STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MEDICINE, Petitioner, vs. LUCIEN ARMAND, M.D., Respondent.	)	Case Nos. 08-4403PL DOH Case No. 2005-63004

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case before Larry J. Sartin, an Administrative Law Judge of the Division of Administrative Hearings, on April 6, 2009, by video teleconference between Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Diane K. Kiesling
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STATEMENT OF THE ISSUES

The issues for determination are whether Respondent Lucien Armand, M.D., violated Section 458.331(1)(nn), Florida Statutes (2004), by having violated Florida Administrative Code Rules 64B8-9.009, 64B8-9.0091, and 64B8-9.0092, and Section 458.331(1)(m), Florida Statutes (2003), as alleged in an Administrative Complaint filed by the Department of Health before the Board of Medicine on March 28, 2006; and, if so, what disciplinary action should be taken against his license to practice medicine in the State of Florida.

PRELIMINARY STATEMENT

This case began with the filing by the Department of Health before the Board of Medicine of a two-count Administrative Complaint, DOH Case Number 2005-63004, against Respondent Lucien Armand, M.D., an individual licensed to practice medicine in Florida. On or about April 27, 2006, Respondent, through counsel, filed a Petition for Formal Administrative Hearing and Request for Complete Investigative File and Exhibits, and an Election of Rights form signed by Respondent, disputing the allegations of fact contained in the Administrative Complaint and requesting a formal administrative hearing pursuant to Sections 120.569(2)(a) and 120.57(1), Florida Statutes (2005).

On August 4, 2006, the matter was filed with the Division of Administrative Hearings with a request that an administrative

law judge be assigned to conduct proceedings pursuant to Section 120.57(1), Florida Statutes (2006). The matter was designated DOAH Case Number 06-2823PL and was assigned to the undersigned. By Order entered October 10, 2006, that case was closed when the parties represented that they had reached a tentative settlement. Because that tentative settlement needed to be approved by the Board of Medicine, DOAH Case No. 06-29823Pl was closed with leave for either party to request that the matter be reopened should their settlement not be accepted by the Board of Medicine.

On August 29, 2008, Petitioner filed a Motion to Re-Open Case, representing that the tentative settlement reached by the parties had been rejected by the Board of Medicine. On September 8, 2008, the Motion was granted and the matter was reopened as DOAH Case No. 08-4403PL. By Order entered September 22, 2008, all pleadings previously filed in DOAH Case No. 06-2923PL were consolidated with this case.

This case was consolidated with another case involving the parties, DOAH Case No. 08-4285PL, DOH Case No. 2006-38439, by Order of Consolidation entered September 12, 2008. The two cases were consolidated for purposes of hearing only. A separate Recommended Order is being entered in DOAH Case No. 08-4285PL.

The final hearing was scheduled to be held on November 7, 2008, by video teleconference between sites in Miami and Tallahassee, Florida, by Notice of Hearing by Video Teleconference entered September 12, 2008. The hearing was re-scheduled twice at the request of Respondent.

On March 20, 2009, the parties filed a Joint Pre-Hearing Stipulation, in which they identified certain facts and issues of law they agreed on. To the extent relevant, those agreed-upon facts and issues of law have been included in this Recommended Order.

On March 31, 2009, an Order Granting Petitioner's Motion for Official Recognition was entered.

During the final hearing, Petitioner presented the testimony of Melinda Gray, Debra Ann Conn, R.M., L.H.C.R.M., and Philip Jacobson, M.D. Petitioner's Exhibits 1 through 7, and 14 were admitted. Respondent testified on his own behalf and had one exhibit admitted.

The two-volume Transcript of the final hearing was filed on April 24, 2009. By Notice of Filing Transcript entered the same day, the parties were informed that the Transcript had been filed and that their proposed recommended orders were to be filed on or by May 25, 2009. May 25, 2009, was a holiday, so proposed orders were actually required to be filed on or before May 26, 2009.

Petitioner's Proposed Recommended Order and Dr. Armand's Memorandum in Support of a Recommended Order Dismissing Administrative Complaints were filed on May 26, 2009. The post-hearing proposals of both parties have been fully considered in rendering this Recommended Order.

FINDINGS OF FACT

A. The Parties.

1. Petitioner, the Department of Health (hereinafter referred to as the "Department"), is the agency of the State of Florida charged with the responsibility for the investigation and prosecution of complaints involving physicians licensed to practice medicine in Florida. § 20.43 and Chs. 456 and 458, Fla. Stat.

