STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MEDICINE,

Petitioner,

vs. Case Nos. 14-1342PL
14-1343PL
14-2488PL

ALBERT ESMAILZADEH, M.D.,

Respondent.
_______________________________/

RECOMMENDED ORDER

Pursuant to notice to all parties, the final hearing was conducted in this case on September 23-26, 2014, in Viera, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Alicia E. Adams, Esquire
Daniel Hernandez, Esquire
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For Respondent: Gregory W. Eisenmenger, Esquire
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STATEMENT OF THE ISSUES

The issues in this case, as set forth in the Prehearing Stipulation, are as follows:

> i. Whether Respondent was terminated from the State Medicaid Program; [Case No. 14-2488, Count I]
>
> ii. Whether Respondent failed to update his practitioner profile within fifteen days of the filing of the order terminating him from the State Medicaid Program; [Case No. 14-2488, Count II]
>
> iii. Whether Respondent exercised influence within the patient-physician relationship with T.J.[1/] for the purposes of engaging in sexual activity and/or whether Respondent engaged in sexual conduct with T.J.; [Case No. 14-1342, Counts I & II]
>
> iv. Whether Respondent exercised influence within the patient-physician relationship with M.B. for the purposes of engaging in sexual activity and/or whether Respondent engaged in sexual conduct with M.B.; [Case No. 14-1343, Counts I & II]
>
> v. Whether Respondent exercised influence within the patient-physician relationship with C.J. for the purposes of engaging in sexual activity and/or whether Respondent engaged in sexual conduct with C.J.; [Case No. 14-1343, Counts I & II]
>
> vi. Whether Respondent exercised influence within the patient-physician relationship with D.K. for the purposes of engaging in sexual activity and/or whether Respondent engaged in sexual conduct with D.K.; [Case No. 14-1343, Counts I & II]
>
> vii. Whether Respondent exercised influence within the patient-physician relationship with A.H. for the purposes of engaging in sexual activity and/or whether

Respondent engaged in sexual conduct with A.H.; [Case No. 14-1343, Counts I & II] and

viii. Whether Respondent exercised influence within the patient-physician relationship with S.D. for the purposes of engaging in sexual activity and/or whether Respondent engaged in sexual conduct with S.D. [Case No. 14-1343, Counts I & II]

PRELIMINARY STATEMENT

This case involves the Administrative Complaints in three separately filed actions: DOAH Case Nos. 14-1342PL, 14-1343PL, and 14-2488PL. The cases were consolidated for purposes of conducting a single final hearing to address all issues within the three Administrative Complaints.

At the final hearing, the Department presented the testimony of twelve witnesses: Respondent, Dr. Albert Esmailzadeh; patient M.B.; patient D.K.; patient T.J.; patient A.H.; Gary Pachkoski, site operations manager; Patty Knapp, patient advocate; Roberta “Bobbi” McDonald, medical assistant; Lizamar Korfhage, physician’s assistant; Derek Middendorf, police officer; Cathy Bird (who testified over objection via telephone); Dr. Richard Hynes; and, via deposition transcripts: patient C.J., Michael West, JoAnn Trexler, and Dr. Jonathan Waldbaum. The Department's Exhibits 1-8 and 31, and Joint Exhibits 1-5 were admitted into evidence. Respondent also called twelve witnesses: Rachel Jeppesen, radiology technician; Dr. Farhan Zaidi; Kerri Herzog; Michelle Morrell, instrument technician; former

patients E.A., V.N., D.B., J.M., and K.Z.; Sally Ruiz, medical assistant; Noemi Camacho, receptionist; and Respondent, Dr. Albert Esmailzadeh, on his own behalf. Respondent's Exhibits 1-6 were admitted into evidence.

The parties advised that a transcript of the final hearing would be ordered. By rule the parties have 10 days from the date the transcript is filed at DOAH to file proposed recommended orders. The Transcript was filed on October 20, 2014. Both Petitioner and Respondent timely filed a proposed recommended order and each was duly considered in the preparation of this Recommended Order.

The following findings of fact were made based upon the evidence and testimony presented by the parties at the final hearing in this matter.

FINDINGS OF FACT

1. Petitioner, Department of Health, Board of Medicine (the "Department") is the State agency responsible for licensing and monitoring physicians in the State of Florida. The Department regulates the practice of medicine in accordance with section 20.43 and chapters 456 and 458, Florida Statutes. Unless specifically stated otherwise herein, all references to Florida Statutes will be to the 2014 codification.

