately 25 minutes after A.M. had arrived at the ER, an ER nurse contacted A.M.'s primary physician by telephone and obtained an order to administer Lasix to A.M. The Lasix was administered immediately. A.M.'s oxygen saturation level was 81%, down 10 points since her arrival, when the Lasix was administered. Within half an hour, at 0:18 hours (18 minutes after midnight) on June 8, 2002, A.M.'s oxygen saturation level had dropped another 10 points, to 71%. A.M. then "crashed and coded."

25. Mr. Carmouze initiated appropriate emergency measures when A.M. coded, including initiating Cardio Pulmonary Resuscitation and endotracheal intubation. A.M. was given epinephrine, atropine, and a CVP line was placed. These actions by Mr. Carmouze were appropriate.

26. Mr. Carmouze did not attempt or order that A.M. be intubated prior to 0:18 hours when she coded.

27. A.M.'s primary physician, Dr. Sanaullah, arrived at the ER. Shortly after she coded, Dr. Sanaullah continued the same efforts initiated by Mr. Carmouze. A.M., however, did not recover, expiring at 01:00.

E. The "Standard of Care" for Treating A.M.

28. Four expert witnesses testified in this matter, rendering opinions as to whether Mr. Carmouze's treatment of A.M. was consistent with "that level of care, skill, and treatment which is recognized by a reasonably prudent similar [physician assistant] as being acceptable under similar conditions and circumstances. . . ." (hereinafter referred to as the "Standard of Care"). The expert witnesses who testified were Dr. Fernandez-Gonzalez, Dr. Julio Lora, Dr. Harry W. Lee, and James L. Cary, P.A.

29. Dr. Fernandez-Gonzalez's testimony as to whether Mr. Carmouze treated A.M. within the Standard of Care is rejected for lack of credibility. Dr. Fernandez-Gonzalez's testimony has been found to lack credibility for the reasons explained by Petitioner in paragraph 25 of Petitioner's Proposed Recommended Order. That paragraph, except for the last two sentences, is hereby adopted. Additionally, Dr. Fernandez-Gonzalez's testimony is rejected because, in the undersigned's judgment, he made too much of an effort to give the answers that he appeared to conclude that Mr. Carmouze wanted him to give.

30. The testimony of Dr. Lora on the other hand is found to be credible. Dr. Lora, testifying as an expert in cardiology and internal medicine, offered convincing explanations as to why Mr. Carmouze did not violate the Standard of Care in his overall

treatment of A.M. and, in particular, in not attempting to intubate A.M. earlier than he did. Dr. Lee's testimony, while corroborating Dr. Lora's testimony, was cumulative and of little weight.

31. A.M. was reported to be awake, alert, and oriented. She was breathing, albeit with difficulty, on her own. Therefore, it was appropriate for Mr. Carmouze to attempt the other measures to assist her breathing he instituted.

32. Mr. Cary's testimony, while credible, was not convincing, especially given Dr. Lora's expert opinions. Mr. Cary's testimony was taken during a discovery deposition by Respondent and, as a result, the benefit of his testimony to Petitioner's case was limited.

33. The evidence failed to prove that Mr. Carmouze violated the standard of care:

- a. In his treatment of A.M.;
- b. By failing "to contact his supervising physician, the ED director, and/or Patient A.M.'s primary physician for assistance in treating Patient A.M.";
- c. By failing "to identify a treatment plan for Patient A.M."; and
- d. By failing "to consult his supervising physician prior to ordering Demerol, a controlled substance, for Patients C.M.,

J.S., B.M., R.M., M.F., G.C., G.B., K.S., C.W., M.A.C., R.S.,
and K.M."

F. Mr. Carmouze's Treatment Plan and Medical Records for Patient A.M.

34. Mr. Carmouze, as the Department has conceded in Petitioner's Proposed Recommended Order, paragraph 13, page 20, did identify a treatment plan for Patient A.M.

35. Having found that Mr. Carmouze did not err when he did not initiate intubation of A.M. earlier than he did, the evidence failed to prove that "he failed to maintain medical records that justified the course of treatment in that he failed to record a reason for not intubating sooner in an attempt to address Patient A.M.'s respiratory distress."