2. Respondent, Lucien Armand, M.D., is, and was at the times material to this matter, a physician licensed to practice medicine in Florida, having been issued license number ME 33997.

3. Dr. Armand is board-certified in general surgery by the American Board of Surgery.

4. Dr. Armand's mailing address of record at all times relevant to this matter was 2071 Southwest 52nd Way, Plantation, Florida 33317. At the times relevant, Dr. Armand practiced medicine at 4100 South Hospital Drive, Suite 108, Plantation, Florida 33317. The office at which Dr. Armand practiced

medicine was located very close to Plantation General Hospital (hereinafter referred to as “Plantation”).

5. Dr. Armand has been the subject of three prior disciplinary matters arising out of five separate cases. Penalties were imposed in those three disciplinary matters. The Department summarized those disciplinary matters in paragraph 34 of its Proposed Recommended Order:

> In DPR Case Numbers 0019222, 0019123 and 0091224, Respondent was fined, received a reprimand, and was required to complete 30 hours of Continuing Medical Education (CME) in general vascular surgery and risk management within the surgical practice. In Case Number 94-10100, Respondent was required to submit to and comply with an evaluation at the University of Florida, to pay a fine, was reprimanded, was required to complete twenty hours of CME in general surgery in performing Laparoscopic Cholecystectomy, and was placed on Probation for two (2) years. In Case Number 1999-58474, Respondent was restricted from performing Level II or above office surgery as defined in Rule 64B8-9.009(1)(d), Florida Administrative Code, until the Respondent demonstrated to the Board that he had successfully completed the University of Florida Comprehensive Assessment and Remedial Education Service (UF C.A.R.E.S.) course and complied with all recommendations, was reprimanded, was placed on probation for two (2) years, was required to attend the Florida Medical Association “Quality Medical Record Keeping for health Care Practitioners” course, was required to perform 100 hours of community service, and was required to reimburse the Department for costs.

6. Dr. Armand, who is 70 years of age, has been practicing medicine for 46 years. He has practiced medicine in Florida since 1979. During the eight months prior to the final hearing of this matter, Dr. Armand was practicing in South Sudan pursuant to contract with the United States State Department.

B. Office Surgery Registration.

7. Section 458.309(3), Florida Statutes (2003) (hereinafter referred to as the "Office Registration Statute"), requires that any physician in the State of Florida who performs certain levels of surgery in his or her office, with one exception not pertinent to this case, must first register his or her office with the Department:

> (3) All physicians who perform level 2 procedures lasting more than 5 minutes and all level 3 surgical procedures in an office setting must register the office with the department unless that office is licensed as a facility pursuant to chapter 395. The department shall inspect the physician's office annually unless the office is accredited by a nationally recognized accrediting agency or an accrediting organization subsequently approved by the Board of Medicine. The actual costs for registration and inspection or accreditation shall be paid by the person seeking to register and operate the office setting in which office surgery is performed.

What constitutes "Level II" and "Level III" office surgery have been defined by the Board of Medicine (hereinafter referred to

as the “Board”) in Florida Administrative Code Rule 64B8-9.009 (hereinafter referred to as the “Office Surgery Rule”).

8. In summary, as relevant to this matter, any physician who wishes to perform Level II as defined in the Office Surgery Rule which will last more than 5 minutes or any Level III Surgery in his or her office must register with the Department and either undergo an annual inspection of the office by the Department or obtain accreditation as specified in the statute. If not performing the surgery specified in the statute, no registration is required.

9. In furtherance of this process, the Department has promulgated Florida Administrative Code Rule 64B8-9.0091 setting out the “Requirement for Physician Office Registration: Inspection or Accreditation” (hereinafter referred to as the “Office Registration Rule”). This Rule further explains the physician’s choices for completing the registration of an office for Level II procedures by inspection or accreditation.

10. What is not proscribed by statute or rule is the process by which a previously registered office may be “unregistered” by a physician or precisely what happens when the accreditation of an office expires.

C. Registration of Dr. Armand's Office.

11. On or about April 16, 2003, Dr. Armand registered his office to perform Level II procedures. His office was designated as having Registration Number 331.

12. Following an inspection of Dr. Armand's office conducted on or about June 8, 2001, by the Florida Academy of Cosmetic Surgeons, an organization approved at that time by the Board as an "accrediting organization," Dr. Armand's office was accredited by the Department to perform Level II procedures in his office. That accreditation was valid for three years, until June 2004.

