File # 50723

Final Order No. DOH-13-2367- FOI -MQA
FILED DATE DEC 23 2013
Department of Health
By: Deputy Agency Clerk

STATE OF FLORIDA
BOARD OF MEDICINE

DEPARTMENT OF HEALTH,

Petitioner,

vs.

DOH CASE NO.: 2006-38711
DOAH CASE NO.: 12-0666PL
LICENSE NO.: ME0059800

FILED
2013 DEC 30 PM 3:27
DIVISION OF ADMINISTRATIVE HEARINGS

NEELAM UPPAL, M.D.,

Respondent.
_____/

ORDER VACATING FINAL ORDER

THIS CAUSE came before the BOARD OF MEDICINE (Board), on December 6, 2013, in Orlando, Florida, for the purpose of considering the Petitioner's Motion to Vacate Final Order filed in this matter on December 13, 2012. Upon review of the documents submitted and the argument of the parties, the Board hereby VACATES the Final Order filed in this matter on December 13, 2012, and the Administrative Complaint filed in this matter is hereby DISMISSED.

DONE AND ORDERED this 20th day of December, 2013.

BOARD OF MEDICINE

Allison M. Dudley, J.D., Executive Director
For Zachariah P. Zachariah, M.D., Chair

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been provided by U.S. Mail to NEELAM UPPAL, M.D., Post Office Box 60357, St. Petersburg, Florida 33784; George F. Indest, III, Esquire, The Health Law Firm, 1101 Douglas Avenue, Altamonte Springs, Florida 32414; to J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; and by interoffice delivery to Sharmin Hibbert, Department of Health, 4052 Bald Cypress Way, Bin #C-65, Tallahassee, Florida 32399-3253 this 23rd day of December, 2013.

Angel Sanders

Deputy Agency Clerk

STATE OF FLORIDA
DEPARTMENT OF HEALTH

DEPARTMENT OF HEALTH,

PETITIONER,

v.

DOH CASE NO. 2006-38711
DOAH CASE NO. 12-0666PL
LICENSE NO. ME0059800

NEELAM UPPAL, M.D.,

RESPONDENT.
_____/

MOTION TO VACATE FINAL ORDER

Petitioner, Department of Health ("Department"), by and through undersigned counsel, moves the Board of Medicine ("Board") for the entry of an order vacating the Final Order in this matter. As grounds therefore, Petitioner states the following:

1. The Department of Health (Department) is the state agency charged with regulating the practice of medicine pursuant to Section 20.43, Florida Statutes; Chapter 456, Florida Statutes; and Chapter 458, Florida Statutes.

2. On December 13, 2012, the Department filed a Final Order in the above mentioned matter (Final Oder No. DOH-12-2668-FOF-MQA, Exhibit A).

3. On June 19, 2012, a disputed fact administrative hearing was held regarding the above mentioned matter before an Administrative Law Judge (ALJ), Division of Administrative Hearings (DOAH).

4. The ALJ recommended that the Board enter a final order finding Respondent guilty of Count III of the Amended Administrative Complaint (Exhibit B) for

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violating Rule 64B8-9.0075 Standards of Practice in Certain Office Settings, Florida Administrative Code, and issue a letter of concern and impose a $1,000 fine.

5. On December 12, 2012, the Board entered a Final Order approving and adopting and incorporating by reference the Findings of Fact and Conclusions of Law set forth in the ALJ's Recommended Order in this matter. The Board accepted the penalty recommended by the Administrative Law Judge.

6. Respondent timely filed a Notice of Appeal with the First District Court of Appeal (Case No. 2D13-2). Respondent, the Appellant, raised the issue on appeal that it was error by the Board to impose a penalty for violating Rule 64B8-9.0075, Florida Administrative Code, when that rule was repealed at the time of imposing the penalty.

7. Upon reviewing the record on appeal in conjunction with the issue raised, the Department, the Appellee, sought relinquishment from the Second District Court of Appeal so that the Department may file this Motion with the Board.

8. On September 24, 2013, the Second District Court of Appeal relinquished jurisdiction of this matter until December 18, 2013, so that the Board may consider this motion (Exhibit C).

9. *Department of Banking and Finance v. Frank Lamb and Next Step Brokerage, Inc.*, 1992 WL 880497 (Fla.Div.Admin.Hrgs., Case No. 91-2226) discusses the issue of enforcement of a repealed rule. Essentially, a respondent cannot be disciplined for violating a department rule that was repealed and not in effect at the time of imposition of the penalty, when that rule was not re-enacted, replaced, or

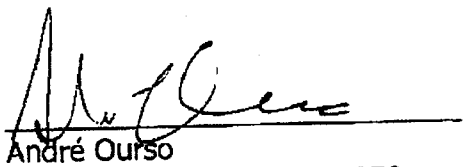
another similar rule prohibiting the conduct was not implemented and effective at the time of the penalty imposition.

10. Rule 64B8-9.0075, Florida Administrative Code, was repealed on May 7, 2012. Respondent's formal administrative hearing was held on June 19, 2012. The ALJ recommended the imposition of a penalty against Respondent's license on September 4, 2012. Subsequently, the Board entered a final order imposing a penalty on Respondent for violating Rule 64B8-9.0075, Florida Administrative Code, on December 12, 2012.

11. Respondent was disciplined for violating Rule 64B8-9.0075, Florida Administrative Code, when that rule was repealed and no longer in effect at the time of the hearing date, at the time of the ALJ's recommended order, and at the time of entry of the final order imposing discipline. The Board did not re-enact this rule, replace it, or implement another rule that was similar.

WHEREFORE, the Petitioner, respectfully requests that the Board of Medicine enter an Order Vacating the Final Order is this matter.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the forgoing has been furnished Dr. Neelam Uppal at 5840 Park Boulevard, Pinellas Park FL 33781 by overnight mail and by email at nneelu123@aol.com this 1st day of October, 2013.

André Ourso
Assistant General Counsel

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Final Order No. DOH-12-2668-FOF-MQA
FILED DATE - DEC 13 2012
Department of Health
By: Angel Sanders
Deputy Agency Clerk

STATE OF FLORIDA
BOARD OF MEDICINE

DEPARTMENT OF HEALTH,

Petitioner,

vs.

DOH CASE NO.: 2006-38711
DOAH CASE NO.: 12-0666PL
LICENSE NO.: ME0059800

NEELAM UPPAL, 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 November 30, 2012, in Orlando, Florida, for the purpose of considering the Administrative Law Judge's Recommended Order, Exceptions to the Recommended Order, and Response to Exceptions to the Recommended Order (copies of which are attached hereto as Exhibits A, B, and C, respectively) in the above-styled cause. Petitioner was represented by Yolanda Green, Assistant General Counsel. Respondent was present and represented by George F. Indest, III, Esquire.

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.

RULING ON EXCEPTIONS

The Board reviewed and considered the Respondent's Exceptions to the Recommended Order and ruled as follows:

1. The Respondent's exception number 1 to paragraph 17 of the Recommended Order is rejected because there is competent substantial evidence in the record to support the Administrative Law Judge's findings and based upon reasons written and stated orally by the Petitioner.

2. The Respondent's exception number 2 to paragraph 38 of the Recommended Order regarding the applicability of the Doctrine of Laches to the circumstances presented in this case is rejected because there is competent substantial evidence in the record to support the Administrative Law Judge's findings and based upon reasons written and stated orally by the Petitioner.

3. The Respondent's exception number 3 regarding Respondent's right to due process is rejected for the reasons both written and stated by the Petitioner.

4. The Respondent's exception number 4 regarding the Administrative Law Judge's recommendation is rejected for the reasons both written and stated by the Petitioner.

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.

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 an administrative fine in the amount of $1,000.00 to the Board within 30 days from the date this Final Order is filed. Said fine shall be paid by money order or cashier's check.

2. Respondent shall be and is hereby issued a letter of concern by the Board.

RULING ON MOTION TO BIFURCATE AND RETAIN JURISDICTION TO ASSESS COSTS

The Board reviewed the Petitioner's Motion to Bifurcate and Retain Jurisdiction to Assess Costs granted the Motion.

(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 12th day of December, 2012.

BOARD OF MEDICINE

Allison M. Dudley, J.D., Executive Director
For Jason J. Rosenberg, 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 NEELAM UPPAL, M.D., Post Office Box 60357, St. Petersburg, Florida 33784; George F. Indest, III, Esquire, The Health Law Firm, 1101 Douglas Avenue, Altamonte Springs, Florida 32414; to J. Lawrence Johnston, Administrative Law Judge, Division of Administrative

Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; and by interoffice delivery to Sharmin Hibbert, Department of Health, 4052 Bald Cypress Way, Bin #C-65, Tallahassee, Florida 32399-3253 this 13th day of December, 2012.

Angel Sanders

Deputy Agency Clerk

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MEDICINE, Petitioner, vs. NEELAM T. UPPAL, M.D., Respondent.	)	Case Nos. 12-0666PL

RECOMMENDED ORDER

On June 19, 2012, a disputed fact administrative hearing was held in this case by video teleconference in Tallahassee and St. Petersburg, Florida, before J. Lawrence Johnston, Administrative Law Judge, Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Elana J. Jones, Esquire
Department of Health
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Tallahassee, Florida 32399-3265

For Respondent: Michael R. D'Lugo, Esquire
Wicker, Smith, O'Hara,
McCoy and Ford, P.A.
Post Office Box 2753
Orlando, Florida 32802

STATEMENT OF THE ISSUE

The issue in this case is whether the Board of Medicine should discipline Respondent under section 458.331(1)(g), Florida Statutes (2006),[1/] for failures to perform statutory or legal obligations allegedly revealed during an inspection of her medical practice on March 17, 2007. Respondent denies the charges and also defends on the ground of laches.

