

STATE OF FLORIDA
BOARD OF MEDICINE

DEPARTMENT OF HEALTH,

Petitioner,

vs.

DOH CASE NOS.: 2006-05930
DOAH CASE NO.: 08-4197PL
LICENSE NO.: ME0059702

JAMES S. PENDERGRAFT, IV, M.D.,

Respondent.

FINAL ORDER

THIS CAUSE came before the BOARD OF MEDICINE (Board pursuant to Sections 120.569 and 120.57(1), Florida Statutes, on December 4, 2009, in Orlando, Florida, for the purpose of considering the Administrative Law Judge's Recommended Order, Respondent's Exceptions to the Recommended Order, Petitioner's Response to Respondent's Exceptions to the Recommended Order, Petitioner's Exceptions to the Recommended Order, and Respondent's Response to Petitioner's Exceptions to the Recommended Order (copies of which are attached hereto as Exhibits A, B, C, and D respectively) in the above-styled cause. Petitioner was represented by Greg Marr, Assistant General Counsel. Respondent was represented by Kenneth Metzger, Esquire.

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DIVISION OF ADMINISTRATIVE HEARINGS
FILED

Upon review of the Recommended Order, the argument of the parties, and after a review of the complete record in this case, the Board makes the following findings and conclusions.

RULINGS ON RESPONDENT'S EXCEPTIONS

The Board reviewed the Respondent's Exceptions to the Recommended Order and the Petitioner's Response to Respondent's Exceptions and rules as follows:

1. Exception to Findings of Fact 1: The Board denied Respondent's exceptions to the findings of fact in paragraph 41 on page 9 of the Recommended Order on the grounds that the finding was based on competent substantial evidence.
2. Exception to Findings of Fact 2: The Board denied Respondent's exceptions to the second sentence in the findings of fact in paragraph 48 on page 10 of the Recommended Order on the grounds that the finding was based on competent substantial evidence.
3. Exceptions to Conclusion of Law 1: The Board denied Respondent's exceptions to the conclusion of law 61 on page 15 of the Recommended Order because Petitioner's application of Section 458.331(1)(m), Florida Statutes, to the circumstances presented to in this matter is based on the clear unambiguous language of the statute. The Respondent's claim as to the

legislative intent behind Section 458.331(1)(m) is misplaced because the statute is clear and unambiguous.

4. Exceptions to Conclusion of Law 2: The Board denied Respondent's exceptions to the conclusion of law 78 on page 20 of the Recommended Order. The Respondent asserted that because the legal conclusion was predicated on a factual finding that he believed should have been rejected (see exception 1 to findings of fact), the legal conclusion should also be rejected. The Board, however, already rejected Respondent's first exception to the factual findings, and therefore, rejected the exception to the corresponding legal conclusion.

5. Exceptions to Conclusion of Law 3: The Board denied Respondent's exceptions to the conclusion of law 78 on page 20 of the Recommended Order. The Respondent took further exception to conclusion of law 78 on the grounds that the Petitioner failed to prove all the elements of malpractice as set forth in Section 766.102, Florida Statutes. The Board rejected the Respondent's exception based on the grounds set forth by the Petitioner in its Response to Petitioner's Exceptions to the Recommended Order.

6. Exceptions to Conclusion of Law 4: The Board denied Respondent's exceptions to the conclusion of law 80 on pages 20 and 21 of the Recommended Order. The Respondent asserted that

because the legal conclusion was predicated on a factual finding that he believed should have been rejected (see exception 1 to findings of fact), the legal conclusion should also be rejected. The Board rejected the Respondent's exception based on the grounds set forth by the Petitioner in its Response to Petitioner's Exceptions to the Recommended Order.

7. Exceptions to Conclusion of Law 5: The Board denied Respondent's exceptions to the conclusion of law 82 on page 21 of the Recommended Order based on the grounds set forth by the Petitioner in its Response to Petitioner's Exceptions to the Recommended Order.

