STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MEDICINE,	)	
Petitioner,	)	
vs.	)	Case No. 07-3396PL
JAMES F. PENDERGRAFT, IV, M.D.,	)	
Respondent.	)	

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Orlando, Florida, on January 11-13, 2010.

APPEARANCES

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STATEMENT OF THE ISSUES

The issues are whether Respondent deviated from the applicable standard of care, failed to keep medical records justifying the course of treatment, improperly delegated professional responsibilities, or prescribed, dispensed or administered controlled substances other than in the course of his professional practice; and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

By Administrative Complaint dated September 2, 2005, Petitioner alleged that Respondent is a licensed Florida physician, holding license number 59702. The Administrative Complaint alleges that Respondent owned and operated the Orlando Women's Center, which employed M. W., who was also a patient of Respondent.

The Administrative Complaint alleges that M. W., who was not a licensed health care provider, assisted in patient preparation, administered medications, cleaned equipment, ordered supplies, and remained overnight with patients to administer pain medications, such as Demerol, which is a controlled substance. The Administrative Complaint alleges that Respondent authorized M. W. to administer pain medications without his supervision. The Administrative Complaint alleges that, in 1997, M. W.'s duties expanded to ordering controlled

substances for the Orlando Women's Center using Respondent's Drug Enforcement Agency registration certificate (DEA number).

The Administrative Complaint alleges that, in November 1998, M. W. informed Respondent that she wanted to become a wrestler and bodybuilder and asked that he prescribe anabolic steroids for these purposes. However, the Administrative Complaint alleges that there was no medical justification for prescribing anabolic steroids to M. W.

The Administrative Complaint alleges that, in November 1998, Respondent allowed M. W. to use his DEA number to order anabolic steroids--specifically, Winstrol, depo-testosterone, and Stanozolol--for her personal use. The Administrative Complaint alleges that Chapter 893, Florida Statutes, defines an anabolic steroid as a Schedule III controlled substance and is any drug or hormonal substance chemically or pharmacologically related to testosterone that promotes muscle growth.

The Administrative Complaint alleges that Respondent failed to order laboratory studies, such as liver function tests, to monitor the effect of the steroids that he authorized for M. W. Futher, the Administrative Complaint alleges that Respondent failed to document his monitoring of the effects of the steroids in his medical records.

The Administrative Complaint alleges that, in March 1999, M. W. was found unconscious on the floor of the Orlando Women's

Center. She allegedly told Respondent that she had abused cocaine, a Schedule II controlled substance, and heroin, a Schedule I controlled substance. Respondent allegedly made no effort to treat M. W.'s drug addiction or to refer her to an addiction specialist.

The Administrative Complaint alleges that, in April 1999, M. W. was again found unconscious on the floor of the Orlando Women's Center. On August 23, 1999, Respondent allegedly ordered a drug profile on M. W., which was positive for benzodiazepines, a group of psychotropic drugs with potent hypnotic and sedative action used predominantly as anti-anxiety and sleep-inducing drugs, and cocaine metabolites, a Class II controlled substance that is a drug of abuse when used for nonmedical purposes, but is used medically to numb mucous membranes.

The Administrative Complaint alleges that, on September 22, 1999, M. W. expired from acute pulmonary edema and respiratory compromise due to acute bronchitis with persistent airway obstruction. The medical examiner allegedly stated that her death was due to natural causes.

These paragraphs of the Administrative Complaint are realleged in each of the four counts of the pleading.

Count One of the Administrative Complaint alleges that Section 458.331(1)(t), Florida Statutes, authorizes discipline

for failing to practice medicine with that level of skill, care, and treatment that is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances (Standard of Care). Count One alleges that Respondent violated the Standard of Care by:

> a. Prescribing anabolic steroids for M. W. when there were no medical indications to justify giving these drugs.
>
> b. Failing to order laboratory tests for M. W. to monitor the effects of the prescribed anabolic steroids.
>
> c. Failing to treat M. W.'s known drug addiction or to refer her to an addiction specialist.
>
> d. Employing M. W. in a position that gave her full access to narcotics to maintain her drug addiction.
>
> e. Allowing M. W., an unlicensed practitioner, to administer narcotics to patients without supervision.
>
> f. Allowing M. W. to use Respondent's DEA number to order controlled substances.
>
> g. Maintaining inadequate medical records that would justify the course of treatment.

Count Two alleges that Section 458.331(1)(m), Florida Statutes, authorizes discipline for failing to keep legible medical records justifying the course of treatment, including patient histories, examination results, test results, records of drugs prescribed, dispensed or administered, and reports of consultations or hospitalizations. Count Two alleges that

Respondent committed a medical records violation by failing to justify the course of treatment when he did not adequately document the monitoring of the effects of the anabolic steroids.

Count Three alleges that Section 458.331(1)(w), Florida Statutes, authorizes discipline for delegating professional responsibilities to a person the licensee knows or has reason to know is not qualified by training, experience, or licensure to perform them. Count Three alleges that Respondent violated this provision by: a) allowing M. W. to administer controlled drugs and narcotics to patients and b) allowing M. W., who had a known drug addiction, to use Respondent's DEA number to order controlled substances.