2. Respondent is a licensed Florida physician, certified in the area of pain management, holding license number ME 97134. At

all times relevant hereto, Respondent was practicing medicine at one of two locations: the Back Authority for Contemporary Knowledge, (a pain management clinic known as the "Back Center" located in Melbourne, Florida); and Advantacare (in its Altamonte Springs and Daytona Beach offices). Respondent was employed at the Back Center from January 2008 through September 2011, and at Advantacare from March 2012 through April 2013.

3. Respondent provided pain management services for numerous patients during his tenure at each of the clinics. While at the Back Center, he saw 50 to 60 patients per day in an 8-hour workday, doing about 15 medication injections per day. At Advantacare he was seeing about 30 patients per day. By all accounts, Respondent is a skilled and proficient pain management physician.

4. At Advantacare, Respondent would see patients for regular office visits at the Altamonte Springs office on Monday, Tuesday, Thursday, and Friday; Wednesday would be set aside for administering injections under a fluoroscope, described as sort of a C-shaped X-ray machine, performed at the Daytona Beach office. None of the sexual behavior alleged in the Administrative Complaints occurred during injections performed under fluoroscope.

5. A general policy existed at the Back Center that required physicians to have another facility employee (medical

technician, nurse, other) present in an examination room when a physician was providing care to a patient not of the same gender as the doctor. This "chaperone" policy is standard in the health care industry. There is no credible evidence that Respondent was ever shown the Back Center's policy in writing, although it is probable the policy was accessible on the website of the entity (Osler Corporation) that owned the Back Center for a period of time. As a practicing physician, Respondent was also presumed to be aware of and to follow the chaperone policy and he admitted knowing about the policy in general. Respondent was, however, verbally apprised of the policy by his supervisor, Dr. Hynes, by the clinic operations manager, Mr. Pachkoski, and by the chief administrative officer, Cathy Bird.

6. Respondent acknowledged that it was best to have another person in the examination room if he was providing treatment to a female patient. If no chaperone was available, it was his stated practice to keep the door open. Respondent did not feel like assistants were always available to chaperone, but neither his supervisor (Dr. Hynes) nor a co-physician (Dr. Zaidi) remembers Respondent complaining that staff was not available at the Back Center. The testimony of all six complainants in this case contradicts Respondent's contention; each of them said they were treated by Respondent (alone) in a room with the door closed. When asked directly whether he ever treated female patients at

the Back Center in a room with the door closed, Respondent admitted that it happened on occasion. The best and most persuasive evidence in this case is that a chaperone policy did exist and that Respondent did not follow the policy.

7. Between September 2008 and January 2013, Respondent treated six female patients who are the subjects of the Department's Administrative Complaint. Each of the patients is identified only by their initials in an attempt to maintain their confidentiality and privacy. The six patients will be addressed in chronological order based on the dates of their alleged mistreatment by Respondent.

Patient S.D.

8. Patient S.D. was a patient of Respondent between September and December 2008. S.D.'s status as a patient was stipulated to by the parties.[2/] While she was Respondent's patient, S.D. was also an employee of the Back Center. During the period of time Respondent was treating S.D., they engaged in a series of emails which could be construed as very sexual in nature. For example, on September 23, 2008, Respondent and S.D. had the following email exchange:

> **S.D.** – "You buying Dinner….Or am I your [f***ing] dinner????"
> **Respondent** – "What do you think? I want u as breakfast, lunch and dinner. My precious love."

S.D. – Ok so what am I going to eat LOL???
Let me guess a protein shake"
Respondent – "If I shake it hard enough yes."

Then, on September 25, the two had this email exchange:

Respondent – "NO I WANT U TO FEED ME!!! AND NO YOU R NOT GOING THERE!!! ABSOLUTELY NOT!!! I'M UR MAN AND I SAY NO."
S.D. – "Then act like it and stop flirting with the [f***ing] skank!"
Respondent – "WHY? GETTING JEALOUS SWEETHEART?"
S.D. - "No I guess I have no reason to be."
Respondent – "EXACTLY, YOU HAD ME AT LUNCH AND LEFT TO GO TO WORK. SO YOU CAN'T SAY ANYTHING, PRECIOUS."

9. Respondent denies that the exchange of emails with S.D. suggests anything of a sexual nature. He said, e.g., that in his Iranian culture, talking about eating someone was tantamount to saying you cared deeply for them. Respondent's denial of the sexual nature of the emails is not persuasive.