PRELIMINARY STATEMENT

On March 12, 2008, Petitioner, the Department of Health (DOH), filed the Administrative Complaint resulting from the inspection on March 17, 2007. Respondent timely disputed the facts and requested a hearing. The matter was not referred to DOAH until February 12, 2012, after failed attempts to settle this and another administrative complaint against Respondent (for allegedly facilitating the unlicensed practice of medicine by her medical assistant). (The other administrative complaint also was referred to DOAH and was consolidated with this case, but later was severed and closed, and jurisdiction was relinquished to allow the Board of Medicine to reconsider probable cause.)

At the final hearing on June 19, 2012 (which was governed by the parties' Second Amended Joint Pre-hearing Stipulation), DOH called Benjamin Simpkins, Karen Hanzal, and Mary Mayleben, Pharm.D., as witnesses and had Petitioner's Exhibits 1 through 5,

7, and 8 admitted in evidence. Respondent testified and had Respondent's Exhibits 1, 15, 17, and 22 admitted in evidence.

On June 22, DOH moved unopposed for leave to file an Amended Administrative Complaint to correct two minor errors, which was granted.

The Transcript of the final hearing was filed on July 11. On August 10, the parties filed proposed recommended orders, which have been considered.

FINDINGS OF FACT

1. Respondent holds license ME 59800, which allows her to practice medicine in Florida, subject to regulation by DOH and the Board of Medicine. In March 2006, it was noted on Respondent's license that she was a dispensing practitioner, meaning that she could sell or dispense medication. Her medical office at the time was at 5840 Park Boulevard in Pinellas Park.

2. Respondent has been practicing medicine in Florida since 1998. She has not been disciplined by the Board of Medicine. Her practice treats patients for infectious diseases. She often is referred patients who cannot be treated effectively by their regular internists.

3. Although licensed as a dispensing practitioner, Respondent actually has not been operating as a dispensing practitioner. She was not purchasing medications for resale to her patients. (She sometimes gives her patients free samples.)

Rather, Respondent stores at her office medications purchased by her patients in large quantities to save money. Sometimes, patients bring their medications to Respondent; sometimes, an online pharmacist sends her patients' medications directly to Respondent's medical practice. Respondent keeps the medications in her office until the patients come in for treatment by infusion or injection. If enough of a reusable medication remains after infusion or injection, Respondent will store the left-over medication, sometimes in a refrigerator or freezer, for subsequent reuse. Respondent has no wholesale contracts for medications and is not affiliated with any manufacturer of medications.

4. Respondent's medical office is in a two-story building. The patient lobby and reception area, Respondent's personal office, and several infusion and examination rooms are on the first floor. The second floor is used to store medications. Every three to four weeks, an employee sweeps the office for expired medications and puts them in storage on the second floor. A biohazard removal service comes to the office once a month to remove and dispose of discarded sharps, used non-reusable medications, and expired medications.

5. DOH conducted a routine inspection of Respondent's medical practice in February 2007. The practice was rated satisfactory in all 28 elements of the inspection, including:

clean and safe dispensing area; proper storage of medications requiring refrigeration; expiration/discard date of prescription labels provided in written form; no controlled substances; and outdated medications removed from stock satisfactorily. Respondent's medical practice also was subject to periodic Medicaid inspections and biohazard inspections that were passed satisfactorily.

6. At some time before March 17, 2007, DOH received a complaint that Respondent's patients were being seen and treated by unlicensed medical assistants on Saturdays when Respondent was not present. On Saturday, March 17, 2007, Pinellas Park police and DOH inspectors "raided" the practice. After making sure it was safe to discontinue and postpone patient treatments, DOH ordered all patient treatment to stop and ordered all patients to leave the building. The police officer took photographs of the medical practice. The inspection and photographs resulted in the charges leveled against Respondent in this case. (They also resulted in charges that Respondent facilitated the unlicensed practice of medicine, but DOAH jurisdiction over those charges was relinquished to allow the Board of Medicine to reconsider probable cause.)

Findings as to Count I

7. Count I of the Amended Administrative Complaint alleges that Respondent violated Florida Administrative Code Rule 64B16-

28.110 by failing to remove expired and deteriorated medications from her stock of medications at least every four months and by selling or dispensing expired medications.

8. On March 17, 2007, there were some expired and deteriorated medications at Respondent's medical practice. The deteriorated medications were partially or almost completely used medications. In some cases, it was unclear whether the expiration date was a prescription expiration or a medication expiration.

9. One medication bore an expiration date of 1994. There was no rational explanation for how that date came to be on the medication since Respondent was in New Jersey then and was not practicing medicine in Florida until 1998.

10. Except for possibly the mysterious medication bearing the 1994 expiration date, there was no proof that any medications were expired for more than four months. To the contrary, the evidence was that there were no expired medications in storage as of February 7, 2007.

Findings as to Count II

11. Count II of the Amended Administrative Complaint alleges that Respondent violated section 499.005(1), Florida Statutes, by storing medications in a freezer that were not supposed to be stored that way, or by possessing legend drugs for which she could not produce pedigree papers.

12. The evidence proved that Respondent stored medications in a freezer that were labeled "refrigerate." The evidence did not prove that those medications were not allowed to be stored in a freezer, or that storage in a freezer would adulterate the medication or render it unfit for use. To the contrary, there was evidence that, for at least one of the medications being stored in a freezer (ceftriaxone, generic for Rocephin), freezing can extend the useful life of the medication for up to 26 weeks. As DOH points out, it cannot be assumed that the same is true of another medication (Azactam) found in a freezer at Respondent's medical practice and labeled "refrigerate." But DOH did not prove that the useful life of Azactam cannot be extended by freezing.

13. DOH proved that Respondent could not produce pedigree papers for any of the medications found at Respondent's medical practice on March 17, 2007. It would not be expected that Respondent would have pedigree papers for medications purchased by her patients from other pharmacies and stored at Respondent's office for their convenience. Those pedigree papers would be held by the pharmacies that sold the medications to the patients. Since Respondent was not acting as a dispensing practitioner, she was not receiving pedigree papers and did not even know what they were on March 17, 2007.

Findings as to Count III

14. Count III of the Amended Administrative Complaint alleges that Respondent violated rule 64B8-9.0075 by leaving a syringe, or allowing a syringe to be left, on the counter in the reception area of her office, or by storing or allowing medications to be stored in a refrigerator with uneaten food in a McDonald's bag.

15. Respondent herself was not physically present at her medical office on March 17, 2007, which was a Saturday, before the arrival of the police and DOH inspectors.

16. There was a syringe left on the counter in the reception area of Respondent's office that was photographed by the police officer and seen by him and the DOH inspectors. There was no evidence as to the circumstances of how or when the syringe came to be there. It is possible that it was left there by someone who was interrupted in the provision of medical services by the raid that morning. It was not proven that, as a result of the syringe left on the counter, Respondent was not providing appropriate medical care under sanitary conditions.

17. On March 17, 2007, medications were being stored in a refrigerator with a McDonald's bag that had food in it. There was no evidence as to the circumstances of how or when the bag of food came to be in the refrigerator, but it was unlikely that it was placed there because of the raid that day, and it was

inappropriate to store medications in the refrigerator with the food bag.

18. There was other evidence that Respondent's medical practice was not providing patients with appropriate medical care under sanitary conditions. Open vials and injection and infusion devices lay on unsanitary shelves and other surfaces. Refrigerators and freezers where used medications and infusion and injection devices were being stored were not cleaned appropriately. Floors were not cleaned appropriately. However, those items were not specifically charged in the Amended Administrative Complaint.

Findings as to Count IV

19. Count IV of the Amended Administrative Complaint alleges that Respondent violated section 456.057, Florida Statutes, by maintaining patient records in an unlocked file cabinet in an examination room, or by maintaining medical records (or allowing them to be maintained) in plain view of anyone who approached the reception area of Respondent's office.

20. DOH proved that there were records stored in an unlocked cabinet in one of Respondent's examination rooms, but it was not proved that they were patient records. Neither the police officer nor any inspector looked at the records to ascertain what they were. Respondent testified that they were administrative records, not confidential patient records.

21. There were patient files left lying on the shelf of the half-door between the patient lobby and waiting area and the reception desk of Respondent's medical practice. There also were open files on the reception desk that possibly could have been seen and read (upside down) by someone standing at the counter in front of the reception desk. These files were photographed by the police officer and seen by him and the DOH inspectors. There was no evidence as to the circumstances of how or when the files got there. It is possible that they were left there by someone who was interrupted in the provision of medical services by the raid that morning.

Respondent's Defenses

22. Respondent contends that the photographs taken at her office on March 17, 2007, were "staged"--i.e., that the charges were trumped up by moving or placing items to be photographed (including the McDonald's bag) to make it appear that Respondent was in violation when she was not. The police or DOH investigators did not stage the photographs. Respondent herself testified that she did not believe her medical assistant and other office staff would have done so. That leaves only her medical assistant's boyfriend, who may have been there on March 17, 2007. No plausible reason was given why the boyfriend would have done such a thing (although it is conceivable that he might have placed a McDonald's bag in the refrigerator).

23. Part of Respondent's case that violations were staged was the hearsay of a patient who was there on March 17, 2007. Respondent testified that, when she arrived at the office during the raid, the patient told her she was being "set up," that he saw patient files being placed in open view on countertops and saw someone enter the back door with coffee and food that was placed in the refrigerator. She says he told her that he would testify to what he saw in her defense.

24. Respondent also contends that laches bars the Amended Administrative Complaint because the employee assigned to monitor and discard expired medications and the patient whose hearsay claimed Respondent was set up have died. There was no evidence as to when these individuals died, or why Respondent was unable to preserve their testimony before they died.

25. The Administrative Complaint was filed in March 2008. Respondent requested a disputed fact hearing in April 2008. No evidence was presented at the hearing as to why the matter was not referred to DOAH until February 2012. DOAH files, which can be officially recognized, indicate that at least some of the delay related to settlement negotiations and the consideration of settlement proposals through August 2008.

26. In October 2008 and again in 2011, Respondent's office computer systems malfunctioned, resulting in the loss of digital patient appointment records for March 2007. No evidence was

presented at the hearing as to how DOH is responsible for this loss or how the loss of patient appointment records prejudiced Respondent in the presentation of her defense.

