

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
OSTEOPATHIC MEDICINE,

Petitioner,

vs.

Case No. 14-1077PL

JOSEPH MILLER, D.O.,

Respondent.

_____ /

RECOMMENDED ORDER

Administrative Law Judge Edward T. Bauer held a final hearing in this case by video teleconference between sites in Tallahassee and Gainesville, Florida, on May 30, 2014.

APPEARANCES

For Petitioner: Candace A. Rochester, Esquire
Carol L. Gregg, Esquire
Hillary Anne Ryan, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399

For Respondent: Joseph Miller, D.O., pro se
3250 Northeast 28th Street, Suite 805
Fort Lauderdale, Florida 33308

STATEMENT OF THE ISSUES

The issues in this case are whether Respondent committed the allegations contained in the Administrative Complaint and, if so, the penalty that should be imposed.

PRELIMINARY STATEMENT

On October 17, 2012, Petitioner, Department of Health, Board of Osteopathic Medicine, filed an Administrative Complaint ("Complaint") against Respondent, Dr. Joseph Miller. In Count I of the Complaint, Petitioner contends that Respondent exercised influence within a patient-physician relationship for purposes of engaging in sexual activity, contrary to section 459.015(1)(1), Florida Statutes. As an overlapping charge, Petitioner alleges in Count II that Respondent engaged or attempted to engage in sexual misconduct, in violation of section 456.072(1)(v), Florida Statutes.

Respondent timely requested a formal hearing to contest the allegations and, on March 11, 2014, the matter was referred to the Division of Administrative Hearings ("DOAH") and assigned to Administrative Law Judge John G. Van Laningham. On May 29, 2014, Judge Van Laningham transferred this cause to the undersigned for further proceedings.

As noted above, the final hearing in this matter was held on May 30, 2014, during which Petitioner presented the testimony of four witnesses (patient T.S., Kathleen Powers, Dodi Pruitt, and Linda Colaianni) and introduced seven exhibits, numbered 1 through 6 and 8.^{1/} Respondent presented no witness testimony, but introduced one exhibit, identified as Respondent's Exhibit I.

The final hearing Transcript was filed with DOAH on June 30, 2014. Both parties submitted proposed recommended orders, which the undersigned has considered in the preparation of this Recommended Order.^{2/}

FINDINGS OF FACT

A. The Parties

1. Petitioner Department of Health has regulatory jurisdiction over licensed osteopathic physicians such as Respondent. In particular, Petitioner is authorized to file and prosecute an administrative complaint, as it has done in this instance, when a panel of the Board of Osteopathic Medicine has found probable cause to suspect that the licensee has committed one or more disciplinable offenses.

2. At all times material to this proceeding, Respondent was licensed to practice osteopathic medicine in the State of Florida, having been issued license number OS 10658.

B. Background

3. On February 3, 2012, T.S., a 26-year-old single mother, presented to Respondent's medical office as a new obstetrical patient. At that time, T.S. was carrying her third child.

4. For the next five months, T.S. and Respondent enjoyed what was, by all appearances, a productive and appropriate physician-patient relationship. However, as discussed below, Respondent would transgress the bounds of that relationship

during an office visit on the evening of July 11, 2012. First, though, it is necessary to sketch the relevant background.

5. On the morning of July 11, 2012, T.S.—who was then nine months pregnant—appeared at Respondent's office for a routine examination. During the visit, T.S. advised Respondent that she was experiencing substantial cramping and discomfort. In response to these complaints, Respondent performed a pelvic examination and a sonogram, both of which yielded normal results.

6. Later that day, at approximately 4:00 or 4:30 p.m., T.S. telephoned Respondent's office and informed his staff of a new symptom: namely, that significant pain was making it difficult to lift her right arm. Although a member of the staff advised T.S. that she could be seen immediately, logistical constraints made it impossible for her to report to Respondent's office prior to the close of business.

7. Over the course of the next several hours, T.S. communicated with Respondent by phone and text (his cell number was available to all patients) concerning the new symptom and her preference to be seen that evening. Ultimately, Respondent informed T.S., via a text message sent at approximately 6:15 p.m., that she could meet him at his office for an examination.

