STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MEDICINE,

Petitioner,

vs. Case No. 13-4266PL

CHERYL DEBBIE ACKERMAN, M.D.,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, an administrative hearing was conducted in this case in Tallahassee, Florida, on March 24 and April 21, 2014. Lisa Shearer Nelson, an administrative law judge assigned by the Division of Administrative Hearings, presided over the hearing.

APPEARANCES

For Petitioner: Jonathan R. Zachem, Esquire
Douglas D. Sunshine, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Kristian E. Dunn, Esquire
517 East College Avenue
Tallahassee, Florida 32301

STATEMENT OF THE ISSUE

The issue to be determined is whether Respondent has violated section 458.331(1)(b), (kk), and (nn), Florida Statutes

(2011), as alleged in the Administrative Complaint, and if so, what penalty should be imposed?

PRELIMINARY STATEMENT

On January 14, 2013, Petitioner, Department of Health, filed an Administrative Complaint against Respondent, Cheryl Ackerman, M.D., alleging that she had violated section 458.331(1)(b), (kk), and (nn), Florida Statutes (2011). The factual allegations in the Administrative Complaint are that Dr. Ackerman had action taken against her medical license in New Jersey; that she failed to notify the Board of Medicine within 30 days of the action by the New Jersey Board; and that she failed to update her practitioner profile within 15 days of the action.

Dr. Ackerman filed an election of rights form on April 19, 2013, disputing the allegations in the Administrative Complaint and requesting a hearing pursuant to section 120.57(1), Florida Statutes. On November 4, 2013, the Department forwarded the case to the Division of Administrative Hearings for assignment of an administrative law judge.

Pursuant to notice issued November 13, 2013, the hearing was scheduled for January 7-8, 2014. On December 3, 2013, counsel for Respondent filed an unopposed motion for continuance, indicating that Respondent had a scheduled court appearance in New Jersey on January 6, 2014, leaving insufficient time for

travel arrangements to Florida. Based upon the unopposed motion, the case was continued and rescheduled for February 12-13, 2014.

On December 13, 2014, counsel for Respondent filed a Notice of Withdrawal of Counsel, which complied with the requirements of Florida Administrative Code Rule 28-106.105(3). The Notice was treated as a motion to withdraw in accordance with the rule, and was granted by Order dated December 16, 2013.

On January 9, 2014, Respondent filed a document that was captioned as an "Unopposed Motion for Continuance." The Motion represented that Dr. Ackerman was unable to travel due to "health issues with pain from car accident, bleeding," and civil court issues in New Jersey. The motion also specifically indicated that Respondent had contacted counsel for Petitioner and that he had no objection to the continuance. However, the Department responded in opposition to the Motion and stated that counsel had not been contacted before the Motion was filed. On January 13, 2014, an Order was entered denying the Motion, without prejudice for Dr. Ackerman to file an amended motion that included documentation with respect to the New Jersey litigation that prevented her appearance (such as a Notice of Hearing or subpoena), and/or documentation from a licensed physician other than Respondent that demonstrated her inability to participate in the hearing.

Between January 13, 2014, and January 22, 2014, Respondent filed seven requests for continuance in various forms. At least two of these requests did not indicate that they were served on opposing counsel, and two Notices of Ex Parte Communication were filed. The Notice issued January 16, 2014, stated in bold typeface that "no motions will be ruled on without a certificate of service indicating that a copy of the document filed with the undersigned has been served on counsel for Petitioner." The admonition made little difference in Respondent's filing practices.

On January 22, 2014, an Order was issued denying Respondent's motions for continuance. The Order also permitted Respondent to appear by telephone and ordered a pre-hearing conference call to be conducted on Monday, February 3, 2014. The Order also reiterated the type of documentation needed to justify the continuance Respondent was seeking.

Between January 23, 2014, and January 31, 2014, Respondent filed seven additional requests for hearing, some of which continued to lack any indication that Respondent had served opposing counsel with a copy of the document. On January 30, 2014, the undersigned issued an Order directing Respondent to use a certificate of service in her motions and that no motion without a certificate of service would receive a ruling. The Order went so far as to provide an example of a certificate of

service from the Florida Rules of Judicial Administration. The admonition was to no avail.

On February 3, 2014, a pre-hearing conference was conducted. On that same day, Martin McDonnell entered a limited appearance for the purpose of representing Dr. Ackerman at the pre-hearing conference. Dr. Ackerman was also present on the conference call. During the conference, Respondent was advised that filing successive motions or correspondence on a nearly daily basis was not helpful, in that opposing counsel had to be given an opportunity to respond to her requests. After consideration of the arguments of counsel and the documentation finally provided, Respondent's motions for continuance were granted and the hearing previously scheduled for February 12-13, 2014, was canceled. The parties were directed to file a Joint Status Report no later than February 12, 2014, regarding dates of availability to reschedule the hearing. Respondent was advised that no further continuances would be entertained, absent an extreme emergency. On February 13, 2014, the hearing was rescheduled for March 24, 2014.