8. Exceptions to Conclusion of Law 6: The Board denied Respondent's exceptions to the conclusion of law 94 on page 24 and 25 of the Recommended Order because the Board believed that there was clear and convincing evidence in the record supporting the underlying conclusion of law. More specifically, the Board found that there was evidence in the record provided by the Petitioner's expert supporting the finding that having to look for the missing fetal body part in the hospital exposed the patient to further potential injury.

RULINGS ON PETITIONER'S EXCEPTIONS

9. Exceptions to Conclusion of Law 1 and 2: The Board denied Petitioner's exceptions to conclusions of law 72 and 80

in the Recommended Order. The Board believes that the requirement to have a DEA registration in order to prescribe certain medications is a "legal obligation" that is placed on a physician, not a minimum standard of care as to the appropriate care and treatment to render to a patient. There are no supporting findings of fact that indicate that ordering Demerol for the patient in this case was medically inappropriate other than the legal obligation for the ordering physician to have a DEA registration. The DEA registration has nothing to do with whether a patient received appropriate care and treatment in accordance with the standard of care.

The exceptions were also denied based on the reasons set forth in Respondent's Response to Petitioner's Exceptions.

10. The Board accepted and approved Petitioner's exceptions to conclusion of law 85 in the Recommended Order and its substituted language for paragraph 85. Conclusion of Law 85 in the Recommended Order inaccurately states that the Administrative Complaint alleges that the Respondent committed medical malpractice in violation of Section 458.331(1)(q). The Administrative Complaint does not allege medical malpractice in violation of Section 458.331(1)(q). The Respondent had no objection to the exception and the change.

11. Exceptions to Conclusion of Law 4: The Board approved in part and denied in part Petitioner's exceptions to conclusion of law 86 on page 23 of the Recommended Order. To the extent that the ALJ was making a determination that the Respondent did not violate Section 458.331(1)(q) because he was not involved in illicit activity at the time he ordered the Demerol, the Board rejects the ALJ's legal conclusion and accepts the Petitioner's exception. It has been previously determined by this Board and upheld by the Third District Court of Appeals in *Waters v. Department of Health, Board of Medicine*, 962 So.2d 1011 (Fla. 3rd DCA 2007) there need not be illicit activity on the part of the physician when finding that a physician violated Section 458.331(1)(q). This finding is supported by Board's previous cases, case law, and is more reasonable than that set forth by the ALJ.

The Board, however, rejects the Petitioner's objection to the ALJ's finding that the Respondent did not violate Section 458.331(1)(q) because he ordered rather than prescribed the Demerol he administered to the patient. The Petitioner asserts that there is no difference between prescribing and ordering a drug, and therefore, the Respondent could be found to have violated Section 458.331(1)(q). The Board rejects this reasoning because it believes there is a difference between

prescribing and ordering a drug. While "ordering" is not explicitly defined in statute, Chapter 458 makes a clear distinction between the two. For example, while under Section 458.347(4)(e), physician assistants are authorized to prescribe certain drugs under certain conditions, under Section 458.347(4)(e)9., such restrictions are not applicable to physician assistants "ordering" drugs for hospitalized patients under a supervisory physician's delegation.

FINDINGS OF FACT

1. The findings of fact set forth in the Recommended Order are approved and adopted and incorporated herein by reference.
2. There is competent substantial evidence to support the findings of fact.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter pursuant to Section 120.57(1), Florida Statutes, and Chapter 458, Florida Statutes.
2. The conclusions of law set forth in the Recommended Order are approved and adopted and incorporated herein by reference with the exception of Paragraph 85 of the Recommended Order which is amended to read as follows:

85. Count III of the Administrative Complaint alleged that the Respondent violated Subsection 458.331(1)(q) Florida Statutes (2005), by

"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." Specifically, the Petitioner alleged that the Respondent violated Subsection 458.331(1)(q) Florida Statutes (2005), by ordering Demerol without proper DEA registration and through the administration of "excessive" Cytotec.

