

FILED DATE ~~FEB 17 2015~~

Department of Health

By: Carol Sanders  
Deputy Agency Clerk

STATE OF FLORIDA  
BOARD OF MEDICINE

FILED

DEPARTMENT OF HEALTH,

Petitioner,

2015 FEB 18 AM 11 37

vs.

DIVISION OF  
ADMINISTRATIVE  
HEARINGS

DOH CASE NO.: 2010-03217  
DOAH CASE NO.: 14-1115PL  
LICENSE NO.: ME0040201

KENNETH RIVERA-KOLB, 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 February 6, 2015, in Stuart, 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 Daniel Hernandez, Assistant General Counsel. Respondent was represented by Charles Curtis, 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. Respondent's exception 1 to Paragraph 18 of the Recommended Order is rejected based upon the competent substantial evidence in the record and the Petitioner's written and oral responses.

2. Respondent's exception 2 to Paragraph 20 of the Recommended Order is rejected based upon the competent substantial evidence in the record and the Petitioner's written and oral response.

3. Respondent's exception 3 to Paragraph 41 of the Recommended Order is rejected based upon the competent substantial evidence in the record and the Petitioner's written and oral response.

4. Respondent's exception 4 to Paragraph 23 of the Recommended Order is rejected based upon the competent substantial evidence in the record and the Petitioner's written and oral response.

5. Respondent's exception 5 to Paragraph 26 of the Recommended Order is rejected based upon the competent substantial evidence in the record and the Petitioner's written and oral response.

6. Respondent's exception 6 to Paragraph 27 of the Recommended Order is rejected based upon the competent substantial evidence in the record and the Petitioner's written and oral response.

7. Respondent's exception 7 to Paragraph 27 of the Recommended Order is rejected based upon the competent substantial evidence in the record and the Petitioner's written and oral response.

8. Respondent's exception 8 to Paragraph 28 of the Recommended Order is rejected based upon the competent substantial evidence in the record and the Petitioner's written and oral response.

9. Respondent's exception 9 to Paragraph 39 of the Recommended Order is rejected based upon the competent substantial evidence in the record and the Petitioner's written and oral response.

10. Respondent's exception 10 to Paragraph 50 of the Recommended Order is rejected based upon the competent substantial evidence in the record and the Petitioner's written and oral response.

11. Respondent's exception 11 to Paragraph 54 of the Recommended Order is rejected based upon the competent substantial evidence in the record and the Petitioner's written and oral response.

12. Respondent's exception 12 to Paragraph 60 of the Recommended Order is rejected based upon the competent substantial evidence in the record and the Petitioner's written and oral response.

13. Respondent's exception 13 to Paragraph 61 of the Recommended Order is rejected based upon the competent substantial evidence in the record and the Petitioner's written and oral response.

14. Respondent's exception 15 to Paragraph 64 of the Recommended Order is rejected based upon the competent substantial evidence in the record and the Petitioner's written and oral response.

15. Respondent's exception 15 is rejected based upon the competent substantial evidence in the record and the Petitioner's written and oral response.

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

16. The Board approves Petitioner's exception to paragraph 95 of the Recommended Order. In doing so the Board rejects the ALJ's characterization that the Respondent's previous discipline under the 2003 Consent Order does not reflect that an offense was committed. He acknowledges that it constitutes discipline but because the final order does not set forth an explicit

finding that Respondent committed the acts alleged in the administrative complaint the ALJ concludes that it cannot be used as an aggravator under Rule 64B8-8.001(3)(d), Florida Administrative Code. In essence the ALJ concludes that the Consent Order in question constitutes discipline but an offense was not committed. Such a conclusion defies logic and is merely form over substance. Under Sections 458.331 and 456.072, Florida Statutes, the Board may only discipline physicians for violating the disciplinary grounds set forth within the respective statutes. The Board's failure to employ specific language in a Consent Order finding that an offense was "committed" should not lead one to conclude that the Respondent did not commit the offense(s) because a violation is a necessary predicate for taking disciplinary action.

The Board believes that its interpretation and application of Rule 64B8-8.001(3)(d), Florida Administrative Code, as set forth above, is as reasonable or more reasonable than that of the ALJ and that its interpretation and application of its own rule, Rule 64B8-8.001(3)(d), should be given deference. See *Pan American World Airways, Inc., Florida Public Service Commission*, 427 So.2d 716 (Fla. 1983).

17. The Board approves Petitioner's exception to paragraph 66-68 of the Recommended Order. The Board believes that there is competent and substantial evidence in the record

demonstrating that Respondent was disciplined a total of three times rather than two and the ALJ's failure to consider the third instance of discipline did not comply with essential requirements of law as set forth above in paragraph 16 of this order.