C. The Misconduct

8. T.S. arrived at the office at 6:30 p.m., whereupon Respondent unlocked the front door and invited T.S. inside. Upon entering the lobby area, which was only partially illuminated, T.S. saw no sign of Respondent's office staff. At that point, Respondent asked T.S. to sign a form that read as follows:

I give consent to be seen at Dr. Miller's office, by Dr. Miller, without an assistant present, at my request, in order to have a medically urgent need addressed.

9. The foregoing document, although signed by T.S., is of dubious propriety, as obstetrical treatment without a chaperone present is rarely, if ever, appropriate.^{3/} This issue is of no moment, however, for most of what occurred next—as established by the credible testimony of T.S. and Petitioner's expert witness—was not a legitimate medical examination but, rather, nonconsensual sexual contact perpetrated *under the guise of an examination*.

10. Upon the execution of the "consent" document, Respondent directed T.S. to an examination room and informed her that the likely cause of her arm pain was either a clogged milk duct or the positioning of the fetus. Respondent then requested that T.S. disrobe her upper body, at which point he left the room for a few moments.

11. Upon his return, Respondent asked T.S. to recline on the examination table, purportedly so he could examine her right breast to rule out the possibility of a clogged duct. T.S. complied and, for the next 30 to 45 seconds, Respondent squeezed her breast in a manner quite dissimilar to examinations she had undergone in the past. In particular, T.S. thought it peculiar that Respondent "cupped" her entire breast with his hand—as opposed to examining the breast from the outside in with the pads of his fingers.^{4/} Even more troublingly, Respondent asked T.S., while his hand was still in contact with her breast, whether "it felt good."^{5/}

12. After removing his hand from T.S.'s breast, Respondent remarked to T.S. that her arm pain was not the result of a clogged milk duct. Respondent further stated that her symptoms would be assuaged upon the baby's delivery, an event which, according to him, could be facilitated by sexual activity.

13. Before proceeding further, it is important to note that T.S.'s symptoms of arm pain arguably warranted, at most, a legitimate breast examination. In other words, there were no symptoms or aspects of T.S.'s history that justified a pelvic examination at that time,^{6/} particularly since Respondent had performed such a procedure (along with a sonogram) earlier in the day.

14. Nevertheless, Respondent informed T.S. that he "needed" to measure the dilation of her cervix; then, in a disturbing and conspicuous departure from accepted obstetrical practice,^{7/} Respondent applied lubricant to one of his *ungloved* hands. Moments later, Respondent inserted two fingers into T.S.'s vagina and, for the next 30 seconds or so, positioned his penetrating hand in such a manner that his thumb was in continuous contact with T.S.'s clitoris—something that would never occur during a proper examination.^{8/} Tellingly, this was not the only physical contact incongruous with a legitimate pelvic examination, for at one point Respondent used his free hand to pull on one of T.S.'s nipples.^{9/}

15. By now suspicious of Respondent's conduct, T.S. attempted to maneuver her body toward the head of the examination table. As she did so, Respondent began to remove his fingers from T.S.'s vagina while stating that she "needed to have sex" in order to induce labor. This could be accomplished, Respondent further suggested, by having sex *with him*, an invitation T.S. sensibly declined.^{10/}

16. On the heels of this rejection, Respondent told T.S. that the only other means of inducing labor would be to "strip her membranes." Owing perhaps to an urgent desire to give birth—the reader should recall that she was nine months pregnant and in significant discomfort—T.S. acceded to

Respondent's suggestion. Respondent then penetrated T.S.'s vagina with his (ungloved) hand for a second time and, prior to the removal of his fingers, repeatedly implored T.S. to engage in sexual intercourse with him.^{11/} When T.S. refused and tried to move to the other end of the table, Respondent grabbed her by the hips and pulled his midsection into her exposed vaginal area. By virtue of this aggression, T.S. could feel that Respondent's penis, albeit clothed, was erect.^{12/}

17. Wishing to extricate herself from this situation, T.S. pushed Respondent away, at which point he attempted to "laugh off" his abhorrent behavior. T.S. dressed herself and, a short time later, drove to the home of an acquaintance to seek advice.