Count Four alleges that Section 458.331(1)(q), Florida Statutes, authorizes discipline for prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug, including any controlled substance, other than in the course of the physician's practice. Count Four alleges that Respondent violated this provision by prescribing or allowing to be purchased, with his DEA number, anabolic steroids for M. W. without a medical indication or justification.

By Motion to Amend Administrative Complaint filed August 20, 2009, Petitioner requested leave to amend paragraph 7, above, of Count One, which alleges medical records as a Standard of Care violation, to add a reference to Florida

Administrative Code Rule 64B8-9.003. By Order entered September 3, 2009, this request was granted.

Petitioner transmitted the file to the Division of Administrative Hearings on July 23, 2007. The case was first set for hearing on January 7-11, 2008. The hearing was repeatedly continued, most often due to problems in obtaining discovery from the Drug Enforcement Administration (DEA).[1] Prior to the assignment of the case to the undersigned Administrative Law Judge in late October 2009, the case had been assigned to three Administrative Law Judges, two of whom had disqualified themselves.

At the hearing, ruling on Respondent's Motion to Dismiss filed December 30, 2009, the Administrative Law Judge struck paragraph g, above, of Count One, based on Board of Dentistry v. Barr, 954 So. 2d 668 (Fla. 1st DCA 2007), and limited paragraphs d, e, and f, above, of Count One to alleged breaches of the Standard of Care with respect to the practice of medicine as to M. W., as a patient, based on the final order in DOAH Case No. 08-4197PL (requirement of a DEA registration to prescribe certain medications is not a standard-of-care requirement). These matters are discussed in the conclusions of law. Petitioner voluntarily dismissed paragraph b of Count Three at the start of the hearing.

At the hearing, Petitioner called seven witnesses and offered into evidence seven exhibits: Petitioner Exhibits 1-3, 5, 9, and 11-12. Petitioner Exhibit 1 is limited to pages 4-6 and A and B. Petitioner Exhibit 9 is admitted for penalty, not liability. Respondent called seven witnesses and offered into evidence eight exhibits: Respondent Exhibits 1-4, 7, and 8. Respondent Exhibit 7 is the following pages of Petitioner Exhibit 1: 11-20 and 22-32. Respondent Exhibit 8 is Petitioner Exhibits 7 and 8. All exhibits were admitted.

The parties received the Transcript prior to its filing with the Division of Administrative Hearings. The parties filed their Proposed Recommended Orders on March 22, 2010, and the court reporter filed the transcript on March 31, 2010.

FINDINGS OF FACT

1. Respondent is a licensed physician in Florida, holding license number 59702. He has been licensed in Florida since 1991. Respondent is Board-certified in obstetrics and gynecology. His last certification was in November 2009.

2. Respondent received his bachelor of science degree from the University of North Carolina at Chapel Hill in 1978. He received his doctor of medicine degree from Meharry Medical College in Nashville in 1982. He performed a surgical internship from 1982-83 with the Madigan Army Medical Center in Tacoma, an obstetrics and gynecology residency from 1987-91 at

the Harbor Hospital Center in Baltimore, and a maternal fetal medicine fellowship from 1991-93 at the University of South Florida.

3. During the residency, Respondent completed a six-week rotation in the mental evaluation, diagnosis, and treatment of transgendered patients. The training took place on the campus of Johns Hopkins University, which was one of the first medical schools to offer training in the diagnosis and treatment of transgendered patients. During this rotation, Respondent assumed responsibility for the care of about 30 patients, a little over half transitioning from female to male.

4. From 1991-93, Respondent performed obstetrics and gynecology at several medical facilities in Florida, Maine, and Missouri. From 1993-96, Respondent was the Chief of Perinatology, Healthy Start Program, at the D.C. General Hospital/Howard University in Washington.

5. In 1996, Respondent started the Orlando Women's Center (OWC) in Orlando, which he still owns and operates. He opened a second women's clinic in Orlando the following year. Respondent also participated in the starting of women's clinics in Ocala in 1998, Fort Lauderdale in April 1999, and Tampa in October 1999.

6. In October 1996, about six months after opening, OWC hired M. W. as a medical assistant. She had nearly completed the coursework to become a licensed practical nurse, but at no

time material to this case was she ever a licensed health care provider. M. W. was employed by OWC until 1999.

7. M. W. was a diligent employee. Her initial duties were answering the telephone and working in the lab. However, her enthusiasm, intelligence, dedication, and discretion earned M. W. a promotion. In January 1997, Respondent promoted M. W. to a trusted position in which she would care for patients undergoing abortions during the second trimester of pregnancy.

8. Working conditions required M. W. to be on-call nearly all of the time, as certain patients demanded to be admitted during nights or weekends to preserve confidentiality. The work was stressful because some patients bore fetuses with abnormalities, and protestors regularly demonstrated outside the clinic. M. W.'s new duties allowed Respondent himself to observe her work and determine that M. W. had the psychological stability to perform her job well.