13. As of June 2004, the Florida Academy of Cosmetic Surgeons was no longer approved as an accrediting organization by the Board. Nor was Dr. Armand at that time performing any procedures that required registration of his office pursuant to the Office Registration Statute. Dr. Armand was effectively no longer approved as a registered Level II office.

14. In July 2004, Dr. Armand spoke by telephone with personnel in the Department's Office of Surgery Registration and Inspection Program (hereinafter referred to as the "OSRIP"), about the status of his registration. Dr. Armand expressed interest in continuing his office registration. He was, consistent with existing statutory and rule law, told that he would need to become reaccredited or submit to inspection in

order to be considered an office approved to conduct Level II or Level III procedures.

15. As of September 22, 2004, Dr. Armand, having taken no action to obtain accreditation or to request an inspection, and having performed no Level II or Level III procedures in his office, changed his mind about registering his office to perform Level II or III procedures. On that date, he telephoned the OSRIP and stated that he was only performing Level I procedures, that he might want to perform Level II and III procedures in the future, and that he would contact the OSRIP the following month. Dr. Armand made this telephone call because he was considering closing down his office surgery practice completely and was trying to decide whether he wanted to make the effort to bring his office back into compliance with the Office Surgery Rule:

> No, at some point when I considered the expenses involved into – For a period of time, I did not operate in the office and I did not have any procedures happen at Level II or III. When I decided to re-equip the office, to bring it up to date, up to Code for the surgery and I considered the expense involved and I figured that I was going to be retired from surgery anyway because at that time I was barely practicing, I was going maybe two or three times in the office a week for a few hours, because I was in school studying for me [sic] Public Health Degree, I was winding down my office.
>
> I decided it was not necessary for me to go into the expense of re-fitting, bring the office up to Code or to inspection because I was going to close down anyway, further down

> the line, within a year, six months or a year.

Page 179, Lines 2-25, Vol. II, Transcript of Final Hearing.

16. By letter dated October 29, 2004, Dr. Armand was informed by the OSRIP that he needed to advise the office whether he was accredited or would submit to an inspection, alternative steps required to be registered pursuant to the Office Registration Statute. He was also told that, if he did not intend to perform officer surgery, he needed to submit written documentation to that effect immediately. What law the OSRIP was relying upon for this latter directive was not cited in the letter or at hearing. An office registration application form was provided to Dr. Armand.

17. On November 24, 2004, the OSRIP received a completed Application for Office Surgery Registration (hereinafter referred to as the “Application”) from Dr. Armand in which he indicated that the wanted to perform Level II and Level III surgery in his office. The Application contained the names of other medical staff who were represented by Dr. Armand would be “involved in the office surgery or anesthesia," an affirmation that Dr. Armand was in compliance with the requirements for performing office surgery established by Florida Administrative Code Rule 64B8-9.009, and a representation that Dr. Armand would

immediately notify the Board of Medicine of any changes to his registration information.

18. At that point, had Dr. Armand's Application been deemed complete, which it was not, Dr. Armand would have been required to either provide proof of accreditation or submit to an inspection by the Department pursuant to Florida Administrative Code Rule 64B8-9.0091(2)(a), which provides, in part, that "[u]nless the physician has previously provided written notification of current accreditation by a nationally recognized accrediting agency or an accrediting organization approved by the Board the physician shall submit to an annual inspection by the Department. . . ." This portion of the Office Registration Rule, however, when read in context of the entire Rule, applies by its terms only to instances where a physician is requesting registration of an office. It does not by its terms proscribe what happens if an office has previously been registered by accreditation, the accreditation expires, and subsequently, the physician does not "perform level 2 procedures lasting more than 5 minutes [or any] level 3 surgical procedures in an office setting . . . ."

19. Dr. Armand's Application was found to be incomplete by the Department because he had not designated why the Application was being filed.

20. By letter dated December 8, 2004, the OSRIP notified Dr. Armand that his Application was incomplete. Dr. Armand was asked to either provide current accreditation or submit to inspection. At no time did Dr. Armand comply with this request.

21. On February 23, 2005, having heard nothing from Dr. Armand, the OSRIP changed his registration to "by inspection" and proceeded to initiate the process to have Dr. Armand's office inspected.