CONCLUSIONS OF LAW

27. Section 458.331(1)(g) authorizes the Board of Medicine to discipline a Florida-licensed physician who fails to perform any statutory or legal obligation placed upon a licensed physician.

28. Because it seeks to impose license discipline, DOH has the burden to prove its allegations by clear and convincing evidence. See In re Davey, 645 So. 2d 398, 405 (Fla. 1994); Dep't of Banking & Fin. v. Osborne Stern & Co., Inc., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

29. Count I of the Amended Administrative Complaint alleges that Respondent violated rule 64B16-28.110. That rule governs pharmacies and dispensing practitioners and states:

> Persons qualified to do so shall examine the stock of the prescription department of each pharmacy at a minimum interval of four months, and shall remove all deteriorated pharmaceuticals, or pharmaceuticals which bear upon the container an expiration date which date has been reached, and under no circumstances will pharmaceuticals or devices which bear upon the container an expiration date which has been reached be sold or dispensed to the public.

30. DOH did not prove either that Respondent did not have a qualified person examine prescriptions at least every four months and remove all deteriorated and expired pharmaceuticals, or that Respondent sold or dispensed expired medications to the public.

31. Count II of the Amended Administrative Complaint alleges that Respondent violated section 499.005(1), Florida Statutes, by storing medications in a freezer that were not supposed to be stored that way, or by possessing legend drugs for which she could not produce pedigree papers. Expired drugs are, by definition, adulterated; so are legend drugs for which the required pedigree paper is nonexistent, fraudulent, or incomplete. § 499.006(9)-(10), Fla. Stat.

32. DOH did not prove either that Respondent stored medications in a freezer that were not supposed to be stored that way, or that Respondent did not have pedigree papers that she was supposed to have.

33. Count III of the Amended Administrative Complaint alleges that Respondent violated rule 64B8-9.0075 by leaving a syringe, or allowing a syringe to be left, on the counter in the reception area of her office, or by storing or allowing medications to be stored in a refrigerator with a bag of fast food. The rule requires licensed physicians to ensure that their patients are provided appropriate medical care under sanitary conditions.

34. DOH proved that on March 17, 2007, a syringe was on the counter in the reception area and that medications were stored in a refrigerator with a bag of fast food. DOH did not prove the circumstances of how or when either the syringe or the bag of fast food came to be where they were on March 17, 2007. As a result, the syringe did not clearly prove inappropriate provision of medical care under less-than-sanitary conditions. On the other hand, the storage of medications alongside a food bag in a refrigerator did prove a violation.

35. There was other evidence that Respondent's medical practice was not providing patients with appropriate medical care under sanitary conditions. However, those items were not specifically charged in the Amended Administrative Complaint, and discipline cannot be based on them. See Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005); Aldrete v. Dep't of Health, Bd. of Med., 879 So. 2d 1244 (Fla. 1st DCA 2004); Ghani v. Dep't of Health, 714 So. 2d 1113 (Fla. 1st DCA 1998); Willner v. Dep't of Prof'l Reg., Bd. of Med., 563 So. 2d 805 (Fla. 1st DCA 1990).

36. Count IV of the Amended Administrative Complaint alleges that Respondent violated section 456.057 by maintaining patient records in an unlocked file cabinet in an examination room, or by maintaining medical records in plain view of anyone who approached the reception area.

37. It was proven that during the raid on Respondent's medical practice on March 17, 2007, medical records were left in places where they could be seen, but they could have been left there by someone who was interrupted in the provision of medical services by the raid that morning. For that reason, the alleged violation was not proven.

38. Respondent did not prove her defense that she was set up. She also did not prove her defense of laches.

39. Technically, laches does not apply to administrative license discipline cases. See Farzad v. Dep't of Prof'l Reg., Bd. of Med., 443 So. 2d 373 (Fla. 1st DCA 1983). Procedural delays contrary to statute can result in dismissal if the delays impair the fairness of the proceedings or the correctness of the action taken and prejudice the licensee. See Carter v. Dep't of Prof'l Reg., Bd. of Optometry, 613 So. 2d 78 (Fla. 1st DCA 1993). In this case, under section 456.073(2), DOH was to have completed the report of its initial investigative findings and recommendations concerning probable cause within six months of March 17, 2007, but there was no evidence that the delay prejudiced Respondent in any way. No evidence was presented at the hearing as to why the referral to DOAH was delayed from April 2008 until February 2012. DOAH files, which can be officially recognized, indicate that at least some of the delay was related to settlement negotiations and proposals.

40. The alleged unfairness was due to the death of two witnesses. No evidence was presented as to when the two witnesses died, or why Respondent was unable to preserve their testimony. For these reasons, dismissal is not an appropriate consequence of the delay in referring the matter to DOAH.

41. Respondent also asserted that the loss of digital patient appointment records during the delay in referring the matter to DOAH resulted in unfairness to Respondent. No evidence was presented at the hearing as to whether Respondent was prejudiced in any way from the loss of digital patient appointment records during the delay in referring the matter to DOAH. In any event, it was Respondent's duty to maintain these records. See §§ 458.331(1)(g) & (m) & 456.057, Fla. Stat.; Fla. Admin. Code R. 64B8-10.002.

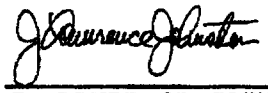
42. Under rule 64B8-8.001(g), the recommended ranges of penalties for the proven violation alleged in Count III are from a letter of concern to revocation and an administrative fine from $1,000 to $10,000. Based on the severity of the offense and the potential for patient harm, the lower quartile of the penalty range is appropriate. Consideration of the aggravating and mitigating factors in paragraph (3) of the rule makes a penalty at the low end of the range appropriate in this case.

RECOMMENDATION

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

RECOMMENDED that the Board of Medicine enter a final order: finding Respondent guilty of one of the violations alleged in Count III of the Amended Administrative Complaint, but not guilty of the other charges; issuing a letter of concern; and imposing a $1,000 fine.

DONE AND ENTERED this 4th day of September, 2012, in Tallahassee, Leon County, Florida.



J. LAWRENCE JOHNSTON
Administrative Law Judge
Division of Administrative Hearings
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Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 4th day of September, 2012.

ENDNOTE

[1/] All statutory references are to the 2006 Florida Statutes, which were in effect at the time of the alleged violations. Likewise, all rule references are to the revision of the Florida Administrative Code in effect at the time of the alleged violations.

COPIES FURNISHED:

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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.

STATE OF FLORIDA
DEPARTMENT OF HEALTH
BOARD OF MEDICINE

DEPARTMENT OF HEALTH,

Petitioner,

v.

DOAH CASE NO.: 12-0666PL
DOH CASE NO.: 2006-38711

NEELAM T. UPPAL, M.D.,

Respondent.
_____/

MOTION TO BIFURCATE AND RETAIN JURISDICTION TO ASSESS COSTS IN ACCORDANCE WITH SECTION 456.072, FLORIDA STATUTES (2011)

The Department of Health, by and through undersigned counsel requests that the Board of Medicine enter an Order bifurcating the issue of costs and retaining jurisdiction to assess costs, against Respondent for the investigation and prosecution of this case in accordance with Section 456.072(4), Florida Statutes (2011). Petitioner states the following in support of this Motion:

26248

1. At its next regularly scheduled meeting, the Board of Medicine will take up for consideration the above-styled disciplinary action and will enter a Final Order therein.

2. Pursuant to Section 120.569(2)(1), Florida Statutes (2011), the Final Order in a proceeding heard by an administrative law judge, which affects a party's substantial interest, must be rendered within ninety (90) days after a Recommended Order is submitted to an agency, unless the ninety (90) days is waived by the Respondent.

3. The Administrative Law Judge's Recommended Order was submitted to the department on or about September 4, 2012; and ninety (90) days from that date is on or about December 3, 2012.

4. Section 456.072(4), Florida Statutes (2011), states as follows:

> In addition to any other discipline imposed through final order, or citation, entered on or after July 1, 2001, pursuant to this section or discipline imposed through final order, or citation, entered on or after July 1, 2001, for a violation of any practice act, the board, or the department when there is not board, shall assess costs related to the investigation and prosecution of the case. The costs related to the investigation and prosecution include, but are not limited to, salaries and benefits of personnel, costs related to the time spent by the attorney and other personnel working on the case, and any other expenses incurred by the department for the case. The board, or the department when there is no board, shall determine the amount of costs to be assessed after its

consideration of an affidavit of itemized costs and any written objections thereto . . . (emphasis added)

5. In the event Respondent's license is revoked, Respondent will not be able to practice medicine in the State of Florida.

6. In order for the Board to assess costs against the Respondent, under the current case law, the Department is required to obtain an outside expert attorney's opinion verifying the reasonableness of the time spent by the Department's attorneys on this matter or the amount of fees sought. *Georges v. Department of Health,* 75 So. 3d 759 (Fla, 2nd DCA 2011).

7. In order for the Board to assess costs against the Respondent, under the current case law, the Department is also required to verify attorney's time spent on the case and prepare supporting affidavits for the amount of attorney's time sought to be recovered. *Georges v. Department of Health,* 75 So. 3d 759 (Fla, 2nd DCA 2011).

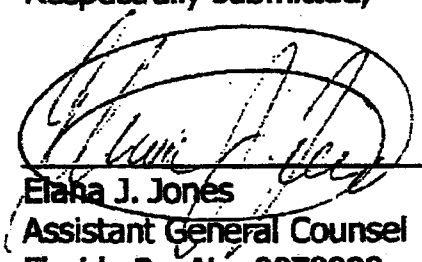
8. There is insufficient time for the Department to verify its attorneys' time spent on the case; prepare supporting affidavits for the amount of attorneys' time sought to be recovered; and obtain an outside expert attorney's opinion verifying the reasonableness of the time spent by the Department's attorneys on this matter or the amount of fees sought.