9. M. W. demonstrated her trustworthiness by dealing with patients' valuables, opening and closing the clinic, ordering supplies and stocking five surgical rooms, and drawing controlled substances for administration by Respondent. At the end of 1997, Respondent promoted M. W. to ordering and stocking the clinic's medical supplies, which include controlled substances. For Schedule II drugs, which includes narcotics, and Schedule III drugs, which includes steroids, M. W. had to

fill out a DEA Form 222, using Respondent's DEA number to place the order.

10. When OWC received Schedule III drugs, M. W. matched the order with the shipment. She then recorded the information in the OWC drug log. M. W. would place the drugs in a locked cabinet, if they were not needed for immediate use in the clinic.

11. After nearly one year of ordering supplies, toward the end of 1998, M. W. approached Respondent to discuss a personal matter. At this point, the material disputes between the parties emerge. Respondent testified that M. W. discussed with him the possibility of undergoing transgender therapy, as well as treatment for an injured shoulder. According to Petitioner, M. W. discussed with Respondent the possibility of using anabolic steroids to improve her bodybuilding and weightlifting. The parties do not dispute that M. W. had participated in bodybuilding and weightlifting for several years prior to her employment with OWC. The Administrative Law Judge credits Petitioner's version of the purpose of treatment.

12. Respondent testified that M. W. told him that she had thought about changing genders for several years. She did not like or want her breasts. She did not like the shape of her hips and thighs. She had decided that she did not want children and did not want to undergo menstruation. Although M. W. may

have told Respondent that she did not like her body shape, she did not tell him that she wanted to change into a man.

13. As discussed below, M. W. is not available to confirm or deny Respondent's version of events, and Respondent does not have any medical records documenting his care and treatment of M. W. Assigning a secondary reason for the treatment--healing a long-injured shoulder--is an awkward fit with Respondent's version of events, given the unlikelihood that someone considering a decision as major as changing genders would bother assigning a secondary reason for the decision. This secondary reason for the treatment is a better fit with Petitioner's version of events, although treatment of an injured shoulder was, at most, a very minor factor in the steroid treatment because the reconstructed medical records, discussed below, mention strength and bodybuilding, not recovery from a shoulder injury.

14. The most important reason to credit Petitioner's version of the purpose of the steroid treatment over Respondent's version is that Petitioner's version conforms to Respondent's initial description of the purpose of the treatment. In other words, this is not a case of Respondent's word against contrary inferences drawn by Petitioner; this is a case of Respondent's later word against Respondent's earlier word.

15. The parties do not dispute that, after the initial meeting to discuss the personal matter, Respondent agreed to allow M. W. to order anabolic steroids using his DEA number and at the discounted price charged to OWC. The drugs that Respondent expressly allowed M. W. to order--and which he prescribed for her--were Winstrol and, a short while later, depo-testosterone. Respondent prescribed for M. W. Winstrol orally at the rate of 2 mg per day, increasing to 10 mg per day at the end of six weeks, and depo-testosterone by intramuscular injection, which Respondent administered initially at the rate of 50 mg every two weeks, increasing to 200 mg every two weeks.

16. The parties do not contest that, in early summer 2009, M. W. ordered through OWC sufficient Winstrol and Deca-Durabolin for her weightlifting father and brother, with whom she lived, to complete one six-week bodybuilding cycle each with these two anabolic steroids. For her brother, the evidence establishes that M. W. ordered through OWC additional Winstrol and sufficient depo-testosterone for him to complete a second six-week cycle. The evidence is undisputed that M. W. administered the injections of Deca-Durabolin and depo-testosterone to her brother, Deca-Durabolin to her father, and Deca-Durabolin to herself. M. W. probably took additional Winstrol at home. The evidence is also clear that, in addition to ordering the Winstrol and depo-testosterone in quantities in excess of the

amount that she was authorized to order and Deca-Durabolin without any authority whatsoever, M. W. also ordered--without authorization--Xanax, an anti-anxiety drug, and Soma, a muscle relaxant, possibly for her own use. Petitioner contends that Respondent knew or reasonably should have known of these unauthorized orders, but the evidence that Respondent knew is nonexistent, and the evidence that he should have known is insubstantial.

17. There is little, if any, dispute that, unknown to Respondent, M. W. was using cocaine and heroin--by her own admission since early 1998. In late July 1999, Respondent was informed that M. W. had passed out at work. When Respondent spoke with her about this incident, M. W. admitted to the use of cocaine and heroin, most recently a couple of weeks earlier. Respondent immediately withdrew his authorization of M. W. to order supplies and medications for OWC and immediately discontinued further steroid treatment.

18. Acting as M. W.'s employer, not physician, Respondent ordered M. W. to submit to a drug screen for Demerol, which had been missing from OWC,[2] Valium, and cocaine. Three weeks later, he received the results, which were positive for cocaine. After giving M. W. an opportunity to discontinue illegal drug use, Respondent ordered M. W. to submit to another drug screen for

Demerol, Valium, fentanyl, cocaine, and heroin, and the report, received in late August, was positive for cocaine and Valium.