Respondent's requests for an additional continuance began again on February 27, 2014, and an Order Denying Continuance of Final Hearing was issued March 5, 2014.[1/] Despite the admonition given during the pre-hearing conference, Respondent continued to file requests on an almost daily basis, and sometimes twice a

day. Between March 6, 2014 and March 17, 2014, an additional eight motions/letters were filed. Many continued to lack any indication that Respondent had served opposing counsel. On March 11, Mr. McDonnell filed a Notice of Withdrawal and/or Clarification, reiterating that he had filed a limited appearance for the sole purpose of representing Respondent during the pre-hearing conference and for no other purpose, and was no longer representing her.

On March 17 and 19, 2014, Orders Denying Continuance were filed in response to Respondent's continued requests. On Friday, March 21, 2014, attorney Kristian Dunn filed a Notice of Appearance on behalf of Respondent, along with an Emergency Motion for Continuance. Attached to his emergency motion was a letter from a physician stating that Respondent had been seen in the Hackensack University Medical Center Emergency Trauma Department on March 19, 2014, and requesting that she be "excused" from the "meeting" on March 24, 2014; and a note on a prescription form that she was scheduled for cardiac evaluation on the morning of the hearing. The Department objected to any further continuance.

The hearing began on March 24, 2014, as scheduled. The Department presented the testimony of two witnesses, in order to preserve their testimony; however, in an abundance of caution, the remainder of the hearing was continued until April 15, 2014,

in order to allow Respondent's participation. Respondent's counsel, who was in attendance, was advised, and an Order memorializing the ruling was issued, that no further continuance would be granted absent the provision of a sworn affidavit by Respondent's treating physician, identifying the patient's diagnosis, treatment plan, and a date by which Respondent would be able to participate in the hearing by telephone.

The hearing reconvened on April 15, 2014, and Respondent appeared by telephone. During the two days of hearing, Petitioner presented the testimony of Joanne Trexler and Miley Williams, and Petitioner's Exhibits 1, 2, and 4 were admitted into evidence. Respondent testified on her own behalf, and Respondent's Exhibit 1 was also admitted. Transcripts for each day of the hearing were ordered: the volume for March 24, 2014 was filed March 31, 2014, and the volume for April 15, 2014 was filed April 30, 2014. On April 28, 2014, Dr. Ackerman filed a document that appeared to be a proposed recommended order. However, her counsel filed a Notice the following day asking that the document be withdrawn. Because Respondent is represented by counsel, the document she filed has not been considered. Both counsel filed Proposed Recommended Orders on May 9, 2014, and those submissions have been carefully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Respondent is a medical doctor licensed in the State of Florida, having been issued license number ME 89113.

2. Petitioner is the state agency charged with the licensing and regulation of the practice of medicine pursuant to section 20.43 and chapters 456 and 458, Florida Statutes.

3. Respondent is also licensed as a medical doctor in the State of New Jersey.

4. The Department of Law and Public Safety, Division of Consumer Affairs, New Jersey Board of Medical Examiners (New Jersey Board) is the licensing authority regulating the practice of medicine in the State of New Jersey.

5. On or about February 21, 2012, the New Jersey Board entered an Order of Automatic Suspension of Respondent's New Jersey medical license. The basis for the Order was Respondent's purported failure to comply with a Private Letter Agreement previously entered between Respondent and the New Jersey Board, in that she allegedly failed to undergo an independent psychiatric evaluation and failed to provide required psychiatric reports to the state's Physician Assistance Program (PAP).[2/]

6. The action by the New Jersey Board constitutes action against Respondent's medical license by the licensing authority of another jurisdiction.

7. Respondent did not report the action against her New Jersey license to the Florida Board of Medicine on or before March 23, 2012, or within 30 days of the action against her license.

8. When documents are received by the Department, they are imaged into the Department's system. Mail for the licensing unit is picked up several times a day, and all documents are indexed by the licensee's license number. A licensee can check to see if documents are received by contacting the Department by telephone or e-mail.

9. As of the week before the hearing, no information regarding Dr. Ackerman had been received by the Department from Dr. Ackerman.