9. The bifurcation of the issue of cost recovery by the Department and its postponement to a later date will not cause any undo hardship to the Respondent as it will delay, rather than expedite, the date at which a Final Order on the assessment of cost would be entered against Respondent, and thus delay the date upon which any payment for costs would be due and owing.

10. Petitioner requests that the Board grant this motion, bifurcate the issue of assessment of costs and retain jurisdiction to assess costs against Respondent once the Department has obtained an outside expert attorney's opinion verifying the reasonableness of the time spent by the Department's attorneys on this matter or the amount of fees sought, obtains supporting affidavits for the amount of attorney's time sought to be recovered and brings a motion to assess costs before the Board of Medicine.

WHEREFORE, the Department of Health requests that the Board of Medicine enter an Order bifurcating the issue of cost assessment and retaining jurisdiction to assess costs against Respondent.

Respectfully submitted,



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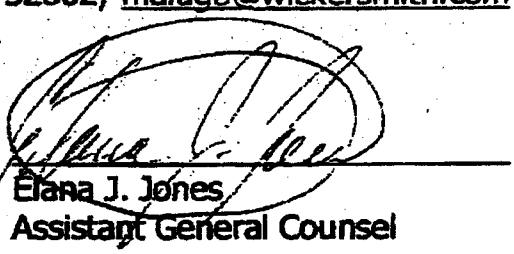
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion to Bifurcate and Retain Jurisdiction to Assess Costs has been furnished via Electronic Mail to Counsels for Respondent, George F. Indest, III, Esquire, and Danielle Murray, Esquire, The Health Law Firm, 1101 Douglas Avenue, Altamonte Springs, Florida 32714, email gindest@thehealthlawfirm.com and dmurray@thehealthlawfirm.com and Michael D'Lugo, Esquire, Wicker, Smith, O'Hara, McCoy and Ford, P.A., Post Office Box 2753, Orlando, Florida 32802, mdlugo@wickersmith.com , this 24th day of October, 2012.



Elana J. Jones
Assistant General Counsel

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,

Petitioner,

v.

DOAH Case No. 2012-0666PL
DOH Case No.: 2006-38711

NEELAM TANEJA UPPAL, M.D.

Respondent.

PETITIONER'S RESPONSE TO RESPONDENT'S EXCEPTIONS TO THE RECOMMENDED ORDER

COMES NOW the Department of Health, Petitioner, pursuant to Rule 28-106.217, Florida Administrative Code (FAC), and files this, its Response to Respondent's Exceptions to the Recommended Order, and states:

PRELIMINARY STATEMENT

Rule 28-106.217 Florida Administrative Code states in part:

> (1) Parties may file exceptions to findings of fact and conclusions of law contained in recommended orders with the agency responsible for rendering final agency action within 15 days of the recommended order except in proceedings conducted pursuant to Section 120.57(3). F.S.

(2) Any party may file responses to another's party's exceptions within 10 days from the date the exceptions were served.

(3) Notwithstanding Rule 28-106.103, no additional time shall be added to the time limits for filing exceptions or responses to exceptions when service has been made by mail. (emphasis added)

The Administrative Law Judge issued the Recommended Order (RO) in this case on September 4, 2012. Respondent filed an "Agreed Motion for Extension of Time to File Exceptions to the Recommended Order" with the Florida Board of Medicine on September 20, 2012, requesting a one-week extension to file exceptions. Respondent filed "Respondent's Exceptions to Recommended Order" with the Florida Board of Medicine on September 26, 2012.

INTRODUCTION

On March 7, 2008, the Department of Health filed a three count Administrative Complaint, which was later amended on motion and granted by the Administrative Law Judge on June 25, 2012, against Respondent. All four counts of the administrative complaint alleged violations of Section 458.331(1)(g), Florida Statutes (2006), by failing

to perform a statutory or legal obligation placed upon a licensed physician. Count One involved a violation of a statutory or legal obligation based on a violation of Rule 64B16-28.110, Florida Administrative Code, due to a failure to remove all deteriorated pharmaceuticals, or pharmaceuticals which bear upon the container an expiration date which date has been reached, and under no circumstances will pharmaceutical or devices which bear upon the container an expiration date which has been reached be sold or dispensed to the public. Count Two involved a violation of Section 499.005(1), Florida Statutes (2006), due to holding or offering for sale of any drug , device, or cosmetic that is adulterated or misbranded or has otherwise been rendered unfit for human or animal use. Count Three involved a violation of Rule 64B8-9.0075, Florida Administrative Code, by Respondent failing to provide appropriate medical care under sanitary conditions. Count Four involved a violation of the Health Insurance Portability and Accountability Act of 1996 (HIPAA), along with Section 456.057, Florida Statutes (2006), which requires that a person who maintains or transmits health information shall maintain reasonable and appropriate administrative, technical, and physical

safeguards to ensure the integrity and confidentiality of the information.

Specifically, the Department alleged:

19. Respondent failed to perform a legal obligation by failing to remove expired medications from her stock of medications, as observed by the investigator,

26. Respondent failed to perform a statutory or legal obligation in one or more of the following ways:

a. By storing medications, which indicated they were not to be frozen, in a freezer; or

b. By possessing legend drugs for which she could not produce pedigree papers,

31. Respondent failed to perform a statutory or legal obligation in one or more of the following ways:

a. By leaving or allowing a syringe to be left lying on the counter in the reception area of her office, as observed by the investigator; or

b. By storing or allowing medications to be stored in a refrigerator with someone's uneaten food in a McDonalds bag,

and

36. Respondent failed to perform a statutory or legal obligation in one or more of the following ways:

a. By maintaining patient records in an unlocked file cabinet in the examination room of Respondent, as observed by the investigator; or

b. By maintaining, or allowing to be maintained, medical records in plain view of anyone who approached the front registration window of the reception area of Respondent's office.

On April 9, 2008, Respondent filed a request for formal hearing which disputed the allegations within the Administrative Complaint. On February 16, 2012, the case was forwarded to the Division of Administrative Hearings ("DOAH"), and Administrative Law Judge (ALJ) J. Lawrence Johnston was assigned by Initial Order dated February 12, 2012, to preside over the case.

At the formal hearing in St. Petersburg, Florida on June 19, 2012, ALJ Johnston presided via videoconference as the trier of fact. Both Petitioner and Respondent filed their respective Proposed Recommended Orders on August 10, 2012.

In his Recommended Order issued on September 4, 2012, ALJ Johnston determined that the Department did not prove that Respondent committed the violations set forth in Counts 1, 2, 3 a. and

4 of the Amended Administrative Complaint by clear and convincing evidence.

However, in his Recommended Order, ALJ Johnston determined that:

> 17. On March 17, 2007, medications were being stored in a refrigerator with a McDonald's bag that had food in it. There was no evidence as to the circumstances of how or when the bag of food came to be in the refrigerators, but it was unlikely that it was placed there because of the raid that day, and it was inappropriate to store medications in the refrigerator with the food bag.

On September 26, 2012, Respondent filed exceptions to ALJ Johnston's Recommended Order. Specifically, Respondent first takes exception to paragraph 17 of ALJ Johnston's conclusions of fact. Second, Respondent also takes exception to ALJ Johnston's conclusions of law in paragraph 38 based on Respondent's position that the case should have been dismissed due to the doctrine of laches due to the delay in forwarding the case to the Division of Administrative Hearings. Third, Respondent also takes exception to ALJ Johnston's conclusions of law in paragraphs 39-40 based on the deprivation of her right to due process and fundamental fairness due to the delay in forwarding the case to the Division of Administrative

Hearings. Fourth, Respondent takes exception to the recommendation made by ALJ Johnston on page 17 of the RO.

For the reasons which follow, after review of Respondent's exceptions, the exceptions should be **denied**.

STANDARD OF REVIEW

1. Florida's Administrative Procedure Act relies upon an Administrative Law Judge to consider all the evidence presented, resolve conflicts, judge credibility of witnesses, draw permissible inferences from the evidence and reach ultimate findings of fact based upon competent substantial evidence. If the evidence presented supports two inconsistent findings, it is the Administrative Law Judge's role to decide the issue one way or the other. Heifetz v. Department of Business Regulation, 475 So.2d 1277 (Fla. 1st DCA 1985).

2. Section 120.57(1)(k), Florida Statutes, authorizes the submission of exceptions to a recommended order. The purpose of filing exceptions is to permit a party to alert the agency to any perceived defects in the Administrative Law Judge's factual findings or conclusions of law. Florida Department of Corrections v. Bradley, 510 So.2d 1122 (Fla. 1st DCA 1987).

3. A reviewing agency may not reweigh the evidence, resolve the conflicts therein, or judge the credibility of witnesses, as those are evidentiary matters within the province of the ALJ as the finder of the facts. Martuccio v. Department of Professional Regulation, Bd. of Optometry, 622 So.2d 607, 609 (Fla. 1st DCA 1993); Heifetz v. Dept. of Business Regulation, 475 So.2d 1277, 1281 (Fla. 1st DCA 1985). An agency reviewing a recommended order is not authorized to re-evaluate the quantity and quality of the evidence presented at DOAH final hearing beyond a determination of whether the evidence is competent and substantial. Brogan v. Carter, 671 So.2d 822, 823 , (Fla. 1st DCA 1996). "Substantial" evidence has been defined as "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion...." Perdue v. TL Palm Associates, Ltd., 755 So.2d 660 (Fla. 4th DCA 1999) quoting DeGroot v. Sheffield, 95 So.2d 912 (Fla. 1957). "Competent" evidence means evidence that is both relevant and material. Id.

4. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of rules over which it has substantive jurisdiction.

Barfield v. Department of Health, Board of Dentistry, 805 So.2d 1008, 1011 (Fla. 1st DCA 2001). The Board can only modify the conclusions of law over which it has substantive jurisdiction, and whether a case should be dismissed based on a legal doctrine such as laches or due process and fundamental fairness is not within its substantive jurisdiction.

5. Finally, the agency may not reject or modify conclusions of law unless it states with particularity its reasons for doing so and makes a finding that its substituted conclusion of law is as or more reasonable than that which was rejected or modified. Section 120.57(1)(l), Florida Statutes (F.S.).