19. On September 22, 1999, M. W. was found dead in her home by her father. The first law enforcement officers responding to the 911 call reported that they had found a lifeless male dressed in woman's panties; this mistaken observation was based on M. W.'s muscularization and shadowy presence of facial hair. A homicide detective conducting an initial investigation found large quantities of syringes and prescription drugs, mostly steroids, in M. W.'s bedroom. He also found shipping labels and receipts with the names of OWC and Respondent.

20. The parties have stipulated that the death was unrelated to steroid use. M. W.'s death was classified as a natural death. She was 30 years old.

21. In resolving the major factual dispute--i.e., the purpose of the treatment--the Administrative Law Judge has assigned considerable weight to Respondent's earlier responses to law enforcement and regulatory inquiries. In these responses, Respondent never mentioned transgender treatment or gender identity disorder, but instead admitted that the treatment was to enhance athletic performance and to facilitate bodybuilding.

22. In a written reconstruction of the medical records done prior to the commencement of this case, Respondent stated that he was "unable to locate [M. W.'s] chart so I will reconstruct her chart from memory. Last time chart was seen was June [19]99 which was given to [her]."

23. The reconstructed chart shows three office visits: November 7, 1998, March 20, 1999, and June 26, 1999. None of the reconstructed notes mentions anything about lab work being ordered, the results of any lab work, or anything about an injured shoulder and whether it was healing.

24. The entry for November 7 starts: "[Patient] request being placed on testosterone for body building. States she . . . is considering Pro-Wrestling." The notes indicate blood pressure of 118 over 64, pulse of 72, and nothing remarkable from a basic physical examination. The notes state: "Wants to body build; requests steroids." The notes report that Respondent prescribed Winstrol in 2 mg doses and explained the side effects, and Respondent was going to allow M. W. to order her steroid medication from the clinic's vendors. This entry concludes with a note for a followup visit in three months.

25. The entry for March 20, 1999, states that M. W. had no complaints, reported getting stronger, and was happy with "bench," meaning bench-pressing, a form of weightlifting. This note states that M. W. denied experiencing any side-effects and

wanted to add a second steroid: "Request to add Depo-Testosterone."

26. The entry for June 26, 1999, notes that M. W. "feels good about herself and her outlook on life is much improved" and is "continuing to [increase] strength [with] weights." This note contains findings of a physical exam, including blood pressure of 124 over 78 and pulse of 72, and the note concludes that M. W. was doing well and Respondent planned to continue the same steroid regime.

27. The other time that Respondent discussed the purpose of the treatment was when he was interviewed by a law enforcement officer on March 10, 2000, in the presence of Respondent's attorney. Respondent did not say anything about transgender treatment or gender identity disorder, and he was evasive when asked if he were M. W.'s physician. When asked if M. W. were ever a patient or just an employee, Respondent responded by referring to the incident when she passed out at work: "She now when you say she would ah the only time when she and I were upstairs that day. . . . And when she had the overdose." The law enforcement officer asked, "And that's like in August [1999]?" Respondent replied, "Yeah. . . . The question was and I and I still haven't been able to define that because she asked me not to tell anybody about her problem with her drug habits and this type of scenario. So the question is

whether or not she was a, whether or not honestly she was a patient of mine at that particular point in time."[3]

28. Shortly after this exchange, the law enforcement officer asked Respondent if the steroids that Respondent allowed M. W. to order through the OWC were for competitive purposes, such as weightlifting. Respondent replied, "we had a discussion about her wanting to . . . make it so that her, that she could work out harder because she was having some problems with her shoulders and these type of things . . . .."[4]

29. These reconstructed records and statements to a law enforcement officer were not casual statements uttered in an informal setting. This was information that Respondent provided to assist in the investigation of the circumstances surrounding the death of this 30-year-old woman. Except for mention of a shoulder injury in the last-cited statement--an effort by Respondent to convert the treatment objective from pure enhancement of athletic performance to a mix of enhancement of athletic performance and therapy for some undiagnosed shoulder injury--the information consistently implies that the treatment objective was to improve M. W.'s efforts in bodybuilding and weightlifting. And the mention of the shoulder injury suggests only that its healing was subordinate to the weightlifting and bodybuilding. The failure of the reconstructed records to contain any diagnostic information or progress reports on the

injured shoulder precludes a finding that the treatment objective was to heal a shoulder injury.

30. Respondent testified about the importance of confidentiality for his patients, especially M. W., as she was undergoing "gender transformation." But patient confidentiality is not an end in itself; it is a means to assuring that the patient will trust the physician with all relevant information necessary for diagnosis and treatment. Respondent implied that the requirement of patient confidentiality somehow trumped the duty not to affirmatively frustrate investigations into the death of his employee and patient. This makes no sense. Respondent's strained "explanation" for creating a misleading set of medical records yields to the simpler explanation that Respondent told the truth in these reconstructed records and in the police interview: Respondent was treating M. W. with steroids for bodybuilding and wrestling, not for gender transformation and not for an injured shoulder.

31. These findings are supported by the fact that the first drug that Respondent prescribed M. W. was Winstrol. The anabolic effect of a steroid promotes muscularization, and the androgenic effect of a steroid promotes masculinization. Because Winstrol produces more anabolic than androgenic effect, it was long favored by females who wanted to produce muscle mass, such as for bodybuilding, without masculinization.

