STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MEDICINE,	)	
Petitioner,	)	
vs.	)	Case No. 06-4288PL
JAMES S. PENDERGRAFT, IV, M.D.,	)	
Respondent.	)	

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on June 20 and 21, 2007, in Orlando, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Irving Levine, Esquire
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For Respondent: Kenneth J. Metzger, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent violated Subsections 456.072(1)(k), 458.331(1)(g), 458.331(1)(m), and 458.331(1)(t), Florida Statutes (2005),[1] and Subsections 458.331(1)(m) and 458.331(1)(t), Florida Statutes (2004), and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

On September 7, 2006, the Department of Health (Department) filed with the Board of Medicine, a six-count Administrative Complaint against Respondent, James S. Pendergraft, IV, M.D. (Dr. Pendergraft), alleging that Dr. Pendergraft violated Subsections 456.072(1)(k), 458.331(1)(g), 458.331(1)(m), and 458.331(1)(t), Florida Statutes, relating to Patient R.W., and that he violated Subsections 458.331(1)(m) and 458.331(1)(t), Florida Statutes (2004), relating to Patient T.R.

Dr. Pendergraft requested an administrative hearing, and the case was forwarded to the Division of Administrative Hearings on November 3, 2006, for assignment of an Administrative Law Judge to conduct a final hearing.

The final hearing was scheduled for January 23 through 25, 2007. Several continuances were requested and granted, and the final hearing was scheduled to commence on June 20, 2007.

The Department filed a Motion for Official Recognition, which was granted by Order dated May 30, 2007. Official

recognition was taken of Sections 390.011, 390.0111, 390.012, 456.50 and 797.03 and Subsections 456.072(1)(k), 458.331(1)(g), (m), and (t)1., Florida Statutes; 21 U.S. Code Sections 802, 821, 822, and 824; and 212 Code of Federal Regulations Section 1301 (subparts 1, 11 through 14, 22, 35, 36, and 76).

On June 15, 2007, the Department filed a Motion to Amend the Administrative Complaint, which was granted at the commencement of the final hearing.

The parties filed a Joint Pre-hearing Stipulation and stipulated to certain facts contained in Section E of the Joint Pre-hearing Stipulation. Those facts have been incorporated in this Recommended Order to the extent relevant.

On June 18, 2007, the Department filed a Notice stating that it would not be presenting evidence at the final hearing relating to DOH Case 2004-39923, which related to Patient T.R.

At the final hearing, the parties submitted Joint Exhibits 1 through 7, 8A, 8B, and 9 through 11, which were admitted in evidence. The Department called Dr. Pendergraft and Jorge Gomez, M.D., as witnesses. Petitioner’s Exhibits 1, 2, and 3 were admitted in evidence.

Leave was granted for Petitioner to take the deposition of Zvi Harry Perper, M.D., after the final hearing. Dr. Perper was deposed via written deposition questions. Responses to the questions were filed on August 17, 2007.

At the final hearing, Dr. Pendergraft called Jay Neil Plotkin, M.D., and Steven Warsof, M.D., as his witnesses. Respondent's Exhibits 1 through 7 and 9 were admitted in evidence. Two exhibits were entered into evidence as Respondent's Exhibit 4: the Agency for Healthcare Administration Surveyor's Notes and the deposition testimony of Dr. P.C. For ease of reference, the surveyor notes are designated as Respondent's Exhibit 4A and the deposition of Dr. P.C. will be designated as Respondent's Exhibit 4B.

The three-volume Transcript was filed on August 13, 2007. The parties filed their Proposed Recommended Orders on September 10, 2007. The parties' Proposed Recommended Orders have been considered in the rendering of this Recommended Order.

FINDINGS OF FACT

1. The Department is the state agency in Florida charged with regulating the practice of medicine pursuant to Section 20.43 and Chapters 456 and 458, Florida Statutes.