10. Respondent claims that she notified the Board by both United States Mail and by certified mail of the action against her New Jersey license. A copy of the letter she claims to have sent is Respondent's Exhibit 1. This letter is dated March 2, 2012, is not signed, does not contain her license number in Florida or New Jersey, and is addressed to "Florida License Board." The document does not include an address beyond Tallahassee, Florida. No zip code is included. Dr. Ackerman could not say whether she had a receipt for the certified mail, only that she probably "had it somewhere." She could not identify who, if anyone, signed for it. When asked for the

address where she mailed the letter, Dr. Ackerman said, after a considerable pause, 452 Bald Cypress Way, and claimed she knew that address "off the top of her head."[3/] The copy admitted into evidence only reflects a faxed date of March 22, 2014, two days before the hearing.[4/]

11. By contrast, Board staff testified credibly as to the process for logging mail at the Department, and that no notification had been received from Dr. Ackerman. While staff acknowledged that it is "possible" for mail to come to the Department and not be routed appropriately, the more persuasive evidence in this case is that the Board staff received nothing from Dr. Ackerman. Respondent's claim that both copies of her letter somehow slipped through the cracks is simply not believable.

12. Moreover, Dr. Ackerman is a physician. As such, she is presumed to be a relatively intelligent person, capable of providing appropriate notification to the Board. The docket and evidentiary record in this case demonstrate that when she wants to get a message across, she is capable of doing so (and equally capable of avoiding answering a direct question if it is not to her advantage). Her claim that she notified the Board of the action against her license in New Jersey is not credible, and is rejected.

13. Dr. Ackerman also did not update her practitioner profile. Practitioner profiles can be updated by faxing the updated information, using the fax number available on-line; by mailing the information to the Department; or by logging into the practitioner profile database using the licensee's specific log-in ID and password. Dr. Ackerman did none of those.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2013).

15. This is a proceeding in which Petitioner seeks to suspend Respondent's license to practice medicine. Because disciplinary proceedings are considered to be penal in nature, Petitioner is required to prove the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987).

16. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). As stated by the Florida Supreme Court, the standard:

> entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.
>
> > Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and lacking in confusion as to the facts in issue. The evidence must be of such a weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994)(quoting, with approval, Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); see also In re Henson, 913 So. 2d 579, 590 (Fla. 2005). "Although this standard of proof may be met where the evidence is in conflict, it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., 590 So. 2d 986, 989 (Fla. 1991).

17. The Administrative Complaint contains three counts against Dr. Ackerman, charging her with violations of section 458.331(1)(b), (kk), and (nn). Section 458.331 provides, in pertinent part:

> (1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):
>
> * * *
>
> (b) Having a license or the authority to practice medicine revoked, suspended, or otherwise acted against, including the denial of licensure, by the licensing authority of any jurisdiction, including its agencies or subdivisions. The licensing authority's acceptance of a physician's relinquishment of a license, stipulation, consent order, or other settlement, offered in response to or in anticipation of the filing of administrative charges against the physician's license, shall be construed as action against the physician's license.
>
> * * *
>
> (kk) Failing to report to the board, in writing, within 30 days if action as defined in paragraph (b) has been taken against one's license to practice medicine in another state, territory, or country.
>
> * * *
>
> (nn) Violating any provision of this chapter or chapter 456, or any rules adopted pursuant thereto.

18. Section 456.042 is referenced as the provision in chapter 456 Respondent violated for the purposes of Count III (which alleges a violation of section 458.331(1)(nn)), and provides:

> **456.042 Practitioner profiles; update.**—A practitioner must submit updates of required information within 15 days after the final activity that renders such information a fact. The Department of Health shall update

> each practitioner's practitioner profile periodically. An updated profile is subject to the same requirements as an original profile.

19. Count I of the Administrative Complaint charges Respondent with violating section 458.331(1)(b), by having action taken against her license in New Jersey by the licensing authority of that state. Petitioner proved the violation alleged in Count I by clear and convincing evidence.

20. Count II of the Administrative Complaint charges Respondent with violating section 458.331(1)(kk), by failing to timely report to the Florida Board of Medicine, in writing, within 30 days, that the New Jersey Board took action against her medical license. Petitioner proved the violation alleged in Count II by clear and convincing evidence.

21. Count III of the Administrative Complaint charges Respondent with violating section 458.331(1)(nn), by failing to timely update her practitioner profile within 15 days of the New Jersey Board action, in violation of section 456.042. The Department proved the violation alleged in Count III by clear and convincing evidence.

22. The Board has adopted disciplinary guidelines which provide notice of a range of appropriate penalties for disciplinary violations. Florida Administrative Code Rule 64B8-8.001(2)(b) provides that, for action taken against a license in

another jurisdiction, the penalty for a first offense ranges from imposition of discipline comparable to the discipline which would have been imposed if the substantive violation had occurred in Florida, to suspension or denial of the license until the license is unencumbered in the jurisdiction in which disciplinary action was originally taken, and a fine of $1,000 to $5,000.