EXCEPTION TO FINDINGS OF FACT

6. Respondent's exception to paragraph number 17, page 8 alleges that the Administrative Law Judge erroneously found that there was food in a McDonald's bag in Respondent's refrigerator. Respondent alleges that there was no evidence adduced at hearing that indicated that there was food in the McDonald's bag in the refrigerator. However, the findings of fact in paragraph 17 are supported by the record at trial.

Specifically, the ALJ states (RO, paragraph 17):

> On March 17, 2007, medications were being stored in a refrigerator with a McDonald's bag that had food in it...and it was inappropriate to store medications in the refrigerator with the food bag.

The ALJ further stated (RO, paragraph 34):

> ...the storage of medications alongside a food bag in a refrigerator did prove a violation.

In deposition testimony of Officer Brian Bilbrey, taken April 13, 2012, and admitted into evidence at hearing, on page 106, Officer Bilbrey testified that he looked in the McDonald's bag and saw that it contained a biscuit (Bilbrey Deposition, p. 53).

The Administrative Law Judge's finding of fact is based upon competent substantial evidence and this Board should not disturb it.

EXCEPTIONS TO FINDINGS OF LAW

7. Respondent's exception to paragraph number 38 of the Recommended Order alleges that the case should have been dismissed due to the doctrine of laches due to the delay in forwarding the case to the Division of Administrative Hearings. While Petitioner maintains that the Administrative Law Judge properly determined that Respondent did not prove her defense of laches, the determination of

the applicability of the doctrine of laches to this case is not within the substantial jurisdiction of the Florida Board of Medicine. As stated in ALJ Johnston's recommended order and in Petitioner's Response in Opposition to Respondent's to Dismiss the Amended Administrative Complaint filed on May 4, 2012, the Respondent must establish that she was prejudiced by the procedural delay. Ong v. Department of Professional Regulation, State Board of Dentistry, 565 So. 2d 1384 (Fla. 5th DCA 1990). The ALJ correctly determined that Respondent did not provide any evidence for her defense that the delay prejudiced her in any way.

8. Respondent's exception to paragraph numbers 39-40 of the Recommended Order alleges that the case should have been dismissed due to the deprivation of her right to due process and fundamental fairness due to the delay in forwarding the case to the Division of Administrative Hearings. Again, while Petitioner maintains that the Administrative Law Judge properly determined that Respondent did not prove her defense that she was deprived of her due process rights and fundamental fairness of the hearing, the determination of the applicability of the these constitutional issues to

this case is not within the substantial jurisdiction of the Florida Board of Medicine. As stated in ALJ Johnston's Recommended Order and in Petitioner's Response in Opposition to Respondent's Motion to Dismiss the Amended Administrative Complaint filed on May 4, 2012, procedural delays contrary to statute can result in dismissal if the delays impair the fairness of the proceedings or the correctness of the action taken and prejudice the licensee. Carter v. Department of Professional Regulation, Board of Optometry, 613 So.2d 78 (Fla. 1st DCA 1993). The ALJ correctly determined that Respondent provided no evidence that she was prejudiced by the delay. In addition, there is no evidence in the record that Respondent did anything to assert her rights concerning the timing of the transmittal of the case of DOAH. There was evidence from the DOAH files, which can be officially recognized, that some of the delay was due to settlement negotiations and proposals.

9. Finallly, Respondent takes exception to the recommendation made by ALJ Johnston on page 17 of the Recommended Order. Based on the finding of ALJ Johnston that Respondent committed the violation in Count 3 b. of the

Administrative Complaint, ALJ Johnston's recommended penalty is within the disciplinary guidelines for the violation and is appropriate.

CONCLUSION

Based upon the foregoing, the Board of Medicine should enter a Final Order denying Respondent's exceptions, and adopting the Recommended Order.

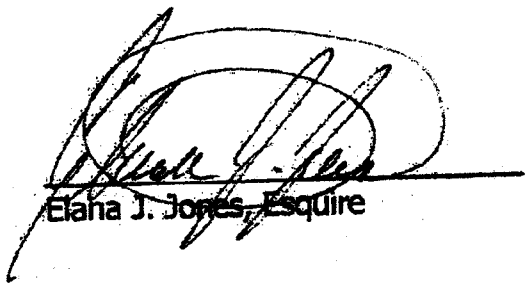
Respectfully Submitted,

Elana J. Jones
Fla. Bar. No. 0078999
Attorney for Petitioner
Department of Health-PSU
4052 Bald Cypress Way, Bin #C-65
Tallahassee, FL 32399-3265
Tel: 850.245.4640 ext. 8137
Fax: 850.245.4681

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of PETITIONER'S RESPONSES TO RESPONDENT'S EXCEPTIONS TO THE RECOMMENDED ORDER was served via e-mail to George R. Indest,

III, Esquire, and Danielle M. Murray, Esquire; The Health Law Firm, 1101 Douglas Avenue, Altamonte Springs, Florida 32714 (gindest@thehealthlawfirm.com and dmurray@thehealthlawfirm.com) this 8th day of October, 2012.



Elana J. Jones, Esquire

STATE OF FLORIDA
BOARD OF MEDICINE, DEPARTMENT OF HEALTH
TALLAHASSEE, FLORIDA

DEPARTMENT OF HEALTH,

Petitioner,

vs.

DOAH CASE NO.: 12-0666PL
DOH CASE NO.: 2006-38711

NEELAM T. UPPAL, M.D.,

Respondent.
_____/

RESPONDENT'S EXCEPTIONS TO RECOMMENDED ORDER

Pursuant to Section 120.57(1)(k), Florida Statutes, and Rule 28-106.217, Florida Administrative Code, the Respondent, Neelam T. Uppal, M.D. (hereafter "Respondent" or "Dr. Uppal"), by and through her undersigned counsel, hereby submits her exceptions to the Recommended Order (RO) by the Administrative Law Judge (ALJ) filed in the above-captioned matter.

Preliminary Statement

1. The charges at issue arose out of a surprise "raid" of Dr. Uppal's office on Saturday, March 17, 2007, when Dr. Uppal was not in the office, by police authorities and Department of Health (DOH) personnel.

2. The ALJ found that all charges and allegations against Dr. Uppal were not proven and should be dismissed, except one factual allegation of Count III. (Paragraphs 33-35, pages 13-14, RO.)

3. Count III alleged that Dr. Uppal committed a violation of Rule 64B8-9.0075, Florida Administrative Code (2006), by allowing a syringe to be left out on the counter in her

office on March 17, 2007, and by storing or allowing medications to be stored in a refrigerator with a bag of fast food (McDonald's) that date.

4. The ALJ found that the factual allegation regarding the syringe, part of Count III, had not been proven and should be dismissed. (Paragraph 34, page 14, RO.)

5. For events that occurred on March 17, 2007, the applicable version of Rule 64B8-9.0075, Florida Administrative Code, that was in effect at the time, was the version last amended in 2006. The relevant part of this Rule, as applicable to Dr. Uppal, is Rule 64B8-9.0075(1), which states:

> Standards of care and standards of practice require that Florida licensed physicians and physician assistants provide their patients appropriate medical care under sanitary conditions. . . .

6. There was no medical expert testimony, no medical doctor or osteopathic physician, other than Dr. Uppal, who testified at the hearing. There was no testimony, other than Dr. Uppal's, as to medical standards or medical care given in her office. There was no testimony that she provided less than appropriate medical care or medical care under unsanitary conditions to her patients.

I. **Respondent's Exception Number 1: No evidence of food in the bag in the refrigerator Paragraph 17, page 8 of the RO.**

7. Dr. Uppal disputes the Recommended Order (RO) and takes exception to Paragraph 17 of the Findings of Fact (FOF), page 8 of the RO. Specifically, Dr. Uppal urges the Board of Medicine ("Board") to strike and disapprove the last five words of the first sentence of Paragraph 17 ("that had food in it") and to disapprove any assumptions made from that finding, including the

remainder of Paragraph 17.

8. There was no evidence of any kind adduced at the hearing that indicated that there was food in the McDonald's bag in the refrigerator. There was no testimony, physical evidence or photographic evidence that showed that anyone ever looked in the bag or saw food of any kind in the bag. (See, for example, the testimony of Mary Mayleben, Pharm.D., at page 94 of the Transcript of the final hearing of June 19, 2012 ("Tr."))

9. Experienced police investigators conducted the "raid" of the office on Saturday, March 17, 2007. Evidence was seized, photographs were taken, reports were filed. Yet at no time did any of the evidence admitted in the hearing state in any way that the bag was opened during the raid or investigation, that the contents of the bag had been examined or that the bag actually contained any food (partially eaten or uneaten).

10. There were ample evidence and findings of fact by the ALJ that patients routinely brought their own medications in to Dr. Uppal and gave them to her to keep in her office. (See FOF, Paragraph 3, pages 3-4, RO.) There were ample evidence and findings of fact by the ALJ that these medications were often stored in the office refrigerator or freezer. (See FOF, Paragraphs 3 and 4, pages 3-4, RO.)

11. There were also substantial evidence at the hearing and findings made by the ALJ that shortly prior to the "raid" on Saturday, March 17, 2007, a routine inspection of Dr. Uppal's office conducted by the Department of Health (DOH) on February 6, 2007, showed no issues of any kind regarding sanitation, storage of food and medications together, or improper usage of the refrigerator for storage of food:

> DOH conducted a routine inspection of Respondent's practice in February 2007. The practice was rated satisfactory in all 28 elements of the inspection, including clean and safe dispensing area; proper storage of medications requiring refrigeration. . . . Respondent's medical practice also was subject to periodic Medicaid inspections and biohazard inspections that were passed satisfactorily.

(FOF, Paragraph 5, pages 4-5, RO.)