36. There is no indication in Mr. Carmouze's medical records for A.M. that Mr. Carmouze attempted to contact Dr. Ajit or Dr. Fernandez-Gonzalez. The medical records do indicate, however, that A.M.'s primary physician, Dr. Sanallah, was "notified and arrived for code." While the evidence did not prove who notified Dr. Sanallah, Petitioner failed to prove that Mr. Carmouze was not responsible for Dr. Sanallah's notification.

37. Mr. Carmouze failed to identify himself by name or professional title in A.M.'s medical records. He also failed to

include Dr. Fernandez-Gonzalez's name and title in A.M.'s medical records.

38. Mr. Carmouze did not ensure that either the signature of his supervising physician or Dr. Ajit was included on A.M.'s medical records.

39. While the quality of Mr. Carmouze's medical records for A.M. was correctly characterized as "minimally acceptable" by Mr. Cary, the evidence failed to prove clearly and convincingly that those medical records were not adequate. This finding is based upon the lack of an unequivocal opinion from Mr. Cary concerning the adequacy of the medical records and a comparison of Mr. Cary's opinions with those of Dr. Lee in support of Mr. Carmouze's medical records for Patient A.M.

40. Mr. Cary, on the one hand, made the following negative comments about Mr. Carmouze's medical records for A.M:

a. "[T]he record isn't really clear on what did happen because he did not write down any times on intervention of what he did." Petitioner's Exhibit numbered 1, page 14;

b. "[W]hen you look at this face sheet here you don't get a picture of what happened and at what time, there's no real times there, no progression of the treatment." Petitioner's Exhibit numbered 1, page 67.

c. Mr. Cary stated that there was no time noted in Patient A.M.'s history/physical section, and that a portion of that

section was illegible. Petitioner's Exhibit numbered 1, page 21 and 25.

41. On the other hand, Mr. Cary stated that "[the medical record for A.M.] is minimally acceptable, it just doesn't give a good clear picture of the sequence of events." Petitioner's Exhibit numbered 1, page 68. Mr. Cary also stated the following when asked if he thought Mr. Carmouze maintained medical records that justified the course of his treatment regarding Patient A.M.: "There were medical records that were there, I think they could have been more complete and more detailed" These statements, taking into account the fact that Mr. Cary was able to read almost all of Mr. Carmouze's medical record pertaining to A.M. on direct examination by counsel for Mr. Carmouze, reduces the effectiveness of his other opinions.

42. Finally, it is noted that all of Mr. Carmouze's experts, along with Mr. Cary, were able to read Mr. Carmouze's notes, other than a word or two.

G. Patients C.M., J.S., B.M., R.M., M.F., G.C., G.B., K.S., C.W., M.A.C., R.S., and K.M.

Patient C.M.

43. On April 23, 2002, Patient C.M., a 20-year-old male presented to Mr. Carmouze at Weems' ER. C.M. complained of a server headache. In pertinent part, Mr. Carmouze ordered 50 milligrams of Demerol and 50 milligrams of Vistaril.

Patient J.S.

44. On April 24, 2002, Patient J.S., a 37-year-old female presented to Mr. Carmouze at Weems' ER. J.S. complained of a burn. In pertinent part, Mr. Carmouze ordered 50 milligrams of Demerol and 50 milligrams of Vistaril.

Patient B.M.

45. On April 24, 2002, Patient B.M., a 46-year-old female, presented to Mr. Carmouze at Weems' ER. B.M. complained of a headache of two-days' duration. In pertinent part, Mr. Carmouze ordered 25 milligrams of Demerol administered to B.M. at the ER.

46. Mr. Carmouze noted in the medical record for B.M. a diagnosis of scabies/headache cluster, severe. This is the only diagnosis made at Weems' ER for B.M.

Patient R.M.

47. On April 24, 2002, Patient R.M., a 73-year-old male, presented to Mr. Carmouze at Weems' ER. R.M. complained of abdominal pain and constipation of several days' duration. In patient part, Mr. Carmouze ordered 50 milligrams of Demerol and 50 milligrams of Vistaril administered to R.M. at the ER.

48. Mr. Carmouze noted in the medical record for R.M. a diagnosis of abdominal pain, impaction. This is the only diagnosis made at Weems' ER for R.M.

Patient M.F.