2. At all times material to the Amended Administrative Complaint, Dr. Pendergraft has been a licensed physician in the State of Florida, having been issued license No. ME 59702. Dr. Pendergraft is board-certified in Obstetrics and Gynecology. He does not have hospital privileges in Florida.

3. At all times material to the Amended Administrative Complaint, Dr. Pendergraft, alone or with one or more partners,

owned and operated Orlando Women's Center, Inc. (OWC), a clinic located in Orlando specializing in abortions. OWC is not a hospital.

4. At all times relevant to the Amended Administrative Complaint, Dr. Pendergraft did not have a current, valid Drug Enforcement Administration (DEA) number.

5. On June 3, 2005, R.W. presented to her primary care physician symptoms of weight gain, fatigue, and lack of a menstrual period for several months. R.W. was a marathon runner and had experienced a delay in her menstrual cycle before because of her strenuous training. She had been taking oral contraceptives. At that time, her primary care physician did not diagnose R.W. as being pregnant.

6. A couple of weeks after her visit with her primary care physician, R.W. still had not regained her menstrual cycle and took a home pregnancy test. The results of the home pregnancy test were positive. R.W. contacted her primary care physician, who ordered laboratory tests for R.W. Laboratory tests were conducted on June 14, 2005, and June 21, 2005. Both tests confirmed the pregnancy.

7. R.W. was referred to Bert Fish Medical Center for an ultrasound on June 21, 2005. The ultrasound showed that R.W. was pregnant. The physician who prepared the diagnostic imaging report based on the ultrasound stated in the report:

> There is a single intrauterine fetus with an estimated gestational age of 24.5 weeks. Positive fetal heartbeat is present at 142 beats per minute. However, there is severe oligohydiamnios with no positive fetal movement.

8. Gestational age is usually calculated from the first day of the last menstrual period (LMP) of the pregnant woman. On average, the last menstrual cycle occurs two weeks prior to conception. Thus, the gestational age that is determined by the LMP is actually two weeks more than the date of conception.[2] When the LMP is unknown, fetal measurements are used to calculate the gestational age.

9. Oligohydramnios means a lack of amniotic fluid. Amniotic fluid is basically the fetus' urine. A lack of amniotic fluid can be caused by the lack of kidneys or obstructed kidneys, rupture of the membranes, or a malfunction of the placenta. The lack of amniotic fluid makes it difficult to assess the fetal measurements using ultrasound.

10. R.W. was referred to an obstetrician, Dr. P.C., who admitted R.W. to Halifax Medical Center for routine laboratory work and an obstetrical ultrasound. The ultrasound was performed on June 22, 2005, and showed that the fetus was in a breech presentation, there was markedly decreased amniotic fluid, the bowel was abnormal, and the ventral wall was suspicious. Based on the ultrasound, it appeared there was

gastroschisis or omphalocele. Gastroschisis occurs when the abdominal wall of the fetus does not close properly and the intestines are outside the body. Omphalocele is a herniation of the intestines, and a sac-like structure covers the intestines outside the abdominal wall. The assigned gestational age estimated by the physician reviewing the ultrasound was 25 weeks and five days.[3]

11. R.W. was referred to a perinatologist in Jacksonville. Another ultrasound was performed on June 23, 2005. The assigned gestational age was 25 weeks and six days, which would mean that the age of the fetus was 23 weeks and six days from conception.[4] The lack of amniotic fluid and the position of the fetus made it difficult to determine the actual gestational age of the fetus. The perinatologist reported the following to Dr. P.C.:

> At this time, an ultrasound examination was performed which showed a single living fetus in breech presentation. There is no amniotic fluid which precluded an adequate examination of fetal anatomy. The right kidney and bladder were visualized essentially excluding diagnosis of renal agenesis. A normal appearing 4 chamber structure was seen which visually appears to occupy more than 50% of the chest cavity. This is also very difficult to evaluate due to the position of the baby. There appears to be an anterior abdominal wall defect most likely a gastroschisis, however, again this is impossible to evaluate in great detail.