RESPONDENT'S EXCEPTIONS TO THE PENALTY

1. Exception to Penalty 1: The Board denied Respondent's first exception to the penalty because it does not possess the authority to determine whether an imposition of a penalty violates the principle of equal protection and because the recommended penalty is within the Board's disciplinary guidelines as stated in its rules.

2. Exception to Penalty 2: The Board denied Respondent's second exception to the penalty because the recommended penalty is within the Board's disciplinary guidelines as stated in its rules.

3. Exception to Penalty 3: The Board denied Respondent's third exception to the penalty because the recommended penalty is within the Board's disciplinary guidelines as stated in its rules.

PENALTY

Upon a complete review of the record in this case, the Board determines that the penalty recommended by the

Administrative Law Judge be ACCEPTED. WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED:

1. Respondent shall pay the costs associated with this case in the amount of \$20,000.00. Said costs shall be paid within 30 days from the date this Final Order is filed.

2. Respondent's license to practice medicine in the State of Florida is hereby SUSPENDED for a period of 2 years.

3. Following the period of suspension, Respondent shall be placed on probation for a period of 3 years subject to the following terms and conditions:

a. Respondent shall appear before the Board's Probation Committee at the first meeting after said probation commences, at the last meeting of the Probation Committee preceding termination of probation, quarterly, and at such other times requested by the Committee. Respondent shall be noticed by Board staff of the date, time and place of the Board's Probation Committee whereat Respondent's appearance is required. Failure of the Respondent to appear as requested or directed shall be considered a violation of the terms of probation, and shall subject the Respondent to disciplinary action. Unless otherwise provided in the Final Order, appearances at the Probation Committee shall be made quarterly.

b. Respondent shall not practice except under the **direct supervision** of a **BOARD CERTIFIED OB/GYN** physician fully licensed under Chapter 458 who has been approved by the Probation Committee. The supervisory physician shall share offices with Respondent. Absent provision for and compliance with the terms regarding temporary approval of a supervising physician set forth below, Respondent shall cease practice and not practice until the Probation Committee approves a supervising physician. Respondent shall have the supervising physician appear at the first probation appearance before the Probation Committee. Prior to approval of the supervising physician by the Committee, the Respondent shall provide to the supervising physician a copy of the Administrative Complaint and Final Order filed in this case. A failure of the Respondent or the supervising physician to appear at the scheduled probation meeting shall constitute a violation of the Board's Final Order. Prior to the approval of the supervising physician by the committee, Respondent shall submit to the committee a current curriculum vitae and description of the current practice of the proposed supervising physician. Said materials shall be received in the Board office no later than fourteen days before the Respondent's first scheduled probation appearance. The attached definition of a

supervising physician is incorporated herein. The responsibilities of a supervising physician shall include:

(1) Submit quarterly reports, in affidavit form, which shall include:

- A. Brief statement of why physician is on probation.
- B. Description of probationer's practice.
- C. Brief statement of probationer's compliance with terms of probation.
- D. Brief description of probationer's relationship with supervising physician.
- E. Detail any problems which may have arisen with probationer.
- F. Report to the Board any violation by the probationer of Chapter 456 and 458, Florida Statutes, and the rules promulgated pursuant thereto.

b. In view of the need for ongoing and continuous monitoring or supervision, Respondent shall also submit the curriculum vitae and name of an alternate supervising/monitoring physician who shall be approved by Probation Committee. Such physician shall be licensed pursuant to Chapter 458, Florida Statutes, and shall have the same duties and responsibilities as specified for Respondent's monitoring/supervising physician during those periods of time which Respondent's

monitoring/supervising physician is temporarily unable to provide supervision. Prior to practicing under the indirect supervision of the alternate monitoring physician or the direct supervision of the alternate supervising physician, Respondent shall so advise the Board in writing. Respondent shall further advise the Board in writing of the period of time during which Respondent shall practice under the supervision of the alternate monitoring/supervising physician. Respondent shall not practice unless Respondent is under the supervision of either the approved supervising/monitoring physician or the approved alternate.

c. CONTINUITY OF PRACTICE

(1) TOLLING PROVISIONS.