49. On April 25, 2002, Patient M.F., a 34-year-old female, presented to Mr. Carmouze at Weems' ER. M.F. complained of left-flank pain. In relevant part, Mr. Carmouze ordered 50 milligrams of Demerol and 50 milligrams of Vistaril administered to M.F. at the ER.

50. Mr. Carmouze noted in the medical record for M.F. a diagnosis of left-flank pain, left nephrolithiasis.

Patient G.C.

51. On June 7, 2002, Patient G.C., a 20-year-old male, presented to Mr. Carmouze at Weems' ER. G.C. complained of right-flank pain. In relevant part, Mr. Carmouze ordered two separate doses of Demerol, 50 milligrams each, and Vistaril, 50 milligrams each.

Patient G.B.

52. On June 7, 2002, Patient G.B., an 83-year-old female, presented to Mr. Carmouze at Weems' ER. G.B. complained of wrist, knee, and leg pain, secondary to a fall. In relevant part, Mr. Carmouze ordered two separate doses of Demerol, 50 milligrams each, and Vistaril, 50 milligrams each.

53. Mr. Carmouze noted in the medical record for G.B. a diagnosis of chest contusion, leg edema, and right Colles' fracture. This is the only diagnosis made at Weems' ER for G.B.

Patient K.S.

54. On June 8, 2002, Patient K.S., an 18-year-old female, presented to Mr. Carmouze at Weems' ER. K.S. complained of lower back pain secondary to a fall. In relevant part, Mr. Carmouze ordered Demerol, 50 milligrams, and Vistaril, 50 milligrams.

55. Mr. Carmouze noted in the medical record for K.S. a diagnosis of intractable back pain, trauma to spine. This is the only diagnosis made at Weems' ER for K.S.

Patient C.W.

56. On June 8, 2002, Patient C.W., a 46-year-old female, presented to Mr. Carmouze at Weems' ER. C.W. complained of headache and dizziness. In relevant part, Mr. Carmouze ordered Demerol, 50 milligrams, and Vistaril, 50 milligrams.

57. Mr. Carmouze noted in the medical record for C.W. a diagnosis of headache and anemia. This is the only diagnosis made at Weems' ER for C.W.

Patient M.A.C.

58. On June 9, 2002, Patient M.A.C., a 49-year-old female, presented to Mr. Carmouze at Weems' ER. M.A.C. complained of pain in the lower right abdomen and back. In relevant part, Mr. Carmouze ordered Demerol, 50 milligrams, and Vistaril, 50 milligrams.

59. Mr. Carmouze noted in the medical record for M.A.C. a diagnosis of diabetes mellitus and abdominal pain. This is the only diagnosis made at Weems' ER for M.A.C.

Patient R.S.

60. On June 9, 2002, Patient R.S., a 34-year-old male, presented to Mr. Carmouze at Weems' ER. R.S. complained of shoulder pain. In relevant part, Mr. Carmouze ordered Demerol, 50 milligrams, and Vistaril, 50 milligrams.

61. Mr. Carmouze noted in the medical record for R.S. a diagnosis of right shoulder tendon tear. This is the only diagnosis made at Weems' ER for R.S.

Patient K.M.

62. On June 11, 2002, Patient K.M., a 52-year-old male, presented to Mr. Carmouze at Weems' ER. R.S. complained of wrist pain secondary to a fall. In relevant part, Mr. Carmouze ordered Demerol, 50 milligrams, and Vistaril, 50 milligrams.

63. Mr. Carmouze noted in the medical record for K.M. a diagnosis of a Colles' fracture. This is the only diagnosis made at Weems' ER for K.S.

Facts Common to Patients C.M., J.S., B.M., R.M., M.F., G.C., G.B., K.S., C.W., M.A.C., R.S., and K.M.

64. Mr. Carmouze did not note in his medical records for Patients C.M., J.S., B.M., R.M., M.F., G.C., G.B., K.S., C.W., M.A.C., R.S., and K.M. (hereinafter referred to jointly as the

"Pain Patients "), that he had consulted with Dr. Fernandez-Gonzalez or Dr. Ajit prior to ordering Demerol for the Pain Patients. Demerol is a controlled substance.

65. Dr. Fernandez-Gonzalez' testimony regarding alleged consultations he had with Mr. Carmouze concerning the Pain Patients and other patients seen by Mr. Carmouze while at Weems is rejected as lacking credibility for the reasons explained, supra.