#### FINDINGS OF FACT

1. The findings of fact set forth in the Recommended Order are approved and adopted and incorporated herein by reference as amended by the exception as set forth by the Petitioner.

2. There is competent substantial evidence to support the findings of fact as amended.

#### 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 as by the exception as set forth by the Petitioner and stated on the record.

#### PENALTY

Upon a complete review of the record in this case, the Board rejects Petitioner's exception to the penalty and 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 \$20,000.00 to the Board within 30 days from the date the Final Order is filed. Said fine shall be paid by money order or cashier's check.

2. Respondent's license to practice medicine in the State of Florida is hereby **SUSPENDED** for a period of four (4) years. The Respondent shall appear before the Board to request reinstatement following the period of suspension the Board shall make the determination of whether Respondent is safe to practice medicine with reasonable skill and safety. The Board retains jurisdiction in this matter to impose terms and conditions upon reinstatement of Respondent's license, including, but not limited to, a period of probation with said terms and conditions to be set at the time of reinstatement.

RULING ON COSTS

At the Petitioner's request, the Board voted to retain jurisdiction to impose the costs associated with this matter to a later date.

(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 16<sup>th</sup> day of February,

2015.

BOARD OF MEDICINE



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André Ourso, J.D., M.P.H., Executive Director  
For James Orr, Jr., 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 **Certified Mail** to KENNETH RIVERA-KOLB, M.D., 1725 Shoreside Circle, Wellington, Florida 33414; to Charles Curtis, Esquire, 2000 South Ocean Boulevard, #11E, Lauderdale-By-The-Sea, Florida 33062; to F. Scott Boyd, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; and by interoffice delivery to Daniel Hernandez, Department of Health, 4052 Bald Cypress Way, Bin #C-65, Tallahassee, Florida 32399-3253 this 17<sup>th</sup> day of February, 2015.

Brygel Saunders

**Deputy Agency Clerk**

K. Rivera-Kolb, M.D.

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Charles Curtis, Esq.

7014 2120 0004 1125 4398



**STATE OF FLORIDA  
DEPARTMENT OF HEALTH  
BOARD OF MEDICINE**

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2015 FEB 18 PM 12:05  
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**DEPARTMENT OF HEALTH,**

**Petitioner,**

**v.**

**DOAH CASE NO.: 14-1115PL  
DOH CASE NO.: 2010-03217**

**KENNETH RIVERA-KOLB, M.D.,**

**Respondent.**

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**MOTION TO BIFURCATE AND RETAIN JURISDICTION  
TO ASSESS COSTS IN ACCORDANCE WITH  
SECTION 456.072, FLORIDA STATUTES (2014)**

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 (2014). Petitioner states the following in support of this Motion:

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 (2014), 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 December 19, 2014; and ninety (90) days from that date is on or about March 19, 2015.

4. Section 456.072(4), Florida Statutes (2014), 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).

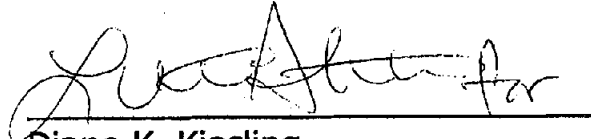
8. There is insufficient time for the Department to verify its attorneys' time spent on the case; prepare supporting affidavits for the amount of attorneys' time sought to be recovered; and obtain an outside expert attorney's opinion verifying the reasonableness of the time spent by the Department's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

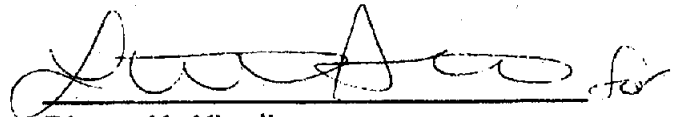
Respectfully submitted,



Diane K. Kiesling  
Assistant General Counsel  
Florida Bar No. 0233285  
DOH Prosecution Services Unit  
4052 Bald Cypress Way Bin-C-65  
Tallahassee, Florida 32399-3265  
(850) 245-4444 Ext. 8127  
(850) 245-4684 Fax

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, Christopher O'Toole, Esq., O'Toole Law Firm, 1132 Southeast Third Avenue, Ft. Lauderdale, FL 33316 ([chris@o-firm.com](mailto:chris@o-firm.com)) and Gary Ostrow, Esq., Law Office of Gary Ostrow, 3000 Northeast 30<sup>th</sup> Place, Suite 302, Ft. Lauderdale, FL 33306 ([gostrow2@gmail.com](mailto:gostrow2@gmail.com)), this 22<sup>nd</sup> day of December, 2014.



Diane K. Kiesling  
Assistant General Counsel