22. By a March 15, 2005, email from Debbi Conn, the individual designated by the Department to conduct the inspection of Dr. Armand's office, the OSRIP was notified that she had spoken to Dr. Armand by telephone and that he had indicated he no longer wished for his office to be registered. Dr. Armand had also indicated, therefore, that he did not wish to have his office inspected.

23. Although the Department could have reasonably interpreted the statutory and rule provisions governing registration of offices in which Level II and Level III surgery can be performed to treat Dr. Armand's registration as having lapsed as of June 2004, when his accreditation ended, and treated the Application as a new application for registration which had now been withdrawn, the OSRIP concluded that an inspection was still necessary. The OSRIP took the position that once a physician has registered an office pursuant to the

Office Registration Statute, that office continues to be "registered" indefinitely regardless of whether the office accreditation expires or whether any procedures requiring registration are being performed in the office.

24. On March 24, 2005, an email was sent to Dr. Armand by Melinda K. Gray, Supervisor of the OSRIP, following up on a telephone conversation she had had with Dr. Armand that day. She told Dr. Armand in the email that his office was required to be inspected despite the fact that he had withdrawn his application. Ms. Gray informed him of the name of the inspector and the scheduled time of the inspection in the email.

25. On March 28, 2005, Dr. Armand sent a letter to Ms. Gray stating the following:

> This letter is to document our conversation of the March 24/05. I do want to state again formally I no longer perform any class II and III procedure [sic] in my office. I have not done so in quite sometime [sic] first because I was prohibited by the board until 2004 and now I am in the process of winding down my surgical career. Please verify the last order of the board. It is in the file. I apologize for having mistakenly submitted last year the form to maintain my office surgical registration active. It was my error. I am hereby formally requesting that you please void, cancel, disregard, delete it from my file. If there is any other procedure or action required beyond this letter to do so please inform me and I will promptly comply.
>
> I thank you in advance for your patience and understanding.

26. An employee in Dr. Armand's office faxed a document to Ms. Conn on April 1, 2005, indicating that Dr. Armand still did not believe he needed to be inspected. Ms. Conn responded that she would be there on April 4, 2005, as scheduled.

D. The April 4, 2005, Inspection.

27. As Dr. Armand had been previously informed, an inspection of his office was conducted by Ms. Conn on April 4, 2005. Dr. Armand was not present.

28. Not surprisingly, since Dr. Armand had not performed anything but Level I surgery since his accreditation ended in June 2004, and he had represented that he was no longer interested in bringing his office up to standard, his office did not meet the requirements of Florida Administrative Code Rule 64B8-9.009.

29. The following deficiencies were found on April 4, 2005:

a. The office equipment failed to meet the requirements of Florida Administrative Code Rule 64B8-9.009(4)(b) and (6)(b)3. There was no working defibrillator, dantrolene, equipment comparable to a free-standing ambulatory surgical center (full monitoring equipment, including an anesthesia machine, EKG, blood pressure, pulse socks, CO2 monitors and a crash cart with a defibrillator or an AD that has been bio-medically inspected),

or an up-to-date and complete crash cart. These deficiencies would present an immediate and imminent danger to patients, but only if Level II and/or Level III procedures were being performed in the office, which they were not;

b. Medications required by Florida Administrative Code Rule 64B8-9.009(4)(a)3.a. on the crash cart were out of date or missing. Again, this would present an immediate and imminent danger to patients, but only if Level II and/or Level III procedures were being performed in the office;

c. The office lacked surgical logs, a policy and procedure manual, risk management program, adverse incident reporting system, required signage, evidence of compliance with Basic Life Support Certification, evidence of Advanced Cardiac Life Support Certification (which Dr. Armand had, but, because he was not at the office during the inspection, was unavailable to provide to Ms. Conn), or any cleaning sterilization, infection control or emergency procedures. See Fla. Admin. Code R. 64B8-9.009(2)(c), (i), (j), (k), (l), and (4)(b)2.

30. No personnel records for Philip Jacobson, M.D., or Barry Miller, ARNP, the two "medical staff" listed by Dr. Armand on his sworn Application as individuals who would be involved in the provision of surgery in his office, were found during the inspection. Dr. Jacobson, who testified at hearing, convincingly testified that, although he had worked with

Dr. Armand during one office procedure, described, infra, he had never agreed to any long-term arrangement with Dr. Armand as suggested on the Application.