66. Mr. Carmouze also failed to note in the medical records for the Pain Patients his name and professional title. His name was stamped on the Emergency Room Record he completed for Patients M.A.C., G.M., and R.S. His name was also written into the space under "Time/Initials" on the Emergency Room Record for Patients M.A.C., C.W., R.M., and J.S. None of these records, however, included his title of "physician assistant."

67. Mr. Carmouze failed to identify Dr. Fernandez-Gonzalez or Dr. Ajit by name and professional title in the medical records of the Pain Patients.

68. Mr. Carmouze failed to ensure that the signature of Dr. Fernandez-Gonzalez or Dr. Ajit was included in the medical records of the Pain Patients.

H. The Other "106 Patients".

69. While at Weems ER, Mr. Carmouze provided medical services, in addition to A.M. and Pain Patients, to 106 other

patients at issue in this case (hereinafter referred to as the "106 Patients"). Petitioner's Exhibit numbered 4 is a composite exhibit of medical records for the 106 Patients. There are approximately two patients for whom more than one medical record has been included in Petitioner's Exhibit numbered 4. The foregoing findings relate to the 108 medical records for the 106 Patients.

70. Mr. Carmouze failed to note in most of the medical records for the 106 Patients his name and professional title. Of the approximately 108 records, Mr. Carmouze's name does not appear in any fashion on 48 of them. The rest either include his name (but not title) either stamped on the record or written into the box titled "Time/Initials." On two of the medical records both Mr. Carmouze's name and "P.A." have been written into the box titled "Time/Initials."

71. Mr. Carmouze failed to identify Dr. Fernandez-Gonzalez or Dr. Ajit by name and professional title in the medical records of the 106 Patients.

72. Mr. Carmouze did not ensure that either the signature of his supervising physician or Dr. Ajit was included on the medical records of the 106 Patients.

CONCLUSIONS OF LAW

A. Jurisdiction.

73. 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 (2006).

B. The Burden and Standard of Proof.

74. The Department seeks to impose penalties against Mr. Carmouze through the Amended 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 Mr. Carmouze violated Subsections 458.331(1)(m), (t), (v), and (nn), 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.").

75. 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).

C. General Authority to Discipline Mr. Carmouze.

76. Section 458.347(7)(g), Florida Statutes, provides the following:

(g) 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 or the supervising physician has been found guilty of or is being investigated for any act that constitutes a violation of this chapter or chapter 456.

77. The Board of Medicine (hereinafter referred to as the "Board") has alleged that Mr. Carmouze violated the provisions of Subsections 458.331(1)(m), (t), (v), and (nn), Florida Statutes.

D. Count One: Subsection 458.331(1)(m), Florida Statutes; Medical Records.

78. In Count One of the Amended Administrative Complaint it is alleged that Mr. Carmouze violated Subsection 458.331(1)(m), Florida Statutes, 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.

79. In the Amended Administrative Complaint, it has been alleged that Mr. Carmouze's medical records were inadequate in one or more of the following ways:

- a. He "failed to maintain legible medical records in that Respondent's written medical records for Patient A.M. are disorganized and illegible."

- b. He "failed to maintain medical records that justify the course of treatment of Patient A.M. in that Respondent failed to identify a treatment plan for Patient A.M."
- c. He "failed to identify himself by name and/or professional title in the records of any of the one hundred six (106) patients treated at Weems ED during the period from about April 2002 through June 2002, and patients A.M., C.M., J.S., B.M., R.M., M.F., G.C., G.B., K.S., M.A.C., R.S., C.W., and K.M."
- d. He "failed to identify his supervising physician by name and professional title in the records of any of the one hundred six (106) patients treated at Weems ED during the period from about April 2002 through June 2002, and patients A.M., C.M., J.S., B.M., R.M., M.F., G.C., G.B., K.S., M.A.C., R.S., C.W., and K.M."

80. The evidence failed to prove clearly and convincingly that Mr. Carmouze's medical records for A.M. were inadequate. The evidence also failed to prove clearly and convincingly, and the Department has conceded as much in Petitioner's Proposed Recommended Order, that Mr. Carmouze violated Subsection 458.331(1)(m), Florida Statutes, by failing to include a course of treatment for A.M.