Initiating treatment with Winstrol and following with depo-testosterone is a conventional example of the cyclical use of steroids for muscularization, not masculinization.

32. One of Respondent's expert witnesses made an interesting observation based on the misidentification of the gender of the body of M. W. by the first responders. He testified that, if Respondent had been ordering the anabolic steroids for weightlifting and bodybuilding, M. W. must have been seriously dissatisfied with the masculinization that she had undergone. However, this observation overlooks the fact that M. W., without Respondent's knowledge, had administered to herself unknown quantities of the prescribed anabolic steroids and Deca-Durabolin. Like Winstrol, Deca-Durabolin is more anabolic, or muscle-making, than androgenic, or masculinizing--which is consistent with M. W.'s intent to enhance her athletic performance and bodybuilding, not change her gender. Although the first responders observed some facial hair, in addition to muscularization, nothing in the record suggests that M. W. could take all of these anabolic steroids in unknown quantities without experiencing some masculinization, or that she expected no such masculinization side effects. Under these circumstances, M. W. could not legitimately have confronted Respondent over the incidental masculinization that she had experienced, while self-administered steroids whose main effect

was muscularization, without running the risk that he would detect her unauthorized ordering of steroids.

33. As noted above, there are no available medical records. Respondent testified that he gave M. W.'s medical chart and drug log "VIP" treatment to preserve confidentiality: Respondent allowed M. W. to keep her medical records and the drug log pertaining to her medications. Each time M. W. presented to Respondent, such as for an injection, she brought with her these files, according to Respondent. Petitioner contends that these records never existed, and, therefore, Respondent failed to document that he monitored the effects of the anabolic steroids that he ordered for M. W. The Administrative Law Judge credits Petitioner's version of the situation regarding medical records.

34. At the hearing, Respondent characterized as a mere "sampling" the medical records that he had initially called a reconstruction. He implied that the reconstructed medical records were illustrative of what the records originally contained. This probably explains how he could reconstruct blood pressure readings of 118 over 64 and 126 over 78 taken six and nearly twelve months prior to the reconstruction of the records. Likely, he recalled that the values were normal and inserted these readings merely to illustrate his recollection.

35. However, as noted above, these reconstructed records are significant for their omission of any similar illustrative reconstructions of an SBC for blood chemistry, SMAC 18 for electrolytes and kidney and liver function, and lipids for cholesterol and triglycerides. This lab work is essential, at the start of a course of treatment with anabolic steroids and periodically during treatment, to ensure the safety of any patient, especially when orally ingested anabolics--here, Winstrol--are administered, due to the possibility of liver damage. Respondent testified at the hearing that the lab results were normal, but, unlike his addition of illustrative, normal values for blood pressure and pulse, Respondent never added illustrative, normal values for this lab work. This is because he never ordered such lab work.

36. These lab tests are common in a variety of circumstances, so they did not require the "VIP treatment" that Respondent claimed was required for the transgender treatment plan. However, Respondent never produced medical records or even lab paperwork, such as test results or invoices, documenting that these tests had been done. Also, if such records had existed and Respondent had allowed M. W. to keep them, one obvious place for them would have been in M. W.'s room at her home, but Respondent never sent anyone there to look for them after her death.

37. As to the Standard of Care allegations, Petitioner has thus proved first, that Respondent prescribed steroids for M. W. both for muscle building (not to treat an injured muscle) and for enhancement of athletic performance; and, second, that Respondent did not order lab work to monitor the effects of the steroids that he prescribed for M. W.

38. The evidence fails to establish that Respondent ever undertook the treatment of M. W.'s drug addiction (despite his statement to the contrary, which has been discredited). The evidence fails to establish the circumstances out of which a duty to treat could have arisen, especially within the brief time frame between Respondent's discovery of her drug problems and her death.

39. Any evidence relevant to the remaining allegations within Count One involves the employer-employee relationship, not the physician-patient relationship, between Respondent and M. W.

40. As to the medical records violation, Petitioner has proved that Respondent's medical records failed to adequately document the monitoring of the effects of anabolic steroids that Respondent prescribed for M. W. The evidence establishes the necessity of lab work, at the start and during steroid treatment, to ensure the safety of the patient. Without this

lab work, documented in the medical records, the course of steroid treatment is not justified.

41. The evidence fails to establish that Respondent delegated responsibilities to a person whom Respondent knew or reasonably should have known was not qualified by training, experience, or licensure to administered controlled substances to patients. Drug addiction is not a deficit in training, experience, or licensure. Even if drug addiction fell within one of these statutory categories, the evidence fails to establish any improprieties in M. W.'s administration of controlled substances to patients, and, even if the evidence proved such improprieties, the evidence fails to establish that Respondent knew of M. W.'s drug addiction at a point to have timely relieved her of her duties, or that Respondent reasonably should have known of M. W.'s drug addiction in time to do anything about it. To the contrary, Respondent's termination of these responsibilities of M. W. appears to have been timely.