> Of importance and further complicating the problems in this case, is the biometry. Measurements of head circumference and cerebellum are consistent with 30 weeks, however, the femur length is consistent with 25 weeks. The fact that this patient has been amenorrheic since October when she could be up to 34 weeks gestation is significant. We don't know the exact gestation but it is of concern that there is a dramatic difference between the extremities, abdomen, and head circumference as well as the cerebellum. This points to a growth retardation process. Doppler studies of the umbilical circulation were slightly elevated but if there had been placental disfunction I would have expected an absent diastolic component which was not the case.
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> * * *
>
> [M]y biggest concern has to do with the anhydramnios and the fact that we don't know for how long this process has been active. Pulmonary hypoplasia is a strong consideration given the size of the chest and the virtual absence of fluid. Nevertheless, not knowing for how long she has not had fluid is difficult to quote her a risk. The second area of concern is that of the appearance of a structural abnormality. Typically gastroschisis is not associated with a chromosomal anomaly, however, given the discrepancies in biometries and the absence of amniotic fluid, I wonder if this is not a gastroschisis or if it is, part of a more complex situation.

12. The perinatologist conveyed his findings to Dr. P.C., who discussed the situation with R.W. R.W. decided to terminate the pregnancy. The office notes of Dr. P.C. stated, "It was

felt by me and my partners that facilitating delivery of this non-viable child was appropriate." Dr. P.C. called Dr. Pendergraft to discuss the case. Dr. Pendergraft agreed to help, and Dr. P.C. gathered R.W.'s medical records to send to Dr. Pendergraft.

13. On July 7, 2005, R.W. presented to Dr. Pendergraft at OWC. R.W. filled out an information sheet and listed the first day of her last normal period as January 5, 2005.[5] R.W. filled out the appropriate consent forms, which a counselor reviewed with her. R.W.'s vital signs were taken and laboratory tests were performed by staff at OWC.

14. Dr. Pendergraft's notes stated that the sonogram showed severe growth restriction of the fetus. He further indicated that there was a possibility of severe pulmonary hypoplasia and risk of life-threatening sudden health issues or probable fetal, prenatal demise. Dr. Pendergraft wrote in his notes that R.W.'s PMD OB/GYN physician concurred with the maternal health reasons for the termination of the pregnancy.

15. On July 7, 2005,[6] at approximately 4:27 p.m., Dr. Pendergraft administered Digoxin into the heart of the fetus to stop the fetal heart beat. Dr. Pendergraft and his medical assistant, S.M., monitored the fetal heart beat using a sonogram until the fetal heart stopped. The procedure was documented on a form used by the OWC entitled "Second Trimester Medical

Procedure." On the form, it is noted that the patient was evaluated on July 7, 2005, and found to be 27 to 28 weeks pregnant, which is 25 to 26 weeks from conception. According to T.S., a medical assistant employed by Dr. Pendergraft, the handwriting which indicates the estimated length of the pregnancy belongs to Dr. Perper, a colleague of Dr. Pendergraft. Both Dr. Perper and Dr. Pendergraft signed the form.

16. After the Digoxin procedure was completed, R.W. was taken to a private room and given Cytotec to induce labor. S.M. continued to administer Cytotec and monitor R.W. until 8:30 p.m., when T.S. relieved S.M.

17. At approximately 12:30 a.m., on July 8, 2005, R.W. developed a fever and the administration of Cytotec was discontinued. T.S. administered Ibuprofen to R.W. to lower the fever.

18. At 1:30 a.m., T.S. noted that R.W. was having some cramping. T.S. wrote the following in the progress notes: "I have a standing order from Dr. Pendergraft for 2 cc Demerol [with] 1 cc Phenergran." This order was to alleviate the pain from the cramping. At the final hearing, T.S. stated that the note was not totally accurate, because the standing order was from Dr. Perper and not Dr. Pendergraft because Dr. Pendergraft did not have DEA authorization. She attributes the error in her notes to her 20-year working relationship with Dr. Pendergraft

and her automatically thinking of Dr. Pendergraft in terms of standing orders. The standing order itself was not submitted into evidence. The evidence is not clear and convincing that Dr. Pendergraft gave the standing order for the Demerol and Phenergran.