81. The evidence did prove, however, clearly and convincingly that Mr. Carmouze failed to include both his name and title in the medical records for A.M. and the Pain Patients. The evidence also proved clearly and convincingly that Mr. Carmouze failed to identify any supervising physician by

name or title in the medical records of A.M., the Pain Patients, and the 106 Patients.

82. While there was testimony that it is "not customary" to include a physician assistant's name and title or the name and title of the supervising physician in hospital medical records, Subsection 458.331(1)(m), Florida Statutes, unequivocally requires that the inclusion of this information.

83. The failure of Mr. Carmouze to include his name and title in the medical records for A.M. and the Pain Patients, and to include the name and title of his supervising physician in the medical records for A.M., the Pain Patients, and the 106 Patients constituted a violation of Subsection 458.331(1)(m), Florida Statutes.

E. Count Two: Subsection 458.331(1)(t), Florida Statutes; The Standard of Care.

84. In Count Two of the Amended Administrative Complaint it is alleged that Mr. Carmouze violated the Standard of Care, as defined in Subsection 458.331(1)(t), Florida Statutes:

(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. . . .

85. In particular, it is alleged in the Amended Administrative Complaint that Mr. Carmouze violated the Standard of Care in one or more of the following ways:

- a. Mr. Carmouze "did not attempt endotracheal intubation or any other measures to treat Patient A.M.'s respiratory failure."
- b. Mr. Carmouze "failed to contact his supervising physician, the ED director, and/or Patient A.M.'s primary physician for assistance in treating Patient A.M."
- c. Mr. Carmouze "failed to identify a treatment plan for Patient A.M."
- d. Mr. Carmouze "failed to consult his supervising physician prior to ordering Demerol, a controlled substance, for Patients C.M., J.S., B.M., R.M., M.F., G.C., G.B., K.S., C.W., M.A.C., R.S., and K.M."

86. The evidence failed to prove that Mr. Carmouze violated the Standard of Care in any way alleged in the Administrative Complaint. The evidence concerning his treatment of A.M. proved that his failure to attempt intubation of A.M. earlier than he did was within the Standard of Care.

87. The evidence also failed to prove that Mr. Carmouze failed to identify a treatment plan for A.M. in violation of the Standard of Care.

88. As to the other allegations of the Amended Administrative Complaint relating to Count Two, while some of those factual allegations included in the count were proved, there was no clear and convincing proof that any violation of

the Standard of Care was committed by Mr. Carmouze. In particular, the evidence did not clearly and convincingly prove that Mr. Carmouze violated the Standard of Care when he failed to contact Dr. Fernandez-Gonzalez or Dr. Ajit concerning his treatment of any patient.

89. The evidence failed to prove clearly and convincingly that Mr. Carmouze violated Subsection 458.331(1)(t), Florida Statutes.

F. Count Three: Subsection 458.331(1)(v), Florida Statutes; Scope of Practice.

90. In Count Three of the Amended Administrative Complaint it is alleged that Mr. Carmouze violated Subsection 458.331(1)(v), Florida Statutes, which defines the following disciplinable offense:

(v) Practicing or offering to practice beyond the scope permitted by law or accepting and performing professional responsibilities which the licensee knows or has reason to know that he or she is not competent to perform. The board may establish by rule standards of practice and standards of care for particular practice settings, including, but not limited to, education and training, equipment and supplies, medications including anesthetics, assistance of and delegation to other personnel, transfer agreements, sterilization, records, performance of complex or multiple procedures, informed consent, and policy and procedure manuals.

91. In particular, it is alleged in the Amended Administrative Complaint that Mr. Carmouze violated the Subsection 458.331(1)(v), Florida Statutes, by "practicing beyond the scope permitted by law" in one or more of the following ways:

- a. Not being "adequately supervised by his supervising physician."
- b. Failing "to consult his supervising physician prior to ordering controlled substances, for Patients C.M., J.S., B.M., R.M., M.F., G.C., G.B., K.S., C.W., M.A.C., R.S., and K.M."
- c. By noting a "final diagnosis in the records of Patients R.M., B.M., G.B., K.S., C.W., M.A.C., M.F., R.S., and K.M."