18. Later that evening, T.S. made a report of the incident to the appropriate authorities,^{13/} which ultimately resulted in the filing of the Complaint at issue in this proceeding.

D. Ultimate Factual Determinations

19. It is determined, as a matter of ultimate fact, that Respondent is guilty of violating section 459.015(1)(l), as charged in Count I of the Complaint.

20. It is further determined, as a matter of ultimate fact, that Respondent is guilty of violating section 456.072(1)(v) and, in turn, section 459.015(1)(pp), as alleged in Count II of the complaint.

CONCLUSIONS OF LAW

A. Jurisdiction

21. DOAH has jurisdiction over the parties and subject matter of this cause, pursuant to section 120.57(1), Florida Statutes.

B. The Burden and Standard of Proof

22. This is a disciplinary proceeding in which Petitioner seeks to discipline Respondent's license to practice osteopathic medicine. Accordingly, Petitioner must prove the allegations contained in the Complaint by clear and convincing evidence.

Dep't of Banking & Fin., Div. of Secs. & Investor Prot. v. Osborne Sterne, Inc., 670 So. 2d 932, 935 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292, 294 (Fla. 1987).

23. Clear and convincing evidence:

[R]equires 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.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).

C. Statutory Construction/Notice

24. Disciplinary statutes and rules "must be construed strictly, in favor of the one against whom the penalty would be

imposed." Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992); McClung v. Crim. Just. Stds. & Training Comm'n, 458 So. 2d 887, 888 (Fla. 5th DCA 1984) ("[W]here a statute provides for revocation of a license the grounds must be strictly construed because the statute is penal in nature. No conduct is to be regarded as included within a penal statute that is not reasonably proscribed by it; if there are any ambiguities included, they must be construed in favor of the licensee.").

25. Due process prohibits an agency from taking disciplinary action against a licensee based on matters not specifically alleged in the charging instrument. Trevisani v. Dep't of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005) ("A physician may not be disciplined for an offense not charged in the complaint"); Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992) ("[T]he conduct proved must legally fall within the statute or rule claimed [in the administrative complaint] to have been violated.").

D. The Charges Against Respondent

26. In Count I of the Complaint, Petitioner charges Respondent with violating section 459.015(1)(1), a provision that subjects a physician to discipline for exercising "influence within a patient-physician relationship for purposes of engaging a patient in sexual activity." Section

459.015(1)(1) further instructs that a "patient shall be presumed to be incapable of giving free, full, and informed consent to sexual activity with his or her physician."

27. The factual findings detailed above, which need not be repeated, demonstrate clearly and convincingly that Respondent leveraged his physician-patient relationship with T.S. for the purpose of engaging her in sexual activity. As such, Respondent is guilty of Count I.

28. As an overlapping charge, Petitioner alleges in Count II of the Complaint that Respondent has violated section 459.015(1)(pp), a provision that subjects a licensee to discipline for running afoul of any provision of chapter 456, by "[e]ngaging or attempting to engage in sexual misconduct," which is prohibited by section 456.072(1)(v). In turn, section 456.063(1), Florida Statutes, defines "sexual misconduct" as:

Sexual misconduct in the practice of a health care profession means violation of the professional relationship through which the health care practitioner uses such relationship to engage or attempt to engage the patient or client, or an immediate family member, guardian, or representative of the patient or client in, or to induce or attempt to induce such person to engage in, verbal or physical sexual activity outside the scope of the professional practice of such health care profession.

(Emphasis added).

29. As with Count I, the record evidence leaves the undersigned with no doubt that Respondent utilized his physician-patient relationship with T.S. to engage or attempt to engage her (or, relatedly, to induce or attempt to induce her) in sexual activity outside the scope of the practice of medicine. Accordingly, Respondent is guilty of Count II.

E. Penalty

30. In determining the appropriate punitive action to recommend in this case, it is necessary to consult the penalty guidelines of the Board of Osteopathic Medicine, which impose restrictions and limitations on the exercise of the Board's disciplinary authority under section 459.015. See Parrot Heads, Inc. v. Dep't of Bus. & Prof'l Reg., 741 So. 2d 1231, 1233-34 (Fla. 5th DCA 1999).