31. At the conclusion of the April 4, 2005, inspection, a copy of the deficiency report was signed by "Clare," who had been present at Dr. Armand's office during the inspection and was apparently employed there. Clare was given a copy of the report and the appropriate rule, and was told that Dr. Armand could file a plan of correction within 30 days. Clare agreed to give the information to Dr. Armand. No correction plan was submitted to the Department by Dr. Armand.

E. Findings Concerning Patient D.V.

32. During the April 4, 2005, inspection, Ms. Conn found a narcotics log concerning one patient, Patient D.V. The log indicated that an abdominoplasty had been performed on Patient D.V. on May 28, 2004, which was before Dr. Armand's accreditation as an office registered to perform Level II and III surgery expired. The procedure had been performed under general anesthesia administered by Dr. Jacobson, as a Level III procedure.

33. On further investigation, Ms. Conn was unable to find the following records concerning the procedure performed on Patient D.V.: pre-operative evaluation; patient/procedure records; informed consent; surgical log; operative report;

recovery notes; discharge orders, post-operative vital signs; post-operative care records; and a pathology report for tissue sent to pathology for examination.

34. Before administering anesthesia to Patient D.V., Dr. Jacobson had visited Dr. Armand's office. That visit took place on January 8, 2004. During the visit, Dr. Jacobson found expired medications, a vaporizer with gasses of undetermined date, and a broken defibrillator. Dr. Jacobson pointed out these problems to Dr. Armand.

35. Because of what he found on January 8, 2004, Dr. Jacobson brought his own medications, vaporizer, and defibrillator for use during the procedure performed on Patient D.V. As of May 28, 2004, Dr. Armand had not disposed of the expired medications found by Dr. Jacobson, and the broken vaporizer and defibrillator were still in the office.

36. Ms. Conn spoke to Dr. Armand by telephone on April 4, 2005, who reiterated that he did not intend to perform Level II or Level III surgery. Dr. Armand also incorrectly stated that he had not performed any Level II or Level III surgery in his office since 2002. When asked about his treatment in 2004 of Patient D.V., Dr. Armand denied having performed the procedure. When Ms. Conn told him about the records she had found concerning Patient D.V., Dr. Armand hung up the telephone.

CONCLUSIONS OF LAW

A. Jurisdiction.

37. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of the parties thereto pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2008).

B. The Burden and Standard of Proof.

38. The Department seeks to impose penalties against Dr. Armand's license through the Administrative Complaint that include suspension or revocation of his license and/or the imposition of an administrative fine. Therefore, the Department has the burden of proving the specific allegations of fact that support its charge that Dr. Armand committed the statutory and rule violations alleged in the Administrative Complaint by clear and convincing evidence. Department of Banking and Finance, Division of Securities and Investor Protection v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Pou v. Department of Insurance and Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998); Nair v. Department of Business and Professional Regulation, 654 So. 2d 205 (Fla. 1st DCA 1995); and § 120.57(1)(j), Fla. Stat. (2007)("Findings of fact shall be based on a preponderance of the evidence, except in penal or licensure disciplinary proceedings or except as otherwise provided by statute.").

39. What constitutes "clear and convincing" evidence was described by the court in Evans Packing Co. v. Department of Agriculture and Consumer Services, 550 So. 2d 112, 116, n. 5 (Fla. 1st DCA 1989), as follows:

> . . . [C]lear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the evidence must be precise and explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact the firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established. Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

See also In re Graziano, 696 So. 2d 744 (Fla. 1997); In re Davey, 645 So. 2d 398 (Fla. 1994); and Walker v. Florida Department of Business and Professional Regulation, 705 So. 2d 652 (Fla. 5th DCA 1998)(Sharp, J., dissenting).

C. The Charges of the Administrative Complaint.

40. Section 458.331(1), Florida Statutes, authorizes the Board to impose penalties against Florida physicians ranging from the issuance of a letter of concern to revocation of the physician's license to practice medicine in Florida if the physician commits one or more acts specified therein.

41. The two-count Administrative Complaint alleges that Dr. Armand violated the following provisions of Section 458.331(1), Florida Statutes:

a. Count One: Section 458.331(1)(nn), Florida Statutes (2004), by violating Florida Administrative Code Rules 64B8-9.009, 64B8-9.0091, and 64B8-9.0092, as detailed more specifically in the allegations of fact in support of the Administrative Complaint; and

b. Count Two: Section 458.331(1)(m), Florida Statutes (2003).