92. Florida Administrative Code Rule 64B8-30.012 establishes the scope of tasks which can be delegated to a physician's assistant:

(1) A supervising physician shall delegate only tasks and procedures to the physician assistant which are within the supervising physician's scope of practice. The physician assistant may work in any setting that is within the scope of practice of the supervising physician's practice. The supervising physician's scope of practice shall be defined for the purpose of this section as "those tasks and procedures which the supervising physician is qualified by training or experience to perform."

(2) The decision to permit the physician assistant to perform a task or procedure under direct or indirect supervision is made by the supervising physician based on reasonable medical judgment regarding the

probability of morbidity and mortality to the patient. Furthermore, the supervising physician must be certain that the physician assistant is knowledgeable and skilled in performing the tasks and procedures assigned. [Emphasis added].

(a) The following duties are not permitted to be delegated at all, except where expressly authorized by statute:

1. Prescribing, dispensing, or compounding medicinal drugs.
2. Final Diagnosis.

(b) The following duties are not permitted to be performed under indirect supervision:

1. Routine insertion of chest tubes and removal of pacer wires or left atrial monitoring lines.
2. Performance of cardiac stress testing.
3. Routine insertion of central venous catheters.
4. Injection of intrathecal medication without prior approval of the supervising physician.
5. Interpretation of laboratory tests, X-ray studies and EKG's without the supervising physician interpretation and final review.
6. Administration of general, spinal, and epidural anesthetics; this may be performed under direct supervision only by physician assistants who graduated from Board-approved programs for the education of anesthesiology assistants.

(3) All tasks and procedures performed by the physician assistant must be documented in the appropriate medical record. The supervising physician must review, sign and date all the physician assistant record within seven (7) days.

(4) In a medical emergency the physician assistant will act in accordance with his or her training and knowledge to maintain life support until a licensed physician assumes responsibility for the patient.

93. Florida Administrative Code Rule 64B8-30.001(4), defines "direct supervision" as "the physical presence of the supervising physician on the premises so that the supervising physician is immediately available to the physician assistant when needed." Obviously, there was no "direct supervision" of Mr. Carmouze during the relevant times.

94. Florida Administrative Code Rule 64B8-30.001(5), defines "indirect supervision," as "the easy availability of the supervising physician to the physician assistant, which includes the ability to communicate by telecommunications. The supervising physician must be within reasonable physical proximity."

95. Dr. Fernandez-Gonzalez was 520 miles from Weems on the days that Mr. Carmouze provided medical services to patients during April and June 2002. Mr. Carmouze, therefore, did not, as required by Florida Administrative Code Rule 64B8-30.012, perform services under "direct" or "indirect" supervision when he treated Patient A.M., the Pain Patients or any of the 106 Patients.

96. Because Mr. Carmouze practiced without the supervision contemplated and required by Florida Administrative Code Rule

64B8-30.012, Mr. Carmouze practiced or offered to practice beyond the scope permitted by law in violation of Subsection 458.331(1)(v), Florida Statutes.

97. Mr. Carmouze argued in Respondent's Proposed Recommended Order that he did not practice beyond the scope permitted by law because his treatment was in an "emergency setting." Although not cited, Mr. Carmouze is apparently relying upon Florida Administrative Code Rule 64B8-012(4), which allows a physician's assistant to provide services even though he or she is not being directly or indirectly supervised if there is a "medical emergency." That provision, however, does not apply to the type of "emergency setting" Mr. Carmouze was in. That exception is clearly intended to govern the actions of a physician's assistant who unexpectedly finds himself or herself in a situation where a person is in need of immediate attention. Under those circumstances, the physician's assistant is allowed to "act in accordance with his or her training and knowledge" Even then the services which the physician's assistant may render are limited to act "to maintain life support until a licensed physician assumes responsibility for the patient." The "exception" of Florida Administrative Code Rule 64B8-012(4) does not apply to this case.

98. As to the second factual basis for the allegation that Mr. Carmouze violated Subsection 458.331(1)(v), Florida

Statutes, (that he failed to consult with Dr. Fernandez-Gonzalez prior to ordering Demerol for the Pain Patients), Petitioner has not explained how this violation is different from the more general violation described in Finding of Fact 90.a. Petitioner has not cited, nor has the undersigned found, any provision governing the practice a physician's assistant that prohibits ordering, as opposed to "dispensing" a controlled substance to a patient independent of the issue of whether the physician's assistant is properly supervised. It is, therefore, concluded that Mr. Carmouze's failure to consult with Dr. Fernandez-Gonzalez prior to ordering Demerol for the Pain Patients was not a separate violation.