10. S.D. did not testify at final hearing nor was her testimony preserved by way of a deposition transcript. The Department offered into evidence an exhibit comprised of various emails between S.D. and Respondent, two of which were discussed above. At least one co-worker, Lizamar Korfhage (a physician's assistant at the Back Center), heard S.D. yell loudly in the office--as S.D. was being terminated from employment--that she (S.D.) and Respondent were having sexual relations. Cathy Bird, former chief administrative officer at the Back Center, had discussed the alleged affair with S.D. during several

conversations before S.D.'s employment with the Back Center ended. Bird also talked with Respondent about the situation after S.D. was fired from the Back Center. Respondent was concerned that S.D. would tell Respondent's wife about the affair and sought Bird's guidance in the matter.

11. Based upon the entirety of the clear and convincing evidence presented, Respondent was involved in a sexual relationship with S.D. at some point in time when S.D. was also a patient of the Back Center.

Patient T.J.

12. Patient T.J. was a 37-year-old patient when she saw Respondent at the Back Center on October 29, 2010. T.J. had seen Respondent professionally some 16 or so times previously. No inappropriate conduct had occurred on any of those visits. On the October 29 visit, T.J. was escorted into an examination room by a nurse as usual. Respondent came in and, after examining her, suggested that trigger point injections might help alleviate her pain, which she described as being a "2" on a scale of 1 to 10.[3/] She agreed to the plan of treatment. Respondent had T.J. sit on an armless stool and lean her arms and head onto a desk. Respondent stood on her left side and began administering injections into her neck. As he leaned against her body, T.J. felt what she described as Respondent's erect penis rubbing on her upper arm or shoulder. She felt like Respondent was

intentionally rubbing her in what she later concluded to be a sexual manner. When he finished the injections, Respondent did not act any differently than usual. T.J. felt like something "weird" had just happened, but decided not to report it because she was not completely sure about her perceptions. Respondent, in contradiction to T.J.'s testimony, said he generally stayed four to five inches away from his patient when administering the injections, but would sometimes come into contact with them.

13. T.J. returned for a follow up visit on November 24, 2010, receiving another injection by Respondent. She reported no misconduct by Respondent on that date. On December 23, 2010, T.J. returned to the Back Center for additional treatment. This time, her pain was radiating all the way down to her buttocks area and was described as a "3" out of 10. She was again escorted to an examination room to wait for Respondent. Respondent came in and closed the door, as was his usual practice during T.J.'s visits. After examining her, Respondent suggested injections for sacroiliac joint pain. T.J. was told to lie on the examination table on her left side. Respondent had T.J. lower her jeans to just below her knees. She had her left leg out straight and her right leg bent at the knee and across her left leg. Respondent then began to press his fingers on different parts of her inner thigh searching for the source of her pain. The pain was centered between her knee and buttocks

area, and Respondent made an injection in that area. Respondent then had T.J. roll over to her right side as he pulled the table slightly away from the wall and placed himself between the wall and the table. Respondent began pushing on her inner thigh again, starting at her knee and moving upward toward her buttocks. As he did that, his tone of voice changed and he began panting. He continued to touch and probe her thighs as his hands went higher until he ultimately touched her vagina. T.J. immediately said, "That's it" and quickly got off the examination table and pulled up her jeans. Respondent appeared sweaty and red-faced, looking to T.J. like a person who had just engaged in sex.

14. T.J. then began to consider whether Respondent's behavior during the October 29, 2010, visit had indeed been sexual in nature as well. She concluded that it was, and decided not to see Respondent for treatment in the future. She did not, however, report either of the incidents to the Back Center immediately. She ultimately did so, telling physician's assistant Korfhage about the incident some 10 months later. After seeing a report on television in 2013 that Respondent had been accused by another patient of sexual misconduct, she decided to make a report to the police about her own experiences with Respondent. When the police did not prosecute, she contacted an attorney in order to file a civil action against Respondent.

15. T.J. appeared to be honest and forthright during her appearance at final hearing. Her testimony about her version of the events was credible, clear, and convincing. In his testimony at final hearing, Respondent did not specifically refute T.J.'s testimony so much as he explained how his normal process would not allow for the kind of touching T.J. alleged to have occurred. Respondent did not specifically or directly deny touching patient T.J.'s vagina, saying only that there would be no reason to do so.

Patient D.K. (also known as D.W.)

16. D.K. was a regular patient of Respondent and the Back Center. She had an appointment on January 13, 2011, to see Respondent for pain she was experiencing in her lower back and sides.

17. On previous visits to the Back Center, Respondent had done localized injections to help D.K. deal with the pain. On those visits, she had simply rolled her pants down below her waist and leaned against the examination table in order for Respondent to do the injections. On the January 13 visit, she was told to lie on the table and pull her jeans down to her knees while Respondent went to prepare the medications. Respondent returned, closing the door as he came into the room.