42. In determining whether Dr. Armand has committed the alleged statutory violations, only those specific factual grounds alleged by the Department in the Administrative Complaint can form the basis of a finding of violation. See Trevisani v. Department of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005); Cottrill v. Department of Insurance, 685 So. 2d 1371 (Fla. 1st DCA 1996). As the Department acknowledged in its Proposed Recommended Order "[d]ue process prohibits the Department from taking disciplinary action against a licensee based on matters not specifically alleged in the charging instrument, unless those matters have been tried by consent. See Shore Village Property Owners' Association, Inc . v. Department of Environmental Protection, 824 So. 2d 208, 210

(Fla. 4th DCA 2002); and Delk v. Department of Professional Regulation, 595 So. 2d 966,967 (Fla. 5th DCA 1992)."

43. In addressing the charges against Dr. Armand, it is recognized that the Board is the agency which has been charged with responsibility for administering the Medical Practice Act, Chapter 458, Florida Statutes, and the Rules relevant to this matter adopted by the Board. The Board's interpretation of those provisions of law that it has been charged by the legislature to administer must be given great weight. See Phillips v. Board of Dentistry, 884 So. 2d 78 (Fla. 4th DCA 2004).

44. It also recognized, however, that "the conduct proved must legally fall within the statute or rule claimed [in the charging instrument] to have been violated." Delk v. Department of Professional Regulation, 595 So. 2d 966, 967 (Fla. 5th DCA 1992). In deciding whether "the statute or rule claimed to have been violated" was in fact violated, as alleged, if there is any reasonable doubt, that doubt must be resolved in favor of the licensee. See Whitaker v. Department of Insurance and Treasurer, 680 So. 2d 528, 531 (Fla. 1st DCA 1996); Elmariah v. Department of Professional Regulation, Board of Medicine, 574 So. 2d 164, 165 (Fla. 1st DCA 1990); and Lester v. Department of Professional and Occupational Regulations, 348 So. 2d 923, 925 (Fla. 1st DCA 1977).

D. Count One; Section 458.331(1)(nn), Florida Statutes (2004).

45. Section 458.331(1)(nn), Florida Statutes (2004), defines the following disciplinable offense:

> (nn) Violating any provision of this chapter or chapter 456, or any rules adopted pursuant thereto.

46. Count One of the Amended Administrative Complaint alleges more specifically that Dr. Armand violated Section 458.331(1)(nn), Florida Statutes (2004), by having violated Florida Administrative Code Rules 64B8-9.009, 64B8-9.0091, and 64B8-9.0092, as detailed more specifically in the allegation of fact in support of the Administrative Complaint.

47. The Department proved clearly and convincingly that the deficiencies alleged in the Administrative Complaint existed during the inspection of Dr. Armand's office on April 4, 2005. That does not, however, resolve this matter. The Board still should consider, in reaching a final decision in this case, (a) whether Dr. Armand was required at the time of the inspection to comply with Florida Administrative Code Rules 64B8-9.009, 64B8-9.0091, and 64B8-9.0092 (hereinafter referred to as the "Rule Compliance Issue"), and (b) whether an inspection of his office was even authorized (hereinafter referred to as the "Inspection Issue").

48. In addressing the Rule Compliance Issue and Inspection Issue, it is recognized that the Board's interpretation of Section 458.309(3), Florida Statutes, and the pertinent Rules may be sufficient to allow the Board to adopt appropriate rules, which would put physicians on notice, consistent with the Department's position in this case. It is questionable, however, whether the interpretation asserted by the Department should be relied upon to impose discipline.

49. In addressing the Rule Compliance Issue and Inspection Issue, the following are the pertinent facts:

a. Dr. Armand, who wanted to "perform level 2 procedures lasting more than 5 minutes and . . . level 3 surgical procedures in an office setting" was required to, and did register his office based upon accreditation valid through June 2004. During this period of time, Dr. Armand was subject to discipline by the Board for failing to comply with the Office Surgery Rule;

b. As of June 2004, when the accreditation of his office expired and no inspection of his office was performed by the Department, Dr. Armand was not entitled to be registered pursuant to the Office Registration Statute or the Office Registration Rule;

c. Although Dr. Armand sought registration or continued registration of his office when he filed the Application, he withdrew that request before any inspection was conducted; and

d. Finally, between June 2004 and the date of the inspection of Dr. Armand's office, Dr. Armand did not "perform level 2 procedures lasting more than 5 minutes [or] . . . level 3 surgical procedures in an office setting."