99. Finally, the evidence proved clearly and convincingly that Mr. Carmouze included a "diagnosis" for Patients R.M., B.M., G.B., K.S., C.W., M.A.C., R.S., and K.M. The evidence also proved that the diagnosis included in their medical records was the only diagnosis made for these patients. It is, therefore, concluded that Mr. Carmouze's diagnosis for these patients was a "final diagnosis" that Florida Administrative Code Rule 64B8-012(2)(b) prohibited him from making.

100. Based upon the foregoing, it is concluded that the Department proved clearly and convincingly that Mr. Carmouze violated Subsection 458.331(1)(v), Florida Statutes, by performing medical duties when he was not adequately supervised

by Dr. Fernandez-Gonzalez and by noting a final diagnosis in the medical records for Patients R.M., B.M., G.B., K.S., C.W., M.A.C., R.S., and K.M.

101. The Department failed to prove clearly and convincingly that Mr. Carmouze committed a violation of Subsection 458.331(1)(v), Florida Statutes, by not obtaining prior approval from Dr. Fernandez-Gonzalez for ordering Demerol for the Pain Patients. This violation is subsumed in the violation as a result of inadequate supervision.

G. Count Four: Subsection 458.331(1)(nn), Florida Statutes; Other Violations.

102. In Count Four of the Amended Administrative Complaint it is alleged that Mr. Carmouze violated Subsection 458.331(1)(nn), Florida Statutes, which defines the following disciplinable offense: "Violating any provision of this chapter or chapter 456, or any rules adopted pursuant thereto."

103. In particular, it is alleged in the Amended Administrative Complaint that Mr. Carmouze violated the Subsection 458.331(1)(nn), Florida Statutes, by violating one or more of the following rules:

- a. Florida Administrative Code Rule 64B8-30.001(5), by failing to practice within a reasonable physical proximity of his supervising physician;
- b. Florida Administrative Code Rule 64B8-30.004(2), by failing to submit any

notification of changes in his employment status; and

- c. Florida Administrative Code Rule 64B8-30.012(3), by failing to obtain the signature of Dr. Fernandez-Gonzalez on the records of any of the 106 patients treated at Weems ER during the period from about April 2002 through June 2002, and Patient A.M. and the Pain Patients.

104. It has already been concluded that Mr. Carmouze violated Subsection 458.331(1)(v), Florida Statutes, because of his violation of the rules governing proper supervision of physician's assistants. He should not, therefore, be disciplined again under Subsection 458.331(1)(nn), Florida Statutes, by way of violating Florida Administrative Code Rule 64B8-30.001(5).

105. Florida Administrative Code Rule 64B8-30.004(2) provides the following:

(2) Each physician assistant shall submit changes to the Department on the form approved by the Council and Boards, and provided by the Department within 30 days of any change in employment status.

106. No definition of "employment status" is included in the Board's rules. The term "employment," when given its commonly understand meaning, however, contemplates a change, not just of the location where a person provides services, but a change in the person's "employer." Given this commonly understood definition to the term "employment status," the

evidence failed to prove clearly and convincingly that Mr. Carmouze underwent any "change in employment status" during the relevant times.

107. Finally, Florida Administrative Code Rule 64B8-30.012(3) requires that a physician's assistant's "supervising physician must review, sign and date all the physician assistant record within seven (7) days." The rule, while requiring supervising physician review, does not specifically place the responsibility for that review on the physician's assistant. It is concluded that the responsibility was more that of Dr. Fernandez-Gonzalez than it was Mr. Carmouze's.

108. Based upon the foregoing, it is concluded that the Department failed to prove clearly and convincingly that Mr. Carmouze violated Subsection 458.331(1)(nn), Florida Statutes.

H. The Appropriate Penalty.

109. 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. See Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231 (Fla. 5th DCA 1999).

110. 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 Sections 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.