19. At 4:30 a.m., the cramping had increased. T.S. gave R.W. an injection of 2 cc of Demerol with 1 cc of Phenergran. At 6:30 a.m., R.W. delivered the fetus and placenta at the same time inside an empty water sack. The products of conception, which included the fetus, membranes, and placenta weighed 800 grams. The weight of the products of conception was recorded on a form used by the OWC, entitled "Clinic Examination of Products of Conception." The form listed the preoperative estimate of gestational age to be 28 weeks, which would be 26 weeks from conception. Dr. Pendergraft was one of the signatories on the form.

20. Dr. Pendergraft charged R.W. $12,000 for the procedure.

21. Although, both Dr. Pendergraft and his associate Dr. Perper, felt that, preoperatively, the gestational age of the fetus was between 27 and 28 weeks, Dr. Pendergraft did not transfer R.W. to a hospital.

22. Jorge Gomez, M.D., testified as an expert witness on behalf of the Department. Dr. Gomez is board-certified in obstetrics and gynecology and in maternal-fetal medicine. Dr. Gomez opined that on July 7, 2005, the age of the fetus from conception was 27 weeks. His opinion was based on biparietal diameter (BPD), the head circumference, the size of the cerebellum, and the femur length. He discounted the abdominal circumference because the abdominal wall defect would result in a less reliable measurement of the age of the fetus. The abdominal wall defect would cause the measurement to be smaller than would be expected for the age of the fetus.

23. Jay Neil Plotkin, M.D., testified as an expert witness for Dr. Pendergraft. Dr. Plotkin has been a licensed physician for 37 years and is board-certified in obstetrics and gynecology. Dr. Plotkin has not treated patients for four years and has not performed an abortion in six or seven years. It was Dr. Plotkin's opinion that the abortion occurred during the second trimester rather than the third trimester. His opinion is based on the combined fetal and placental weight at time of delivery. He concluded that the gestational age at the time of delivery was 24 weeks, which would translate to 22 weeks of pregnancy from conception. He used a chart to determine the age based on the weight of the fetus, but he did not know if the

chart was based on normal fetuses or included fetuses with abnormalities such as the one at issue.

24. Dr. Pendergraft also called Steven Warsof, M.D., as an expert witness. Dr. Warsof is an obstetrician/gynecologist with a subspecialty in maternal-fetal medicine. He has spent most of his professional career pursuing academic issues in obstetrical ultrasonography. It was his opinion that R.W.'s pregnancy was in the second trimester. He also based his opinion on the weight of the products of conception after delivery.

25. Based on the evidence presented, it is clear and convincing that R.W. was in her third trimester of pregnancy when she had the abortion. The only two doctors who placed the pregnancy in the second trimester based their opinions on the weight of the fetus and placenta at the time of delivery. Because of the complications of R.W.'s pregnancy, it is clear that the fetus had not developed normally and was underweight for its age. There had been a lack of amniotic fluid which is essential to development of the fetus. Based on his office records, it is also clear and convincing that Dr. Pendergraft was under the impression that R.W. was in her third trimester of pregnancy when he performed the abortion.

26. The medical records of Dr. Pendergraft do not contain a written certification from two physicians that within a reasonable degree of medical probability the termination of

R.W.’s pregnancy was necessary to save the life or preserve the health of R.W. The evidence established that Dr. Pendergraft wrote in his notes that there was a risk of life-threatening, sudden health issues. Assuming he was referring to the health issues of the pregnant woman, this note could be considered a certification that to a degree of medical probability that the abortion was necessary to preserve the health of R.W. However, there is no written certification from another physician that that was the case, and the note of Dr. Pendergraft that R.W.'s primary care physician concurred with the maternal health reasons for termination of the pregnancy is not a written certification from another physician. The medical records kept by Dr. Pendergraft do not contain a written certification that there is a medical necessity for emergency medical procedures to terminate the pregnancy and that no other physician is available for consultation.