23. The Florida provision most closely resembling the action taken by New Jersey is section 456.072(1)(hh), which makes it a violation to be terminated from a treatment program for impaired practitioners, for failure to comply with the terms of the monitoring or treatment contract. Rule 64B8-8.001(2)(ww) provides that for a first offense, an appropriate penalty is a suspension until the licensee demonstrates compliance with all of the terms of the monitoring or treatment contract, and is able to demonstrate the ability to practice medicine with reasonable skill and safety, to be followed by a term of probation and imposition of a fine from $1,000 to $2,500. An alternative comparable violation would be a violation of section 458.331(1)(s)(inability to practice medicine with reasonable skill and safety as a result of a physical or mental condition). The guideline penalty identified in rule 64B8-8.001(2)(s) for a first violation of this subsection is from probation and 50 to 100 hours of community service to suspension until the licensee can demonstrate the

ability to practice with reasonable skill and safety, followed by probation and an administrative fine from $1,000 to $5,000.

24. For a violation of section 458.331(1)(kk)(failure to report action by another jurisdiction), the guideline penalty for a first offense is an administrative fine of $1,000 to $5,000, a reprimand, and 50 to 100 hours of community service, to denial or revocation of the license and payment of $5,000.

25. For failing to update practitioner profile information, as alleged in Count III, the recommended penalty for a first offense if the licensee complies within six months (which Respondent has not), is an administrative fine of up to $2,000. If the licensee complies after six months, the recommended penalty is an administrative fine of up to $5,000 and a reprimand.

26. Respondent does not live in Florida, and at this time, is unable to practice medicine in her home state of New Jersey. Under these circumstances, requiring community service would not be appropriate. Given Respondent's behavior during the pendency of these proceedings, the undersigned shares the concern voiced by the New Jersey Board regarding Respondent's present ability to practice with reasonable skill and safety. A penalty that requires a demonstration of the ability to practice safely is necessary to protect the public.

27. When the Board considers the penalty recommended below, it is suggested that the Board consider allowing Dr. Ackerman to

present evidence of compliance with the New Jersey PAP to be recognized with respect to any petition for reinstatement, in lieu of requiring a separate evaluation by Florida's PRN program, unless Dr. Ackerman intends to practice in Florida. Given that Dr. Ackerman lives in New Jersey and practiced in that state, requiring a separate contract with PRN may be burdensome.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Board of Medicine enter a Final Order finding that Respondent has violated section 458.331(1)(b), (kk), and (nn). In addition, it is recommended that the Board impose the following penalty:

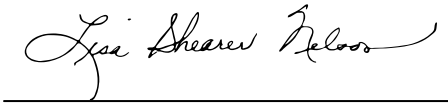
1. a reprimand of Respondent's license to practice medicine;

2. an administrative fine of $5,000;

3. suspension of Respondent's license to practice medicine until such time as Respondent demonstrates that her license in New Jersey has been reinstated and demonstrates the ability to practice medicine with reasonable skill and safety; and

4. reservation of jurisdiction by the Board to impose a period of probation should Respondent successfully petition the Board for reinstatement and demonstrate compliance with the terms described in recommendation three.

DONE AND ENTERED this 15th day of May, 2014, in Tallahassee, Leon County, Florida.



LISA SHEARER NELSON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 15th day of May, 2014.

ENDNOTES

[1/] Respondent's many reasons for seeking continuances included her appearance before traffic court in New Jersey, snow "every other day," vaguely referenced injuries from a traffic accident, elderly parents needing care, an assault (which she stated was by an attorney), the need for a Florida attorney, and chest pains. Little if any documentation was provided to support these claims.

[2/] The contents of the Order are hearsay and cannot, standing alone, be used to establish the underlying basis for New Jersey's actions. § 120.57(1)(c), Fla. Stat. However, its purpose for admission in this case is not to establish the truth of the basis for New Jersey's actions, but simply to establish that the New Jersey Board of Medical Examiners took action.

[3/] The actual address of the Board is 4052 Bald Cypress Way, Bin C-03, Tallahassee, Florida 32399-3253. The address is readily available on the Board's website and as a licensee, should have been readily available to Respondent.

[4/] Respondent also refused to acknowledge that her license was suspended by New Jersey, despite the claim that she notified the Board of the suspension. When asked directly whether her license is currently suspended in the State of New Jersey, she would only

indicate that there is a motion pending to reinstate it. When told she needed to answer the question regarding the current status of her license, as opposed to what she was seeking, she simply stated, "I'm not sure of the status right now. Like I said, there's a lot of paperwork going on with this Board of Medical Examiners."

COPIES FURNISHED:

Jonathan R. Zachem, Esquire
Department of Health
Prosecution Services Unit
Bin C65
4052 Bald Cypress Way
Tallahassee, Florida 32399

Kristian Eiler Dunn, Esquire
Dickens and Dunn, P.L.
517 East College Avenue
Tallahassee, Florida 32301

Allison M. Dudley, Executive Director
Board of Medicine
Department of Health
4052 Bald Cypress Way, Bin C03
Tallahassee, Florida 32399

Jennifer A. Tschetter, General Counsel
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1701

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

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