111. Florida Administrative Code Rule 64B8-8.001 provides, in pertinent part, the following penalty guidelines for the violations alleged in the Amended Administrative Complaint:

a. Subsection 458.331(1)(m), Florida Statutes: from a reprimand to two years' suspension followed by probation, and an administrative fine of from \$1,000.00 to \$10,000.00;

b. Subsection 458.331(1)(t), Florida Statutes: from two years' probation to revocation, and an administrative fine from \$1,000.00 to \$10,000.00;

c. Subsection 458.331(1)(v), Florida Statutes: from two years' suspension to revocation, and an administrative fine of from \$1,000.00 to \$10,000.00; and

d. Subsection 458.331(1)(nn), Florida Statutes: for any offense not specifically listed, based on the severity of the offense and the potential patient harm, from a reprimand to revocation and an administrative fine of from \$1,000.00 to \$10,000.00.

112. 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.

113. In Petitioner's Proposed Recommended Order, the Department has requested that it be recommended that Mr. Carmouze be subjected the following discipline:

- a. A reprimand;
- b. A fine of \$10,000;
- c. Five hours of continuing medical education (hereinafter referred to as "CME") in emergency medicine and five hours of CME in medical risk management;

- d. Fifty hours of community service;
- e. An affidavit from Respondent certifying he has read Chapters 456 and 458, Florida Statutes, and Florida Administrative Code Rule 64B8-30.
- f. Completion of a competency evaluation by a Board approved evaluator;
- g. Probation with direct supervision for one year; and
- h. A suspension of his license for one year (with six months stayed, provided he complies with probation).

114. The Department's suggested penalties are based upon the assumption that most of the allegations of the Amended Administrative Complaint had been proved. That is not, however, the case. What has been proved are the following violations:

- a. A violation of Subsection 458.331(1)(m), Florida Statutes, due to the failure of Mr. Carmouze to include his name and title in the medical records for A.M. and the Pain Patients, and to include the name and title of his supervising physician in the medical records for A.M., the Pain Patients, and the 106 Patients; and
- b. A violation of Subsection 458.331(1)(v), Florida Statutes, due to the fact that Mr. Carmouze performed medical duties when he was not adequately supervised by Dr. Fernandez-

Gonzalez and by noting a final diagnosis in the medical records for Patients R.M., B.M., G.B., K.S., C.W., M.A.C., R.S., and K.M.

115. 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 Board should issue a reprimand, place Mr. Carmouze's license on probation for one year, require that he pay an administrative fine of \$5,000.00, require that he perform five hours of CME in a subject(s) determined appropriate by the Board, and suspend his license for six months (with the suspension stayed provided he complies with probation).

116. It is not recommended that Mr. Carmouze be required to perform community services because the Board's rules do not authorize such a penalty.

117. It is also not recommended that Mr. Carmouze be required to complete a competency evaluation by a Board approved evaluator or be required to undergo direct supervision for one year because the evidence in this case failed to prove that Mr. Carmouze's treatment of patients while at Weems fell short of what was required of him in terms of the substantive service he provided. Mr. Carmouze, who has not been disciplined by the Board prior to this matter, fell short, not in his care, but in his failure to follow procedures clearly established to regulate

his authority to provide medical services; he practiced without the required supervision and without adequately recording information concerning his position in medical records. What Mr. Carmouze needs is to be instructed on proper supervision and to have someone who will ensure that he is received the supervision required, either direct or indirect. This need should be met through the terms of his probation as established by the Board.

118. Finally, it is not recommended that Mr. Carmouze be required to read the statutes or rules which govern his license. The value of such an exercise seems doubtful. Simply requiring him to read the law will not ensure that he fully understands what is required of him as a physician's assistant. Again, what he needs is instruction on what constitutes adequate supervision.

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, Arnaldo Carmouze, P.A., has violated Subsections 458.331(1)(m) and (v), Florida Statutes, as described in this Recommended Order; issuing a reprimand; placing Mr. Carmouze's license on probation for one year; requiring that he pay an administrative fine of \$5,000.00;

requiring that he perform five hours of CME in a subject(s) determined appropriate by the Board; and suspending his license for six months (with the suspension stayed provided he complies with probation).

DONE AND ENTERED this 13th day of December, 2006, in Tallahassee, Leon County, Florida.



LARRY J. SARTIN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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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.