50. According to the Department, despite the foregoing facts, Dr. Armand continued to be required to provide proof of accreditation or submit to an inspection, regardless of whether he was performing "level 2 procedures lasting more than 5 minutes and all level 3 surgical procedures in . . ." his office. Having expressed an interest in continuing his registration and having failed to provide proof of accreditation, the Department goes on to assert that he was, therefore, required to undergo an inspection. Finally, the Department asserts that, having been required to undergo an inspection, his failure to meet the requirements to be performing Level II and Level III procedures of the Office Surgery Rule, despite the failure to prove he actually was performing Level II or Level III surgery, entitles the Board to impose discipline on Dr. Armand.

51. The difficulty with the Department's argument is that the Office Registration Statute, the Office Surgery Rule and the

Office Registration Rule do not specifically authorize the Department to insist upon an inspection of a physician's office under the circumstances of this case, at least not for purposes of imposing discipline on that physician. Registration is only required by the Office Registration Statute if a physician intends to "perform level 2 procedures lasting more than 5 minutes [or] . . . level 3 surgical procedures in an office setting." While specifying when registration is required, the Office Registration Statute and the Office Registration Rule are silent as to what the physician must do when the physician is not longer performing any surgery requiring registration. Most significantly, the Office Registration Statute and the Office Registration Rule are silent with regard to whether the Department may conduct an inspection when a physician is no longer performing any surgery requiring registration. Despite this silence, the Department insists it may require that a physician submit to an inspection and must continue to comply with the Office Surgery Rule even though he or she is no longer performing "level 2 procedures lasting more than 5 minutes [or] . . . level 3 surgical procedures in an office setting."

52. Based upon the forgoing it is recommended that the Board should forego the position taken by the Department in this case because the Office Registration Statute and the Board's rules do not clearly authorize forcing a physician to undergo an

inspection or to comply with the Office Surgery Rule when that physician is no longer performing any procedure defined in the Office Registration Statute.

53. The Board should also forego the position asserted by the Department because of the specific circumstances of this case. Dr. Armand had decided to close his office surgery practice long before the Department's inspection. Indeed, he decided not to pursue registration after June 2004 because he knew his office was not in compliance with the Office Surgery Rule and he did not want to expend the funds which would be required to bring his office into compliance due to his impending retirement from office surgery.

54. The Board should also forego the position asserted by the Department because all the Department's inspection proved is that, on a single date, April 4, 2005, a physician who had not performed nor intended to perform Level II procedure "lasting more than 5 minutes" or any Level III procedure in his office, and who was not, therefore, required to register his office by Office Registration Statute, was not prepared to perform such surgery.

55. Finally, the Board should forego the position asserted by the Department in this disciplinary matter and pursue the adoption of rules which would put physicians on notice of what is required once accreditation expires, an inspection is not

longer valid, and the physician either intends to continue performing Level II and/or Level III procedures in the office or to stop performing such procedures.

56. Based upon the foregoing it is concluded that the Department failed to prove clearly and convincingly that Dr. Armand violated the Office Registration Statute, by having violated Florida Administrative Code Rules 64B8-9.009, 64B8-9.0091, and 64B8-9.0092, as detailed more specifically in the allegation of fact in support of the Administrative Complaint. Should the Department, however, reject the undersigned's conclusions of law on this matter, it would be appropriate for the Board to conclude that the evidence did prove clearly and convincingly that Dr. Armand violated the Office Registration Statute, by having violated Florida Administrative Code Rules 64B8-9.009, 64B8-9.0091, and 64B8-9.0092, as detailed more specifically in the allegation of fact in support of the Administrative Complaint.

E. Count Two; Violation of Section 458.331(1)(m), Florida Statutes (2003).

57. Section 458.331(1)(m), Florida Statutes (2003), defines the following disciplinable offense:

> 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.

58. In the Administrative Complaint it is alleged that Dr. Armand failed to keep adequate medical records in violation of Section 458.331(m), Florida Statutes (2003), in one or more of the following ways concerning his medical chart for Patient D.V.:

> a. A consent that includes the risks or possible complications;
> b. The verbiage required by Rule 64B8-0.009(2)(a), Florida Administrative Code (FAC);
> c. an immediate pre-op form that was completed by Respondent;
> d. an immediate pre-op form that was signed by Respondent;
> e. Recovery notes;
> f. Discharge order;
> g. Post-op vital signs;
> h. Operative report; and
> i. A pathology report.