27. No evidence was presented concerning the allegations in Counts IV, V, and VI of the Amended Administrative Complaint.

CONCLUSIONS OF LAW

28. 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. (2006).

29. The Department must establish the allegations in the Amended Administrative Complaint by clear and convincing

evidence. Department of Banking and Finance v. Osborne Stern and Company, 670 So. 2d 932 (Fla. 1996). The clear and convincing standard has been described by the courts 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 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 v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

30. The Department has alleged that Dr. Pendergraft violated Subsection 456.072(1)(k), Florida Statutes, which provides:

> (1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:
>
> * * *
>
> (k) Failing to perform any statutory or legal obligation placed upon a licensee. . . .

31. The Department has alleged that Dr. Pendergraft violated Subsections 458.331(1)(g), (m), and (t), Florida Statutes, which provide:

> (1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):

* * *

(g) Failing to perform any statutory or legal obligation placed upon a licensed physician.

* * *

(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.

* * *

(t) Notwithstanding s. 456.072(2), but as specified in s. 456.50(2):

1. Committing medical malpractice as defined in s. 456.50. The board shall give great weight to the provisions of s. 766.102 when enforcing this paragraph. Medical malpractice shall not be construed to require more than one instance, event, or act.

32. Subsection 456.50(1)(g), Florida Statutes, defines "medical malpractice" as "the failure to practice medicine in accordance with the level of care, skill, and treatment recognized in general law related to health care licensure," which is the standard of care specified in Subsection 766.102,

Florida Statutes, which provides that the prevailing standard of care for a given health care provider is "that level of care, skill, and treatment, which in light of all relevant surrounding circumstances, is recognized as acceptable and appropriate by reasonably prudent similar health care providers."

33. In Count I of the Amended Administrative Complaint, the Department alleges that Dr. Pendergraft violated Subsections 456.072(1)(k) and 458.331(1)(g), Florida Statutes, by performing a third trimester abortion procedure on R.W. at the OWC facility and by performing a third trimester abortion procedure on R.W. without having two physicians certify in writing to the fact that, to a reasonable degree of medical probability, the termination of the pregnancy was necessary to save the life or preserve the health of R.W. or certifying that it was an emergency and another physician was not available for consultation.

34. Subsection 797.03(3), Florida Statutes, provides that "[i]t is unlawful for any person to perform or assist in performing an abortion on a person in the third trimester other than in a hospital." Subsection 390.0111(1), Florida Statutes, provides:

> (1) TERMINATION IN THIRD TRIMESTER; WHEN ALLOWED.—No termination of pregnancy shall be performed on any human being in the third trimester of pregnancy unless;

> (a) Two physicians certify in writing to the fact that, to a reasonable degree of medical probability, the termination of the pregnancy is necessary to save the life or preserve the health of the pregnant woman; or
>
> (b) The physician certifies in writing to the medical necessity for legitimate emergency medical procedures for termination of pregnancy in the third trimester, and another physician is not available for consultation.

35. Subsection 390.011(8), Florida Statutes, defines "third trimester" as "the weeks of pregnancy after the 24th week of pregnancy." The term "weeks of pregnancy" is not defined in the Florida Statutes. Taken literally, the term would mean that weeks of pregnancy would be the number of weeks that the woman was actually pregnant. Therefore, it is concluded that weeks of pregnancy refers to the number of weeks from the time of conception and not the last menstrual period of the woman. If the Legislature had intended that gestational age be used, it could have so stated.

36. The Department has established by clear and convincing evidence that Dr. Pendergraft violated Subsections 456.072(1)(k) and 458.331(1)(g), Florida Statutes. R.W. was in her third trimester of pregnancy when Dr. Pendergraft performed the abortion. Subsection 797.03(7), Florida Statutes, prohibits persons from performing third trimester abortions in locations other than a hospital. Dr. Pendergraft was under a legal

obligation to perform the third trimester abortion in a hospital, and he did not do so.