42. Petitioner has proved that Respondent prescribed and administered controlled substances--i.e., anabolic steroids--for muscle building, not the treatment of an injured muscle, and for enhanced athletic performance.

43. Respondent has previously been disciplined. By Final Order entered on December 18, 2007, in DOAH Case No. 06-4288PL, the Board of Medicine imposed one year's suspension, a $10,000

fine, and three years' probation for failing to perform a third-trimester abortion in a hospital and failing to obtain the written certifications of two physicians of the necessity for the procedure; committing an associated medical-records violation; and committing a Standard of Care violation for failing to perform a third-trimester abortion in a hospital. Respondent's acts and omissions occurred in 2005. The Fifth District Court of Appeal affirmed the Final Order in Pendergraft v. Department of Health, Board of Medicine, 19 So. 3d 392 (Fla. 5th DCA 2009).

44. By Final Order entered on January 28, 2010, in DOAH Case No. 08-4197PL, the Board of Medicine imposed two years' suspension, a $20,000 fine, and three years' probation for committing a Standard of Care violation for failing to a advise subsequent treating physicians that he had removed a portion of a patient's fetus and an associated medical-records violation. Respondent's acts and omissions occurred in 2006.

45. Although Respondent has been disciplined prior to this recommended order, the acts and omissions in this case took place several years prior to the acts and omissions in the two cases described immediately above.

CONCLUSIONS OF LAW

46. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569 and 120.57(1), Fla. Stat. (2009).

47. Petitioner must prove the material allegations by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Company, Inc., 670 So. 2d 932 (Fla. 1996) and Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

48. Section 458.331(1), Florida Statutes (1998), provides, in relevant part:

> (1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:
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> * * *
>
> (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.
>
> * * *
>
> (q) Prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug, including any

controlled substance, other than in the course of the physician's professional practice. For the purposes of this paragraph, it shall be legally presumed that prescribing, dispensing, administering, mixing, or otherwise preparing legend drugs, including all controlled substances, inappropriately or in excessive or inappropriate quantities is not in the best interest of the patient and is not in the course of the physician's professional practice, without regard to his or her intent.

* * *

(t) Gross or repeated malpractice or the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances. . . . As used in this paragraph, "gross malpractice" or "the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances," shall not be construed so as to require more than one instance, event, or act. Nothing in this paragraph shall be construed to require that a physician be incompetent to practice medicine in order to be disciplined pursuant to this paragraph.

* * *

(w) Delegating professional responsibilities to a person when the licensee delegating such responsibilities knows or has reason to know that such person is not qualified by training, experience, or licensure to perform them.

* * *

> (ee) Prescribing, ordering, dispensing, administering, supplying, selling, or giving growth hormones, testosterone or its analogs, human chorionic gonadotropin (HCG), or other hormones for the purpose of muscle building or to enhance athletic performance. For the purposes of this subsection, the term "muscle building" does not include the treatment of injured muscle. . . .

49. As noted above, the Administrative Law Judge limited the Standard of Care allegations in two respects. First, the allegation in paragraph g of Count One attempts to recast a medical records violation as a Standard of Care violation. This interpretation of these two statutory subsections was rejected, in the context of the practice of dentistry, in Barr v. Department of Health, Board of Dentistry, 954 So. 2d 668 (Fla. 1st DCA 2007).

50. Second, the Administrative Law Judge limited the scope of proof that would be admissible to prove the allegations in paragraphs d, e, and f of Count One because a Standard of Care violation applies only to the practice of medicine and not to other acts and omissions of the licensee. Section 458.305(3), Florida Statutes (1998), provides: "'Practice of medicine' means the diagnosis, treatment, operation, or prescription for any human disease, pain, injury, deformity, or other physical or mental condition." In this case, the evidence supporting these three paragraphs of Count One pertained exclusively to Respondent's employment or managerial practices involving M. W.

as an employee, not the practice of medicine with respect to M. W. as a patient, so Petitioner has failed to prove the Standard of Care violations alleged in these three paragraphs.

51. As to paragraph a of Count One, Petitioner has proved that Respondent prescribed anabolic steroids to M. W. without medical indication. Section 458.331(1)(ee) prohibits the use of anabolic steroids to build muscle, except to treat injured muscle, or to enhance athletic performance. Any prescription of anabolic steroids in violation of this statute thus cannot be medically indicated. The exception applies to building muscle, not athletic performance. To the extent that M. W. sought anabolic steroids for weightlifting, which is athletic performance, not muscle building, the injured-muscle exception is unavailable to Respondent. However, as noted in the findings of fact, Petitioner proved that Respondent did not prescribe anabolic steroids to heal an injured muscle.

52. The problem with paragraph a of Count One is that is it mispleaded, under Barr. The prescription of anabolic steroids under these circumstances violates Section 458.331(1)(ee), so it does not constitute a Standard of Care violation under the reasoning of Barr.