In the event the Respondent leaves the State of Florida for a period of 30 days or more or otherwise does not or may not engage in the active practice of medicine in the State of Florida, then certain provisions of the requirements in the Final Order shall be tolled and shall remain in a tolled status until Respondent returns to the active practice of medicine in the State of Florida. **Respondent shall notify the Compliance Officer 10 days prior to his/her return to practice in the State of Florida.** Unless otherwise set forth in the Final Order, the

following requirements and only the following requirements shall

be tolled until the Respondent returns to active practice:

(A) The time period of probation shall be tolled.

(B) The provisions regarding supervision whether direct or indirect by the monitor/supervisor, and required reports from the monitor/supervisor shall be tolled.

(2) ACTIVE PRACTICE.

In the event that Respondent leaves the active practice of medicine for a period of one year or more, the Respondent may be required to appear before the Board and demonstrate the ability to practice medicine with reasonable skill and safety to patients prior to resuming the practice of medicine in the State of Florida.

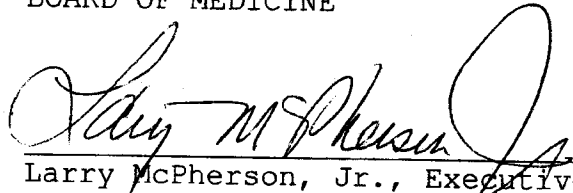
RULING ON AMENDED MOTION TO ASSESS COSTS

The Board reviewed the Petitioner's Amended Motion to Assess Costs, Respondent's Response and Objections to Petitioner's Motion to Assess Costs; Petitioner's Reply to Respondent's Response and Objections to Petitioner's Motion to Assess Costs; Notice of Supplemental Authority to Respondent's Response and Objections to Petitioner's Motion to Assess Costs. The Board imposes the costs associated with this case in the amount of \$102,303.21. Said costs are to be paid within 30 days from the date this Final Order is filed.

(NOTE: SEE RULE 64B8-8.0011, FLORIDA ADMINISTRATIVE CODE. UNLESS OTHERWISE SPECIFIED BY FINAL ORDER, THE RULE SETS FORTH THE REQUIREMENTS FOR PERFORMANCE OF ALL PENALTIES CONTAINED IN THIS FINAL ORDER.)

DONE AND ORDERED this 25 day of JANUARY,
2009. ²⁰¹⁰ *lem*

BOARD OF MEDICINE



Larry McPherson, Jr., Executive Director
For Fred Bearison, M.D., Chair

NOTICE OF RIGHT TO JUDICIAL REVIEW

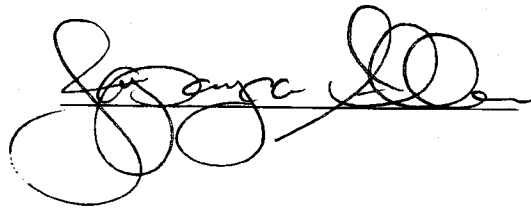
A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF HEALTH AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by U.S. Mail to JAMES S. PENDERGRAFT, IV, M.D., 1103 Lucerne Terrace, Orlando, Florida

32806; to Kenneth Metzger, Esquire, Metzger, Grossman, Furlow & Bayo, LLC, 1408 N. Piedmont Way, Tallahassee, Florida 32308; to William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; and by interoffice delivery to Ephraim Livingston, Department of Health, 4052 Bald Cypress Way, Bin #C-65, Tallahassee, Florida 32399-3253 this

26 day of January, 2010.



Deputy Agency Clerk

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