37. Dr. Pendergraft had a legal obligation pursuant to Subsection 390.0111(1), Florida Statutes, to have the written certifications of two physicians that within a medical probability it is necessary to perform the abortion to save the life or preserve the health of R.W. or to certify in writing that an emergency existed, and there was no other physician available for consultation. He did not do so. The notation in his records that Dr. P.C. concurred with the maternal health reasons for terminating the pregnancy is not sufficient to meet the statutory requirement of Subsection 390.0111(1)(a), Florida Statutes, and there is no certification in the records that an emergency existed, and no other physician was available for consultation.

38. In Count II of the Amended Administrative Complaint, the Department alleges that Dr. Pendergraft violated Subsection 458.331(1)(m), Florida Statutes, by not certifying in writing that to a reasonable degree of medical probability the termination of R.W.’s pregnancy was necessary to save the life or preserve the health of R.W., by failing to obtain a concurring certification from a second physician, and by failing to certify in writing that an emergency existed.

39. The Department has established by clear and convincing evidence that Dr. Pendergraft violated Subsection 458.331(1)(m), Florida Statutes. His medical records did not contain a certification in writing from two physicians that within a reasonable medical probability the abortion was necessary to save the life or preserve the health of R.W., and he did not certify in writing that an emergency existed and that there was no other physician available to consult.

40. In Count III of the Amended Administrative Complaint, the Department alleges that Dr. Pendergraft violated Subsection 458.331(1)(t)1., Florida Statutes, in one or more of the following ways:

> a. By performing a third trimester abortion procedure on Patient R.W. at the OWC facility.
>
> b. By not certifying in writing that to a reasonable degree of medical probability, the termination of Patient R.W.'s pregnancy was necessary to save the life or preserve the health of the pregnant woman, or obtain a concurring certification from a second physician.
>
> c. By not certifying in writing that an emergency existed.
>
> d. By not transferring Patient R.W. to a hospital before performing the third trimester abortion.
>
> e. By prescribing, ordering or administering Demerol to Patient R.W. when Respondent did not have a current, valid DEA number to allow him, as a licensed

physician, to prescribe, order, or administer controlled substances.

41. The Department has failed to establish by clear and convincing evidence that Dr. Pendergraft ordered the administration of Demerol to R.W. when he did not have a current, valid DEA number. Although the note of the medical assistant indicated that the standing order for the Demerol was from Dr. Pendergraft, she credibly testified that the order was from Dr. Perper.

42. The Department has established by clear and convincing evidence that Dr. Pendergraft violated Subsection 458.331(1)(t)1., Florida Statutes, by performing a third trimester abortion on R.W. in a setting other than a hospital, by not transferring R.W. to a hospital for the abortion, by performing the abortion when it was not an emergency, and by performing the abortion without the written certification of two physicians that the procedure was necessary to save the life or preserve the health of R.W. The standard of care for performing third trimester abortions in Florida is set forth in Sections 390.0111 and 797.03, Florida Statutes, and Dr. Pendergraft failed to meet that standard of care.

43. The Department failed to establish the allegations set forth in Counts IV, V, and VI of the Amended Administrative Complaint.

44. Florida Administrative Code Rule 64B8-8.001 sets forth the range of penalties to be imposed for violations of Chapters 456 and 458, Florida Statutes. The range of penalties for a violation of Subsections 456.072(1)(k) and 458.331(1)(g), Florida Statutes, goes from a letter of concern to revocation and an administrative fine of from $1,000.00 to $10,000.00. The penalty for a violation of Subsection 458.331(1)(m), Florida Statutes, goes from a reprimand to two years' suspension followed by probation and an administrative fine from $1,000.00 to $10,000.00. The penalty for violation of Subsection 458.331(1)(t)1., Florida Statutes, goes from one year's probation to revocation and an administrative fine from $1,000.00 to $10,000.00.