The Department proved clearly and convincingly that Dr. Armand failed to keep medical records documenting these matters as alleged in the Administrative Complaint. Therefore, it is concluded that the Department proved clearly and convincingly that Dr. Armand violated Section 458.331(1)(m), Florida Statutes (2003), as alleged in the Administrative Complaint.

F. The Appropriate Penalty.

59. In determining the appropriate punitive action to recommend to the Board in this case, it is necessary to consult the Board's "disciplinary guidelines," which impose restrictions and limitations on the exercise of the Board's disciplinary authority under Section 458.331, Florida Statutes. See Parrot Heads, Inc. v. Department of Business and Professional Regulation, 741 So. 2d 1231 (Fla. 5th DCA 1999).

60. The Board's guidelines are set out in Florida Administrative Code Rule 64B8-8.001, which provides for the following range of penalties:

a. For a violation of Section 458.331(1)(nn), Florida Statutes, second offense: from probation to revocation and an administrative fine from $5,000.00 to $10,000.00; and

b. For a violation of Section 458.331(1)(m), Florida Statutes, second offense: from probation to suspension followed by probation and an administrative fine of from $5,000.00 to $10,000.00.

61. Florida Administrative Code Rule 64B8-8.001(3) provides that, in applying the penalty guidelines, the following aggravating and mitigating circumstances are to be taken into account:

> (3) Aggravating and Mitigating Circumstances. Based upon consideration of aggravating and mitigating factors present

> in an individual case, the Board may deviate from the penalties recommended above. The Board shall consider as aggravating or mitigating factors the following:
>
> (a) Exposure of patient or public to injury or potential injury, physical or otherwise: none, slight, severe, or death;
>
> (b) Legal status at the time of the offense: no restraints, or legal constraints;
>
> (c) The number of counts or separate offenses established;
>
> (d) The number of times the same offense or offenses have previously been committed by the licensee or applicant;
>
> (e) The disciplinary history of the applicant or licensee in any jurisdiction and the length of practice;
>
> (f) Pecuniary benefit or self-gain inuring to the applicant or licensee;
>
> (g) The involvement in any violation of Section 458.331, Florida Statutes, of the provision of controlled substances for trade, barter or sale, by a licensee. In such cases, the Board will deviate from the penalties recommended above and impose suspension or revocation of licensure;
>
> (h) Any other relevant mitigating factors.

62. In its Proposed Recommended Order, the Department has suggested that there are no mitigating circumstances and the following aggravating circumstances in this case:

> Based on the previous serious disciplinary history of the Respondent, including multiple violations of the standard of care, the fact that this is a two count complaint, and because Respondent has been disciplined in three previous cases for the same violation as that at issue here, Section 458.331(1)(m), Florida Statutes, the level of aggravating factors is high. . . .

This summary of aggravating circumstances is accurate.

63. The Department overlooks, however, that, no patient was harmed or placed in harm's way in this case. The Department also has failed to consider the fact that, even if Dr. Armand is ultimately found to be in violation of the Office Registration Statute, such a violation was insignificant, given the fact that Dr. Armand had intended to close his office and was not performing any surgery requiring registration. Finally, the Department has failed to consider the fact that Dr. Armand has ceased performing Level II and Level III surgery in an office setting and that he has effectively closed his office practice.

64. The Department has requested that it be recommended that Dr. Armand's medical license be revoked. Revocation, however is too severe a penalty.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the a final order be entered by the Board of Medicine dismissing Count I of the Administrative Complaint; finding that Lucien Armand, M.C., has violated Section 458.331(1)(m), Florida Statutes (2003), as alleged in Count II of the Administrative Complaint; imposing a fine of $7,500.00 for the violation alleged in Count II; and, indefinitely suspending his license to practice medicine in Florida, but allowing him to continue to practice medicine outside the United

States through his relationship with the United States Department of State after full disclosure of the Board's final order to the United States Department of State. Should a medical license not be a condition of employment by the United States Department of State, his license should be revoked.

DONE AND ENTERED this 17th day of June, 2009, in Tallahassee, Leon County, Florida.

LARRY J. SARTIN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 17th day of June, 2009.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this recommended order. Any exceptions to this recommended order should be filed with the agency that will issue the final order in these cases.