53. As to paragraph b of Count One, Petitioner has proved that the failure to order lab work to monitor the effects of the anabolic steroids is a Standard of Care violation. Respondent

testified that he ordered the lab work, and he was treating M. W. for gender identity disorder. The Administrative Law Judge is free to disbelieve unrebutted testimony of a physician. Fox v. Department of Health, 994 So. 2d 416 (Fla. 1st DCA 2008) (dictum). But see Reich v. Department of Health, 973 So. 2d 1233 (Fla. 4th DCA 2008) (Administrative Law Judge's discrediting of physician's testimony describing additional medical records reversed due to lack of competent substantial evidence). In this case, as noted above, Respondent himself provided contrary evidence, prior to the commencement of this case, that is consistent with Petitioner's version of events.

54. The failure to order lab work is distinct from the medical records violation discussed below because a practitioner could order the lab work, but fail to document it. In this case, though, where the physician fails to order and document the lab work, there is considerable overlap between the offenses, which must be considered when determining the appropriate penalty.

55. As to paragraph c of Count One, the evidence has failed to prove that Respondent violated the Standard of Care by failing to treat M. W.'s drug addiction for the reasons stated above.

56. As to Count Two, Petitioner has proved a medical records violation because Respondent failed to document

adequately the effects of the anabolic steroids--specifically, by failing to document the results of the lab work that must be performed when administering anabolic steroids under these circumstances. This is a failure to justify the course of the steroid treatment that Respondent pursued with M. W.

57. As to Count Three, the evidence fails to establish an improper delegation of professional responsibilities to M. W. for the reasons stated above.

58. As to Count Four, Petitioner has proved that Respondent prescribed and administered anabolic steroids without medical indication because he did so for building muscles and enhancing athletic performance. The question is whether Respondent prescribed and administered these controlled substances other than in the course of his professional practice.

59. As Respondent contends, Rogers v. Department of Health, 920 So. 2d 27 (Fla. 1st DCA 2005), requires an element of illicitness for a determination that the prescription or administration is not in the course of the physician's professional practice. Section 458.331(1)(ee) supplies this element. The holding in Barr does not require a contrary result. Here, Section 458.331(1)(ee) has supplied the element of illicitness necessary to find a violation of Section 458.331(1)(q). The illicit nature of an act or omission may be

derived from any statute, so this situation is different from merely recasting a medical record violation as Standard of Care violation, at least where Petitioner has not pleaded a Section 458.331(1)(ee) violation.

60. Section 458.331(2), Florida Statutes (1998), states:

> When the board finds any person guilty of any of the grounds set forth in subsection (1), . . . it may enter an order imposing one or more of the following penalties:
>
> * * *
>
> (b) Revocation or suspension of a license.
> (c) Restriction of practice.
> (d) Imposition of an administrative fine not to exceed $5,000 for each count or separate offense.
> (e) Issuance of a reprimand.
> (f) Placement of the physician on probation for a period of time and subject to such conditions as the board may specify, including, but not limited to, requiring the physician to submit to treatment, to attend continuing education courses, to submit to reexamination, or to work under the supervision of another physician.
> (g) Issuance of a letter of concern.
> (h) Corrective action.
> (i) Refund of fees billed to and collected from the patient.
>
> In determining what action is appropriate, the board must first consider what sanctions are necessary to protect the public or to compensate the patient. Only after those sanctions have been imposed may the disciplining authority consider and include in the order requirements designed to rehabilitate the physician. All costs associated with compliance with orders issued under this subsection are the obligation of the physician.

61. Legislation raising the maximum fine from $5000 to $10,000, became effective July 1, 1999.[5] However, absent an explicit provision in the new legislation for retroactive application, courts will not retroactively apply a new penalty. McGann v. Florida Elections Commission, 803 So. 2d 763 (Fla. 1st DCA 2001). Thus, in this case, the statute authorizes a fine of no more than $5000 per count or offense.

62. As in effect from May 14, 1998, through December 26, 1999, Florida Administrative Code Rule 64B8-8.001 provides:

> (1) Purpose. Pursuant to Section 2, Chapter 86-90, Laws of Florida, the Board provides within this rule disciplinary guidelines which shall be imposed upon . . . licensees whom it regulates under Chapter 458, F.S. The purpose of this rule is to notify . . . 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 . . . licensees for violations and to deter them from future violations; to offer opportunities for rehabilitation, when appropriate; and to deter other . . . licensees from violations.

63. Former Florida Administrative Code Rule 64B8-8.001(2)(m) punishes a medical records violation with a

reprimand to two years' suspension followed by probation and a fine of $250-$5000. Former Florida Administrative Code Rule 64B8-8.001(2)(q) punishes inappropriate prescribing with one year's probation to revocation and a fine of $250-$5000. Former Florida Administrative Code Rule 64B8-8.001(2)(t)3. punishes a Standard of Care violation with two years' probation to revocation and a fine of $250-$5000.

64. Former Florida Administrative Code Rule 64B8-8.001(3) establishes various aggravating and mitigating circumstances, such as the degree of exposure of the patient or public to injury or death, the legal status of the licensee at the time of the offenses, the number of counts or separate offenses proved, the number of times the same offenses have been committed by the licensee previously, the licensee's disciplinary history, and any pecuniary benefit inuring to the licensee.