45. On September 10, 2007, Dr. Pendergraft filed a Motion for Attorney's Fees and Costs relating to Counts IV, V, and VI of the Amended Administrative Complaint pursuant to Sections 57.105 and 120.595, Florida Statutes.[7] Section 120.595, Florida Statutes, cannot form the basis for an award of attorney's fess in the instant case. Subsection 120.595(1)(b), Florida Statutes, provides:

> (b) The final order in a proceeding pursuant to s. 120.57(1) shall award reasonable costs and a reasonable attorney's fee to the prevailing party only where the nonprevailing adverse party has been determined by the administrative law judge

to have participated in the proceeding for an improper purpose.

46. In the instant case, the Department does not meet the definition of a "nonprevailing adverse party," as defined in Subsection 120.595(1)(e)3., Florida Statutes, as one "that has failed to have substantially changed the outcome of the proposed or final agency action. . . ." The Department has not sought to change the outcome of the proposed agency action.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered finding Dr. Pendergraft guilty of violations of Subsection 456.072(1)(k), 458.331(1)(g), 458.331(1)(m), and 458.331(1)(t)1., Florida Statutes; dismissing Counts IV, V, and VI of the Amended Administrative Complaint; suspending his license for one year followed by three years of probation with indirect monitoring; imposing an administrative fine of $10,000.00; and denying his motion for attorney's fees pursuant to Subsection 120.595(1)(b), Florida Statutes.

DONE AND ENTERED this 26th day of October, 2007, in Tallahassee, Leon County, Florida.

SUSAN B. HARRELL
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of October, 2007.

ENDNOTES

[1/] All references to the Florida Statutes are to the 2005 version, unless otherwise stated.

[2/] The age of the fetus at the time of the ultrasound on June 21, 2005, based on date of conception would have been 22.5 weeks or 22 weeks and three and one-half days. Thus, based on the ultrasound taken on June 21, 2005, R.W. would have been 24 weeks and five and one-half days pregnant.

[3/] Based on the findings of the ultrasound done on June 22, 2005, R.W. would have been 23 weeks and five days pregnant from the time of conception. Thus, based on the findings of the June 22, 2005, ultrasound, R.W. would have been 25 weeks and six days pregnant at the time of the abortion.

[4/] Based on the findings of the physician interpreting the ultrasound on June 23, 2005, R.W. would have been pregnant for 25 weeks and six days at the time of the abortion based on the dating of pregnancy from conception.

[5/] The perinatologist who examined R.W. was under the impression that R.W.'s last menstrual period was in October 2004. However, R.W. listed January 5, 2005, as the first day of her last normal

period. A note in Dr. P.C.'s records indicate that R.W. ran her last marathon in January 2005. Thus, it is not clear if R.W. was listing the time in which she had concluded her strenuous training and should have resumed her normal periods or if January 5, 2005, was, indeed, the last normal period that she had before she learned that she was pregnant. The opinions of the experts who testified were based on the premise that R.W. was not able to determine the date of her last menstrual period because of her amenorrhea. However, if her last menstrual period was January 5, 2005, she would have been 24 weeks and one day pregnant at the time of the abortion on July 7, 2005, based on the fetal age from conception.

[6/] The Amended Administrative Complaint alleged that Dr. Pendergraft performed the abortion on July 5, 2005; however, the evidence established the abortion on July 7, 2005. Dr. Pendergraft argued in his Proposed Recommended Order that he was deprived of due process because the Department did not prove that the abortion occurred on July 5, 2005. The reference to July 5, 2007, in the Amended Administrative Complaint is a scrivener's error. Dr. Pendergraft was not prejudiced by the error. He fully defended against the Amended Administrative Complaint. The instant situation differs vastly from having to defend against a change that was not alleged or conduct that was not alleged. See Werner v. Dept. of Ins. & Treasurer, 689 So. 2d 1211, 1213-1214 (Fla. 1st DCA 1997).

[7/] The motion as it relates to Section 57.105, Florida Statutes, is dealt with by separate order.

COPIES FURNISHED:

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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.