31. For first violations of sections 459.015(1)(1) and 456.072(1)(v), the Board's guidelines prescribe a minimum penalty of probation and a \$10,000 fine, with a maximum punishment of revocation of the license and a \$10,000 fine. Fla. Admin. Code. R. 64B15-19.002(13).

32. Florida Administrative Code Rule 64B15-19.003(3) provides that, in applying the penalty guidelines, aggravating and mitigating circumstances may be taken into account. Such circumstances include, but are not limited to:

- (1) The danger to the public;
- (2) The length of time since the violations;
- (3) The number of times the licensee has been previously disciplined by the Board;
- (4) The length of time the licensee has practiced;
- (5) The actual damage, physical or otherwise, caused by the violation;
- (6) The deterrent effect of the penalty imposed;
- (7) The effect of penalty upon the licensee's livelihood;
- (8) Any effort of rehabilitation by the licensee;
- (9) The actual knowledge of the licensee pertaining to the violation;
- (10) Attempts by the licensee to correct or stop violations or refusal by licensee to correct or stop violations;
- (11) Related violations against licensee in another state, including findings of guilt or innocence, penalties imposed and penalties served;
- (12) The actual negligence of the licensee pertaining to any violations;
- (13) The penalties imposed for related offenses;
- (14) The pecuniary gain to the licensee;
- (15) Any other relevant mitigating or aggravating factors under the circumstances. . . .

33. Although several of the foregoing factors weigh in Respondent's favor (the absence of prior discipline, as well as the effect of a suspension or revocation on Respondent's livelihood), each of these considerations is substantially outweighed by the egregious nature of his conduct vis-à-vis T.S.—behavior that presents a substantial danger to the public. As such, the undersigned agrees with Petitioner that the

revocation of Respondent's license and the imposition of a \$10,000 fine is the appropriate penalty.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that a final order be entered by the Board of Osteopathic Medicine finding Respondent guilty of Counts I and II of the Administrative Complaint; revoking Respondent's license to practice osteopathic medicine; and imposing a fine of \$10,000.00.

DONE AND ENTERED this 30th day of July, 2014, in Tallahassee, Leon County, Florida.



EDWARD T. BAUER
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 30th day of July, 2014.

ENDNOTES

^{1/} The deposition transcript of Dr. N. Donald Diebel (identified as Petitioner's Exhibit 8) has been received in lieu of the witness' live testimony.

^{2/} Unless otherwise noted, all rule and statutory references are to the versions in effect at the time of the alleged misconduct.

^{3/} Pet'r Ex. 8, p. 9.

^{4/} Hr'g Tr. 29:5-30:9.

^{5/} Hr'g Tr. 51:22-52:5.

^{6/} Pet'r Ex. 8, pp. 10 & 12.

^{7/} Pet'r Ex. 8, p. 15.

^{8/} Hr'g Tr. 33:8-24; Pet'r Ex. 8, pp. 13 & 36-37.

^{9/} Hr'g Tr. 35:3-12; Pet'r Ex. 8, p. 13.

^{10/} Hr'g Tr. 34:2-13.

^{11/} Hr'g Tr. 35:21-37:10.

^{12/} Hr'g Tr. 37:10-18.

^{13/} In its Complaint, Petitioner alleged that, during an interview with law enforcement on or about July 20, 2012, Respondent "admitted to engaging in sexual activity with Patient T.S." During the final hearing, however, Petitioner abandoned this position and stipulated, after some back and forth with the undersigned, that those portions of the record (including pages 00023 through 00028 of Petitioner's Exhibit 1) referencing the alleged confession of July 20 would be disregarded in their entirety. Hr'g Tr. 110:9-116:19.

COPIES FURNISHED:

Candace A. Rochester, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399

Joseph Miller, D.O.
3250 Northeast 28th Street, Suite 805
Fort Lauderdale, Florida 33308

Anthony Jusevitch
Executive Director
Board of Osteopathic Medicine
Department of Health
4052 Bald Cypress Way, Bin C-06
Tallahassee, Florida 32399-1701

Jennifer A. Tschetter, General Counsel
Department of Health
4052 Bald Cypress Way, Bin A-02
Tallahassee, Florida 32399

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.