65. Based on Respondent's entire disciplinary record, these are his first offenses. At least six years after these offenses, Respondent committed the acts and omissions in 2005 and 2006 that resulted in the disciplinary proceedings described above. To treat the 1998 and 1999 offenses as subsequent offenses strains the notion of notice mentioned in the above-cited portion of Former Rule 64B8-8.001(1). Petitioner selected the order in which to prosecute these three cases, and its choice does not transform the acts and omissions of 1998 and

1999 into a third offense. Cf. Department of Public Safety v. Mitchell, 152 So. 2d 764 (Fla. 3d DCA 1963). A disciplinary rule must be construed against the agency due to the penal nature of the disciplinary proceeding. Colbert v. Department of Health, 890 So. 2d 1165 (Fla. 2004). However, the language of the rule permits consideration of Respondent's disciplinary history, as distinguished from the number of times he has committed the same offenses, as an aggravating factor, so the other discipline is an aggravating factor, even though the present offenses must be considered a first offense.

66. Although M. W.'s drug addiction and death cannot be linked in any way to the acts and omissions of Respondent, the potential for injury to M. W. was at least moderate when Respondent prescribed anabolic steroids for bodybuilding and weightlifting without ordering lab work. On these facts, as noted above, the failure to document the lab results is essentially duplicative of the Standard of Care violation arising from the failure to order these tests, so, in determining an appropriate penalty, Respondent is essentially guilty only of a Standard of Care violation and a violation of the inappropriate prescription of steroids.

67. If this were a case in which increasingly serious discipline had failed to produce corrective behavior, the Administrative Law Judge would recommend revocation, but a less

harsh penalty is indicated due to the first-offense status of these acts and omissions. On the other hand, the risk of injury and, somewhat contradictorily, the disciplinary history require a significant penalty.

RECOMMENDATION

It is

RECOMMENDED that the Board of Medicine enter a Final Order finding Respondent guilty of violations of Section 458.331(1)(m), (t), and (q), Florida Statutes (1998), and suspending his license for one year followed by three years' probation, imposing a fine of $10,000, and assessing costs as provided by law.

DONE AND ENTERED this 8th day of June, 2010, in Tallahassee, Leon County, Florida.

ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of June, 2010.

ENDNOTES

1. After setting the case for final hearing January 7-11, 2008, the first Administrative Law Judge disqualified herself by Order entered December 7, 2007. On December 27, 2007, the new Administrative Law Judge granted a motion for continuance filed by Respondent, and reset the hearing for April 22-25, 2008. On April 1, 2008, Respondent filed a Motion to Continue Formal Hearing due to the need for more time for discovery, and Petitioner supported the motion. On April 3, 2008, the second Administrative Law Judge abated the case.

Based on joint status reports filed May 2, 2008, and June 27, 2008, the Administrative Law Judge extended the abatement. By joint status report filed October 2, 2008, Petitioner objected to Respondent's claim that the abatement needed to be extended a third time. After a conference call, the Administrative Law Judge extended the abatement 30 days. On November 7, 2008, the parties filed another joint status report, disagreeing again on whether the case was ready to be set for hearing. After a conference call, the Administrative Law Judge extended the abatement about five weeks and transferred the case to a third Administrative Law Judge.

On December 12, 2008, the parties filed a joint status report, in which Petitioner reported that the prior delays were due to the inability of the parties to obtain the cooperation of the U.S. Department of Justice, Drug Enforcement Administration, which had recently responded to a subpoena. Respondent claimed that the case was not ready for hearing because the Drug Enforcement Administration had not agreed to a deposition of any of its agents or investigators.

After a conference call on January 12, 2009, the Administrative Law Judge scheduled the case for final hearing on June 16-19, 2009. On May 28, 2009, Petitioner filed a Motion to Reschedule Final Hearing, and Respondent joined in the motion. After a conference call on June 1, 2009, the Administrative Law Judge continued the hearing to September 15-18, 2009. On September 1, 2009, Respondent filed a Motion for Brief Continuance, based on problems in arranging a deposition of a Drug Enforcement Administration agent. On September 2, 2009, the Administrative Law Judge conducted a conference call, and, the next day, issued an Order continuing the final hearing to December 8-11, 2009.

On October 26, 2009, Respondent filed a Motion to Disqualify the Administrative Law Judge on the ground that he had issued a recommended order on September 21, 2009, in a different disciplinary case involving Respondent and had rejected certain testimony of Respondent as not credible. On the same day, the

Administrative Law Judge granted the motion and the undersigned Administrative Law Judge was assigned the case at that time.

On November 20, 2009, Respondent filed an Unopposed Motion for Continuance due to discovery problems. After a conference call on November 23, 2009, the Administrative Law Judge issued an Order Granting Continuance on November 24, 2009, and reset the final hearing for January 11-15, 2010.

2. By stipulation, there is no evidence that M. W. took the Demerol from OWC.

3. Petitioner Exhibit 5, p. 71.

4. Petitioner Exhibit 5, p. 72.

5. Chap. 99-397, Laws of Fla. § 99. This provision became effective July 1, 1999. Chap. 99-397 Laws of Fla. § 208.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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