18. Respondent began injecting medications into her back and both sides. He then moved lower and administered injections

into her thighs although she had not complained about any pain in that area. Respondent then moved her jeans down to her ankles and began administering injections into her calves. While he was injecting her, she felt him rubbing his erect penis against her thighs and heard his breathing get heavier. She could also feel Respondent lean closer to her and felt his breath on her thighs as he injected her calves. After the injections were complete, D.K. said Respondent was sweating, flushed, and "looked like my husband after we've had intercourse."

19. D.K. left the office and returned to her car. She immediately began to mentally process what had occurred to her, but did not immediately tell anyone at the Back Center. She was shocked and upset by the event but waited a few days before telling her husband what had happened. She then reported the events to someone at the Back Center. The Back Center asked her to come in so she could discuss the situation with Dr. Hynes, medical director of the Back Center. Later, D.K. made a complaint to local law enforcement about the incident. D.K. has also contacted an attorney to look into filing a civil lawsuit against Respondent.

20. In response to the complaint by D.K., Dr. Hynes mandated that Respondent have a medical assistant with him during any contact with female patients. Despite the prohibition, Respondent continued to see female patients in an examination

room without others present. He was confronted several times by the site operations manager about this violation, but Respondent did not change his behavior.

21. D.K. was a credible witness. She provided a clear and unequivocal description of what transpired during her visit to the Back Center on January 13, 2011.

Patient C.J.

22. Patient C.J. presented to the Back Center experiencing pain as a result of shrapnel wounds received while she was serving in the U.S. Army in Afghanistan. C.J. did not testify at final hearing so her physical demeanor could not be assessed. Her deposition transcript was admitted into evidence over objection.

23. In May 2011, C.J. was referred to the Back Center by her treating physician at Patrick Air Force Base. She took the referral, called the Back Center, and was assigned to Respondent for pain management services.

24. C.J. went to the Back Center on May 4, 2011. She was experiencing significant pain and was physically uncomfortable. C.J. was processed in by a receptionist and then led to an examination room by a female employee. The employee took C.J.'s blood pressure, gathered some personal information, and left the room. On that date, C.J. was wearing jeans, a blouse, and open-toed shoes. She had on "full underwear" that day.

25. Respondent came into the room and examined C.J. as she sat on the examining table. He advised C.J. that an injection might benefit her. As C.J. remembered it, the injection was to be in the side of her neck, and then in her back or hip. Respondent left the room to obtain the medications as C.J. waited.

26. Upon his return to the room, Respondent injected Depo-Medrol 40 mg, Toradol 30 mg, Lidocaine 2% 0.5 mL, and Marcaine 0.5 mL into the left side of her neck. After the initial injection, Respondent left the room while the medication took effect. C.J. began to feel very relaxed and sleepy. Respondent recollects that C.J. complained of feeling light-headed, but does not believe any medication he injected would have caused that to happen. Respondent later returned to the room and prepared to give C.J. another injection into her hip area. She sat up on the table as Respondent pulled one end of the table slightly away from the wall.[4/] After moving the table, Respondent had C.J. lie down on her side, lift her blouse, and unbuckle her jeans. She then slid her jeans and underwear down past her hips as directed.

27. At that point, Respondent began injecting a solution into C.J.'s hip. As the injection was proceeding, she felt Respondent slide his hand over her hip and "in my groin area." While doing that, Respondent's crotch was pressed against C.J.'s buttocks. C.J. felt what she believed to be Respondent's erect

penis pushing against her buttocks as he administered the injection.

28. After the injection was completed, Respondent came around from behind the table and told C.J. she would need to come see him again in a few weeks. C.J. got up from the table and began to realize that "something was not right" about the treatment she had just received. When C.J. went to the front desk to check out, she asked a nurse to identify the medications which had been injected but was unable to get that information. C.J. then left the Back Center and immediately called her nurse case manager at Patrick Air Force Base to report what had occurred. Her nurse advised C.J. to call 911 to report the incident; C.J. did so as she walked out to her car in the parking lot. A policeman arrived some 20 minutes later and took her statement. The officer then went inside to talk to Respondent. He said Respondent appeared to be surprised and shocked by C.J.'s allegation. The police decided not to file any charges against Respondent based on C.J.'s complaint. The reporting police officer (Middendorf) seemed to question C.J.'s veracity or truthfulness on the day of the incident. He said C.J. was upset and seemed lethargic, except when she was talking on the telephone to "one of her superiors." According to Middendorf, C.J. acted consistent with someone who may be under the influence of drugs. He did acknowledge that C.J. had just come out of a

pain management clinic. Middendorf also felt C.J. was either confused or not telling the truth concerning where Respondent had allegedly touched her. C.J., who was obviously distraught at the time, indicated both her pubic area and her outer thigh when she told Middendorf that Respondent had touched her "groin." Middendorf challenged her about that and C.J. became defensive and argumentative. He did not provide any credible testimony as to why he believed she might be lying to him. His statement that C.J.'s voice changed when she was talking to her office on the phone is not conclusive evidence that she was not telling him the truth.