12. Despite the fact that photographs were taken of other physical evidence (see, e.g., FOF Paragraph 16, page 8, and Paragraph 21, page 10, RO), there were no photographs taken of the contents of the bag. (See also, Petitioner's Exhibit (PE) 2, Photographs 36 and 38). The only testimony from witnesses regarding this matter was that no one looked in the bag.

13. It is more likely that a patient brought his or her medications in to Dr. Uppal's office in an empty McDonald's bag that the patient had. Regardless, there is no evidence of record to support the finding of fact. Furthermore, there were several different refrigerators in Dr. Uppal's office and there was no evidence as to which one the McDonald's bag had been in. You could not tell from the photographs. (Tr. page 183, line 16, through page 184, line 3.)

14. The ALJ actually made findings that support the exception, that is, findings that show there was no evidence of any food in the bag. For example, the second sentence in Paragraph 17 (FOF, Paragraph 17, pages 8, RO) states: "There was no evidence as to the circumstances of how or when the bag of food came to be in the refrigerator. . . ."

15. Additionally, with respect to the allegation regarding the syringe that was inappropriately placed on the counter in Dr. Uppal's office on the same date, a fact the DOH had alleged as part of the same count (FOF, Paragraphs 14 and 15, page 8 RO), the ALJ specifically

found:

> There was a syringe left on the counter in the reception area of Respondent's office that was photographed by the police officer and seen by him and the DOH inspectors. There was no evidence as to the circumstances of how or when the syringe came to be there. It was possible that it was left there by someone who was interrupted in the provision of medical services by the raid that [Saturday] morning. It was not proven that, as a result of the syringe left on the counter Respondent was not providing appropriate medical care under sanitary conditions.

(FOF, Paragraph 16, page 8 RO.) Likewise, there was no evidence of any food being in the McDonald's bag.

16. Given that Dr. Uppal was not even present in the office that Saturday prior to the "raid," even if there were any evidence of food in the bag, it is equally as likely that the employee who left the syringe exposed also brought in food and placed it in the refrigerator while in the office that Saturday.

17. Since there was no evidence at the hearing that there was actually food in the bag, no specific part of the record or transcript can be cited.

18. Dr. Uppal's clear and direct testimony, competent, substantial evidence, clearly refutes this allegation. She testified that she never stored any food in the refrigerator with the medications. (Tr. page 151, lines 6-10.) The DOH inspection of her office just a month earlier supports her testimony and supplies more competent, substantial evidence as to her sanitary practice.

19. Furthermore, there was no evidence that this condition (the McDonald's bag in the refrigerator) had existed prior to Saturday, March 17, 2007, or that Dr. Uppal had delivered any medical care while the condition existed. There was no testimony or evidence that Dr. Uppal had delivered medical care under less than "sanitary conditions."

20. Because it seeks to impose license discipline, DOH has the burden to prove its allegations by clear and convincing evidence. See In re Davey, 645 So. 2d 398, 405 (Fla. 1994); Dep't of Banking & Fin. v. Osborne Stern & Co., Inc., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

21. DOH has the burden of proving the specific allegations of fact that support its charge that Dr. Uppal violated the applicable statute or rule by clear and convincing evidence. Osborne Stern and Co., supra; Ferris, supra; Pou v. Dep't of Ins. & Treas., 707 So. 2d 941 (Fla. 3d DCA 1998); and Section 120.57(1)(j), Florida Statutes ("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.").

22. What constitutes "clear and convincing" evidence was described by the court in Evans Packing Co. v. Dep't of Agric. & Consumer Serv., 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. Fla. Dep't of Bus. & Prof'l Reg., 705 So. 2d 652 (Fla. 5th DCA 1998)(Sharp, J., dissenting).

23. The Department has failed to meet its burden of proving that there was any food in the McDonald's bag or the refrigerator with the medications.

24. In a case of this nature, the burden of proof is on the DOH to prove the case against the Respondent by clear and convincing evidence. In the present case, regarding this issue, there is no evidence.

25. The assumptions that could be made from the testimony that was presented and the other findings of fact made by the ALJ would more likely than not support a finding that there was a patient's medication in the bag, brought in by a patient.

Accordingly, Respondent Dr. Uppal urges the Board of Medicine to disapprove the Finding of Fact (FOF, Paragraph 17, page 8, RO) relating to food in the McDonald's bag, due to a complete absence of any substantial evidence to show there was food in it. Additionally, there are findings of fact which contradict this finding of fact.

II. Respondent's Exception Number 2: A four (4) year delay in forwarding the case to DOAH for a hearing and the ensuing deaths of two (2) of Dr. Uppal's witnesses, should have resulted in a dismissal due to the doctrine of laches.

26. Dr. Uppal disputes and files exception to the Conclusions of Law made by the ALJ at Paragraph 38, page 15, RO. Dr. Uppal contends that a finding that the doctrine of laches should be applied in this case and the one remaining charge she was found to have committed

should be dismissed as a result.

27. The events giving rise to the charges occurred on March 17, 2007. (Preliminary Statement, page 2, RO.)

28. The Administrative Complaint against Respondent Dr. Uppal was filed March 12, 2008, approximately one year later. (Preliminary Statement, page 2, RO and FOF Paragraph 25, page 11, RO.)

29. Dr. Uppal filed a timely request for a formal administrative hearing in April 2008. ((Preliminary Statement, page 2, and FOF Paragraph 25, page 11, RO.)

30. The case was not referred to the Division of Administrative Hearings (DOAH) for a formal hearing until February 12, 2012. (Preliminary Statement, first paragraph, fifth line, page 2, RO.)

31. This was over five (5) years after the incidents of March 17, 2007, and almost four (4) years after Dr. Uppal requested a formal administrative hearing.

32. The final administrative hearing was held on June 19, 2012. (Preliminary Statement, second paragraph, first line, page 2, RO.)

33. Section 120.569(2)(a), Florida Statutes, states in relevant part:

> [A] a petition or request for a hearing under this section shall be filed with the agency. If the agency requests an administrative law judge from the division, it shall so notify the division by electronic means through the division's website within 15 days after receipt of the petition or request. A request for a hearing shall be granted or denied within 15 days after receipt. . . . The referring agency shall take no further action with respect to a proceeding. . . .

(Emphasis added.)

34. Dr. Uppal testified under oath that a patient who was present on that Saturday, March 17, 2007, told her that she was "being set up" and that he saw a person bringing food into the back door of the office immediately before the raid. The patient had died at some time before the final administrative hearing. (Transcript of Hearing dated July 19, 2012 ("Tr."), page 151, line 11, to page 155, line 12.)

35. Another witness, an employee of Dr. Uppal, who was responsible for monitoring, storing and discarding the expired medications in the office, Ms. Wellen, and could provide testimony as to sanitary conditions in the office and the actual medical practice of Dr. Uppal, had also died by the time of the final administrative hearing. (FOF Paragraph 24, page 11, RO.)

36. In addition to the deaths of two witnesses that Dr. Uppal would have called in her defense, there was also testimony regarding malfunctions of computers in Dr. Uppal's office prior to the hearing, resulting in the loss of electronic records she would have used in her defense. (FOF Paragraph 26, pages 11-12, RO.)

37. Additionally, there was testimony by the Department of Health's expert, a pharmacist and DOH inspector, Mary Mayleben, Pharm.D., regarding photographs she had taken on March 17, 2007, interviews of Dr. Uppal's employees and other documents she had that Dr. Uppal had previously been given to her. Dr. Uppal desired to use these documents to defend herself in the present hearing. When Dr. Uppal sought these from Dr. Mayleben, Dr. Mayleben found that they had, apparently been destroyed. Dr. Mayleben testified that she lost almost all of her documents related to Dr. Uppal when the state department in which she worked was transferred from the Department of Health to the Department of Professional Regulation in 2011. (Tr. page 81, line 22 through page 89, line 8.)

38. A patient, R.W., who was an actual eyewitness to the events in her office the Saturday morning immediately prior to the raid, had told Dr. Uppal of what he saw and that she was being "set up" by her employee and another. (Tr. page 151, line 11, to page 155, line 12.) Although there was an attempt made to place the facts surrounding this eyewitness, Patient R.W., on the record by Dr. Uppal during her testimony, the ALJ sustained the DOH's objections and cut off further testimony by Dr. Uppal relating to Patient R.W. (Tr. page 155, line 13, to page 156, line 1.)

39. Dr. Uppal raised the doctrine of laches in the proceeding below. (FOF Paragraph 24, page 11, RO.)

40. In part, the ALJ relied on information in the DOAH [sic] files which he stated could be officially recognized. (Paragraph 39, page 15, last sentence, RO.) It is believed the ALJ was actually referring to the DOH file on the case. However, in either event, these files were within the state's control and not Dr. Uppal's.

41. Dr. Uppal attempted to testify as to the harm this caused to her case and the prejudice to her defense by the delay and was not allowed to do so. The following is from Dr. Uppal's testimony at the hearing on June 19, 2012:

> Q Okay. Do you believe that he would have had testimony that would have been important as part of your defense in this case based upon his being a physical eyewitness to everything that occurred on March 17 of 2007?
>
> MS. JONES: Objection. Speculative.
>
> MR. D'LUGO: Let the Judge rule.
>
> THE WITNESS: Yes. He had - -

> THE COURT: Just a minute. I'll sustain the objection, without any further foundation, that it would be speculative.

(Tr. page 152, lines 1-10.) The parts of the transcript from pages 152 through 156 shed further light on the prejudice caused to Dr. Uppal's defense

42. The burden of proof in this case is on the DOH, not Dr. Uppal.

43. By finding that Dr. Uppal should have attempted to preserve the testimony of the two dead witnesses, or should be required to show why she was not able to do so, impermissibly shifts the burden to Dr. Uppal, and makes an impermissible presumption against her.

44. Because it seeks to impose license discipline, DOH has the burden of proving its allegations by clear and convincing evidence. In re: Davey, 645 So. 2d 398, 405 (Fla. 1994); Dep't of Banking & Fin. v. Osborne Stern & Co., Inc., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

45. The application of the equitable principle of laches has been recognized under Florida Law as a defense in administrative disciplinary proceedings. See Ong v. Dep't of Prof'l Reg., 565 So. 2d 1384 (Fla. 5th DCA 1990); see also The Florida Bar v. McCain, 361 So. 2d 700 (Fla. 1978).

46. Under Florida law, to claim laches the Respondent must show the following:

> (1) Conduct on the part of the defendant giving rise to the situation of which complaint is raised; (2) delay in asserting the claimant's rights, the complainant having had knowledge or notice of the defendant's conduct and having been afforded an opportunity to institute the suit; (3) lack of knowledge or notice on the part of the defendant that the complainant would assert the right on which he bases his suit; and (4) injury or prejudice to the

> defendant in the event relief is accorded to the complainant.

McCain, 361 So. 2d at 705; Niagara Fire Ins. Co. v. Allied Elec. Co., 319 So. 2d 594, 595 (Fla. 3d DCA 1975); and Van Meter v. Kelsey, 91 So. 2d 327 (Fla. 1956).

47. In the present matter, the Respondent has met all of these required elements.

48. Even if laches is treated as an affirmative defense and Dr. Uppal is required to prove it, she has carried this burden of proof.

49. The facts are that two of Dr. Uppal's witnesses died in the period prior to the hearing. (Paragraph 40, page 16, RO.) There was also documentary (electronic) evidence that Dr. Uppal would have used to defend herself that was destroyed through no fault of hers when her computers crashed. (Paragraph 41, page 16, RO.) Documents that Dr. Mayleben had that Dr. Uppal desired to use, photographs taken by Dr. Mayleben and notes of her interviews on March 17, 2007) were also destroyed when her department was transferred by the State of Florida. (Tr. page 81, line 22 through page 89, line 8.)

50. Dr. Uppal's sworn testimony regarding the statements of the deceased patient, should be accepted as hearsay that is supported by other credible evidence. Such is admissible under Section 120.57(1)(c), Florida Statutes.

51. Regardless, it should be accepted as a proffer of what the witness would have stated, a valid defense for Dr. Uppal, in order to show the harm to Dr. Uppal's defense from the unavailability of this witness.

Accordingly, Respondent Dr. Uppal urges the Board of Medicine to disapprove the Conclusions of Law made by the ALJ that the doctrine of laches was not properly supported by

the Findings of Fact; finding further that under the facts found and the evidence of record the doctrine of laches should be applied and that the remaining charge against Dr. Uppal be dismissed. Dr. Uppal specifically takes exception to the final sentence of Paragraph 40, page 16, and the last two sentences of Paragraph 41, page 16, RO. Alternatively, this error can be corrected by striking the word "not" from the last sentence of Paragraph 40, page 16, RO.

III. **Respondent's Exception Number 3: The failure to forward the administrative complaint to the DOAH in the time required by statute deprived Dr. Uppal of her right to due process of law and fundamental fairness in the hearing; this should result in dismissal of the case. This constitutes an exception to Paragraphs 39-40, pages 15-16, RO.**

52. Even if the doctrine of laches is held to not apply to the facts of this case, nevertheless, fundamental constitutional principles of due process of law do apply, and require dismissal. The facts found by the ALJ and the testimony of record shows that the conclusion reached by the ALJ in the last sentence of Paragraph 40, page 16, RO, is erroneous and should be corrected.

53. Dr. Uppal takes exception to and disputes the ALJ's Conclusions of Law at Paragraph 39, page 15, RO. The ALJ applied an incorrect legal standard in this matter.

54. Dr. Uppal realleges the arguments stated above at paragraphs 27 through 43 for this exception.

55. As quoted previously, Section 120.569(2)(a), Florida Statutes, states in relevant part:

> [A] a petition or request for a hearing under this section shall be filed with the agency. If the agency requests an administrative law judge from the

> division, it shall so notify the division by electronic means through the division's website within 15 days after receipt of the petition or request. A request for a hearing shall be granted or denied within 15 days after receipt. . . . The referring agency shall take no further action with respect to a proceeding. . . .

(Emphasis added.)

56. Section 456.073(5), Florida Statutes, also states:

> . . . .Notwithstanding s. 120.569(2), the department [Department of Health] shall notify the division [Division of Administrative Hearings] within 45 days after receipt of a petition or request for a formal hearing.

57. Procedural delays contrary to statute can result in dismissal if the delays impair the fairness of the proceedings or the correctness of the action taken and prejudice the licensee. See Carter v. Dep't of Prof'l Reg., Bd. of Optometry, 613 So. 2d 78 (Fla. 1st DCA 1993).

58. By way of example, when the DOH took nine (9) months to issue its decision disciplining a social worker, the remedy for the long unexplained delay was reversal because the delay substantially affected the fairness of the proceedings. Kasdaglis v. Dep't of Health, 827 So. 2d 328 (Fla. 4th DCA 2002). In the present case, the delay was approximately four (4) years.

59. In Department of Bus. Reg. v. Hyman, 417 So. 2d 671 (Fla. 1982), the court concluded that to obtain dismissal, a licensee must show: (1) a violation of the time limits set forth in the applicable statute, and (2) that the resulting delay may have impaired the fairness of the proceedings or the correctness of the action and may have prejudiced the licensee. Carter v. Dep't of Prof'l Reg., Bd. of Optometry, 633 So. 2d 3 (Fla. 1994).

60. Article I, Section 9, of the Florida Constitution states, in relevant part: "No person shall be deprived of life, liberty or property without due process of law. . . ." (Emphasis added.)

61. The instant case does not occur in the context of a court, but in the context of a formal administrative hearing. Nevertheless, Dr. Uppal is still entitled to her due process rights as they are applicable to administrative hearings and must be observed.

62. Due process, it is well-established, requires that no one shall be personally bound until she has had her "day in court." 6 FL. JUR. 2D Constitutional Law Section 320, at p. 547. With respect to administrative decisions, a party is afforded her "day in court" when she has a right to a hearing and has the right of an appeal to a judicial tribunal of the action of an administrative body.

63. Although this is not a criminal case, the loss of a professional license is a sufficiently serious loss to an individual to justify affording him similar consideration and fair treatment. Hodge v. Dep't of Prof'l Reg., 432 So. 2d 117 (1983). Such proceedings are considered to be penal in nature and to carry the protections of a criminal case.

64. The Court of Appeal in Gordon v. Savage explained the right to a speedy hearing in an administrative case involving proceedings to suspend or revoke a dentistry license. The Court stated:

> The right to a prompt inquiry into criminal charges is fundamental and the state is obligated to provide a prompt hearing to prevent interference with the defendant's fair opportunity to defend himself.

Gordon v. Savage, 383 So. 2d 646 (Fla. 5th DCA); citing Dickey v. Florida, 398 U.S. 30 (1970).

65. In Department of Bus. Reg. v. Hyman, 417 So. 2d 671 (Fla. 1982), the Florida Supreme Court concluded that to obtain dismissal, a licensee must show: (1) a violation of the time limits in section 455.225 [now 456.073], Florida Statutes, and (2) that the resulting delay may have impaired the fairness of the proceedings or the correctness of the action and may have prejudiced the licensee. Carter v. Dep't of Prof'l. Reg., Bd. of Optometry, 633 So. 2d 3 (Fla. 1994).

66. In the present case Dr. Uppal was denied a prompt and timely hearing. Two of her witnesses died in the five (5) years between the "raid" or inspection of March 17, 2007, and the hearing. Documentary evidence she would have used to defend herself was destroyed when her office computers crashed. Documentary evidence that she would have used was lost by the DOH inspector, Mary Mayleben, Pharm.D. Still Dr. Uppal succeeded in defending herself against all of the prior charges (included in three different administrative complaints) leaving only a finding against her of one factual allegation in one count of the remaining administrative complaint.

67. Dr. Uppal believed that the passage of time had deprived her of her ability to defend herself and she was harmed by this. (Tr. page 130, line 18, through 133, line 9.)

68. A timely hearing at which she would have had the opportunity to produce the two now-deceased witnesses, the documentary evidence she previously had, and those lost by Dr. Mayleben, would most probably have resulted in a complete dismissal of the last remaining allegation. At least she would have believed that she had been afforded a fair hearing.

69. The statutory time limits for filing and prosecuting charges against licensees were intended to protect against potential prejudice from unreasonable delay in disciplinary proceedings. Violations of such time limits are not "mere technicalities." Carter v. Dep't of Prof'l Reg., Bd.

of Optometry, 633 So. 2d 3 (1994).

70. In the present case, given the egregious lapse in time, the death of witnesses, and the loss of evidence, such error cannot be termed "harmless error." There has been an impairment of the fairness of the proceedings, and the correctness of the RO, to the prejudice of Dr. Uppal. Western Acceptance Co. v. State, Dep't of Revenue, 472 So. 2d 497 (Fla. 1st DCA 1985); Section 120.68(8), Florida Statutes.

71. In addition to the Florida Constitution, the U.S. Constitution also applies. The Fifth and Fourteenth Amendment guarantees of procedural due process of law ensure that proceedings to suspend or revoke Petitioner's license to practice medicine must be essentially fair. Ong v. Dep't of Prof'l Reg., 565 So. 2d 1384 (Fla. 5th DCA 1990).

72. Moreover, the passage of time threatens the ability of both a respondent (defendant) and the government to prepare and present a complete case. Delay does not inherently benefit the accused any more than it does the prosecution. Dickey v. Florida, 398 U.S. 30 (1970).

Accordingly, Respondent Dr. Uppal urges the Board of Medicine to disapprove the Conclusions of Law made by the ALJ that the case should not be dismissed, by striking or modifying the last sentence of Paragraph 40, page 16, RO. The Recommendations contained on Page 17, RO, would likewise be modified to recommend dismissal.

IV. Respondent's Exception Number 4: Exception regarding Recommendation, page 17, RO.

73. If any of the foregoing exceptions are accepted by the board of Medicine, then Dr. Uppal contends this would require that the Recommendation on page 17 of the RO be changed to

a recommendation of dismissal. No other recommendation would be appropriate.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served as follows:

Original filed via telefax and Federal Express, overnight delivery, to:

Agency Clerk
Office of the General Counsel
Department of Health
4052 Bald Cypress Way, Bin A-02
Tallahassee, Florida 32399-1703
Telephone: (850) 245-4444, extension 4058
Telefax: (850) 410-1448

and via telefax and Federal Express, overnight delivery, to:

Agency Clerk
C/O Medical Quality Assurance
Central Records Unit
Department of Health
4052 Bald Cypress Way, Bin C-01
Tallahassee, Florida 32399
Telephone: (850) 245-4191
Telefax: (850) 414-0864

with a copy via telefax and Federal Express, overnight delivery, to:

Joy Tootle, Executive Director
Board of Medicine
Department of Health
4052 Bald Cypress Way, Bin C-03
Tallahassee, FL 32399
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Telefax: (850) 488-0596

with a copy served via telefax and Federal Express, overnight delivery, to:

Elana Jones, Esquire
Assistant General Counsel

Florida Department of Health
4052 Bald Cypress Way, Bin A-65
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this 26th day of September 2012.

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LICENSED IN FLORIDA
(OF COUNSEL)

Date: September 26, 2012 No. of Pages (incl. cover sheet): 20 pages

TO: Agency Clerk, c/o Medical Quality Assurance, Central Records Unit

Organization: Dept. of Health City: Tallahassee

Our File No.: 1516/002 Case/Re: DOH v Neelam Uppal, M.D.
DOAH No. 12-0666PL

FAX NUMBER: (850) 414-0864

Phone No: (850) 245-4191 Sent By: Lynda Riley

Remarks: Please see the attached Respondent's Exceptions to Recommended Order, for filing.

PLEASE TELEPHONE IMMEDIATELY IF ALL PAGES ARE NOT RECEIVED.

HARD COPY TO FOLLOW BY MAIL/COURIER: XXX YES ____ NO

STATE OF FLORIDA
DEPARTMENT OF HEALTH

DEPARTMENT OF HEALTH,

PETITIONER,

v. CASE NO. 2006-38711

NEELAM UPPAL, M.D.,

RESPONDENT.
_____/

AMENDED ADMINISTRATIVE COMPLAINT

COMES NOW, Petitioner, Department of Health, by and through its undersigned counsel, and files this Administrative Complaint before the Board of Medicine against the Respondent, Neelam Uppal, M.D., and in support thereof alleges:

1. Petitioner is the state department charged with regulating the practice of medicine pursuant to Section 20.43, Florida Statutes; Chapter 456, Florida Statutes; and Chapter 458, Florida Statutes.

2. At all times material to this Complaint, Respondent was a licensed physician within the State of Florida, having been issued license number ME 59800.

3. Respondent's address of record is Post Office Box 60357, St. Petersburg, Florida 33784.

4. On or about March 17, 2007, Karen Hanzal, Medical Malpractice Investigator with the Department of Health, the Pinellas Park Police Department, and others conducted an inspection of Respondent's office, pictures from which are attached as Composite Exhibit 1.

5. At all times relevant to this investigation, Respondent was a dispensing practitioner.

6. Section 465.0276(2)(b), Florida Statutes (2006), states that a dispensing practitioner must comply with and be subject to all laws and rules applicable to pharmacists and pharmacies, including, but not limited to, this chapter and chapters 499 and 893 and all federal laws and federal regulations.

7. The investigator observed the freezer in Respondent's office contained expired and current medications.

8. The investigator observed in Respondent's refrigerator medication and intravenous paraphernalia along with uneaten food in a McDonalds bag.

9. The investigator observed medications with expiration dates from 1994 to 2009 in Respondent's office or storage area.

10. The investigator observed medications in the freezer, whose instructions specifically stated that they were to be refrigerated.

11. The investigator observed that there was a syringe lying on the counter in the reception area of Respondent's office.

12. The investigator observed that patient records in Respondent's office were kept in an unlocked file cabinet in the examination room.

13. The investigator observed that patient records were also in Respondent's reception area, and visible to anyone who walked up to the registration window.

14. Respondent could not produce pedigree documents for medications she received.

15. Section 499.003(31), Florida Statutes (2006), defines a pedigree paper as a document or electronic form approved by the Department of Health and containing information that records each distribution of any given legend drug, from sale by a pharmaceutical manufacturer, through acquisition and sale by any wholesaler or repackager, until final sale to a pharmacy or other person administering or dispensing the drug.

COUNT ONE

16. Petitioner re-alleges and incorporates paragraphs one (1) through fifteen (15) as if fully set forth herein.

17. Section 458.331(1)(g), Florida Statutes (2006), states that failing to perform any statutory or legal obligation placed upon a licensed physician constitutes grounds for disciplinary action by the Board of Medicine.

18. Rule 64B16-28.110, Florida Administrative Code, states that persons qualified to do so shall examine the stock of the prescription department of each pharmacy at a minimum interval of four months, and shall remove all deteriorated pharmaceuticals, or pharmaceuticals which bear upon the container an expiration date which date has been reached, and under no circumstances will pharmaceuticals or devices which bear upon the container an expiration date which has been reached be sold or dispensed to the public.

19. Respondent failed to perform a legal obligation by failing to remove expired medications from her stock of medications, as observed by the investigator.

20. Based on the foregoing, Respondent has violated Section 458.331(1)(g), Florida Statutes (2006), by failing to perform a legal obligation.

COUNT TWO

21. Petitioner re-alleges and incorporates paragraphs one (1) through fifteen (15) as if fully set forth herein.

22. Section 458.331(1)(g), Florida Statutes (2006), states that failing to perform any statutory or legal obligation placed upon a licensed physician constitutes grounds for disciplinary action by the Board of Medicine.

23. Section 499.005(1), Florida Statutes (2006), states that the manufacture, repackaging, sale, delivery, or holding or offering for sale of any drug, device, or cosmetic that is adulterated or misbranded or has otherwise been rendered unfit for human or animal use is prohibited.

24. Section 499.006(2), Florida Statutes (2006), states that a drug is adulterated if it has been produced, prepared, packed, or held under conditions whereby it could have been contaminated with filth or rendered injurious to health.

25. Section 499.006(10), Florida Statutes (2006), states that a drug is adulterated if it is a legend drug for which the required pedigree

paper is nonexistent, fraudulent, or incomplete under the requirements of ss. 499.001-499.081 or applicable rules.

26. Respondent failed to perform a statutory or legal obligation in one or more of the following ways:

a) By storing medications, which indicated they were not to be frozen, in a freezer; or

b) By possessing legend drugs for which she could not produce pedigree papers.

27. Based on the foregoing, Respondent has violated Section 458.331(1)(g), Florida Statutes (2006), by failing to perform a legal obligation.

COUNT THREE

28. Petitioner re-alleges and incorporates paragraphs one (1) through fifteen (15) as if fully set forth herein.

29. Section 458.331(1)(g), Florida Statutes (2006), states that failing to perform any statutory or legal obligation placed upon a licensed physician constitutes grounds for disciplinary action by the Board of Medicine.

30. Rule 64B8-9.0075, Florida Administrative Code, states that standards of care and standards of practice require that Florida licensed

physicians and physician assistants provide their patients appropriate medical care under sanitary conditions.

31. Respondent failed to perform a statutory or legal obligation in one or more of the following ways:

a) By leaving or allowing a syringe to be left lying on the counter in the reception area of her office, as observed by the investigator; or

b) By storing or allowing medications to be stored in a refrigerator with someone's uneaten food in a McDonalds bag.

32. Based on the foregoing, Respondent has violated Section 458.331(1)(g), Florida Statutes (2006), by failing to perform a statutory or legal obligation.

COUNT FOUR

33. Petitioner re-alleges and incorporates paragraphs one (1) through fifteen (15) as if fully set forth herein.

34. Section 458.331(1)(g), Florida Statutes (2006), states that failing to perform any statutory or legal obligation placed upon a licensed physician constitutes grounds for disciplinary action by the Board of Medicine.

35. The Health Insurance Portability and Accountability Act of 1996 (HIPAA), along with Section 456.057, Florida Statutes (2006), requires that

a person who maintains or transmits health information shall maintain reasonable and appropriate administrative, technical, and physical safeguards to ensure the integrity and confidentiality of the information.

36. Respondent failed to perform a statutory or legal obligation in one or more of the following ways:

a) By maintaining patient records in an unlocked file cabinet in the examination room of Respondent, as observed by the investigator; or

b) By maintaining, or allowing to be maintained, medical records in plain view of anyone who approached the front registration window of the reception area of Respondent's office.

37. Based on the foregoing, Respondent has violated Section 458.331(1)(g), Florida Statutes (2006), by failing to perform a statutory or legal obligation.

WHEREFORE, Petitioner respectfully requests that the Board of Medicine enter an order imposing one or more of the following penalties: permanent revocation or suspension of Respondent's license, restriction of practice, imposition of an administrative fine, issuance of a reprimand, placement of Respondent on probation, corrective action, refund of fees billed or collected, remedial education and/or any other relief that the Board deems appropriate.

SIGNED this 22nd **day of** June, **2012.**

JOHN H. ARMSTRONG, MD
Surgeon General and Secretary of Health
Florida Department of Health

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Neelam Uppal, M.D. CASE NO. 2006-38711

A.

NOTICE OF RIGHTS

Respondent has the right to request a hearing to be conducted in accordance with Section 120.569 and 120.57, Florida Statutes, to be represented by counsel or other qualified representative, to present evidence and argument, to call and cross-examine witnesses and to have subpoena and subpoena duces tecum issued on his or her behalf if a hearing is requested.

NOTICE REGARDING ASSESSMENT OF COSTS

Respondent is placed on notice that Petitioner has incurred costs related to the investigation and prosecution of this matter. Pursuant to Section 456.072(4), Florida Statutes, the Board shall assess costs related to the investigation and prosecution of a disciplinary matter, which may include attorney hours and costs, on the Respondent in addition any other discipline imposed.