29. C.J. never returned to the Back Center. She obtained pain management treatment elsewhere.

30. Inasmuch as C.J.'s demeanor could not be judged because she did not appear in person, her testimony must be considered using other factors. In this case, the testimony was very similar to the facts described by other patients of Respondent concerning their treatment by him. The events as described by C.J. were believable and convincing, especially when compared to the allegations by other alleged victims. Neither C.J. nor any of the other alleged victims/complainants has talked to other alleged victims about their experiences, so there does not appear to be any collusion between the victims.

Patient M.B.

31. Patient M.B. was already a regular patient at the Back Center when she first saw Respondent on July 7, 2011. Respondent's notes in M.B.'s chart indicate the patient was presenting for "initial evaluation" that day, but that was not correct; she had already been seen several times by other physicians at the Back Center. M.B. had chronic lumbalgia (low back pain) and lower extremity dysesthesia (a burning sensation) which was increasing progressively. Respondent examined M.B., discussed his findings, and scheduled a follow-up appointment for August 2, 2011, at which time he gave her an injection of 1% Xylocaine with approximately 30 ml of Lidocaine 1% on both of her side hips. He also injected a block with a solution containing 2 ml of Marcaine 0.5%, 2 ml of Lidocaine 2%, and 2 ml of Depo-Medrol 80 mg into M.B.'s joints. M.B. reported no suspicious or untoward behavior by Respondent during the July 7 and August 2 appointments.

32. On August 29, 2011, M.B. returned to see Respondent. She presented with pain in her hips and left side. Nurse Bobbi McDonald escorted M.B. to the examination room and took her vital signs before leaving. Respondent came into the room, alone, and closed the door. At that visit, M.B. was wearing khaki mid-thigh cargo shorts, a blouse that tied around her neck, and bikini underwear. Respondent asked about her pain, touched points on

her body to identify the exact pain locations, and adjusted her back manually. He then suggested injection of a steroid as a stop-gap measure prior to scheduling her for a fluoroscope injection later. M.B. agreed to the plan. Respondent left the examination room to get the medication. When he returned, he was alone and again he closed the door.

33. Respondent told M.B. to pull her shorts down below her waist and to cover herself with a paper gown. She pulled her shorts and underwear down about halfway across her buttocks, which was lower than she would normally pull them for fluoroscope injections. Respondent began to clean the area for the injection and asked M.B. to pull her garments down further, below her buttocks. Respondent then pulled the table out from the wall and he went between the table and the wall. He injected M.B.'s hip about five times with a solution containing Depo Medrol 80, Toradol 60, Lidocaine, and Marcaine 1 ml. As he injected her, M.B. could feel Respondent's groin touching her hip. She could feel what she believed to be Respondent's erect penis rubbing against her in a back and forth motion. By this time, her paper gown had fallen off, exposing her buttocks and vaginal area. After the last injection, M.B. felt Respondent's fingers touching her vagina. As she pushed upward to get off the table, M.B. felt Respondent touch her vagina again. She got off the table, pulled up her pants, and sat down as the doctor began talking to her.

M.B. did not say anything to Respondent. She immediately believed that she had been sexually assaulted, but was too confused and shocked to say anything to anyone.

34. M.B. did not initially report Respondent’s behavior to the Back Center. She later reported her allegations to the Melbourne Police Department and also filed a civil lawsuit against Respondent and the Back Center. (M.B. would continue to return to the Back Center, but did not see Respondent again for any of her treatments.)

35. M.B.’s testimony was not as immediately believable as that of some of the other witnesses. Based on her personality, fear of the process, or some other factor, she seemed to be fairly emotionless in describing the incident. However, inasmuch as her testimony was corroborated by what other patients had experienced, her clearly enunciated statements are convincing. Further, M.B. exhibited extreme visual cues as to her intense dislike for Respondent at the final hearing. The testimony of M.B. alone would not be clear and convincing evidence of any wrongdoing by Respondent. However, her testimony is corroboration of and support for the testimony of other victims.

36. Respondent's employment at the Back Center was terminated shortly after M.B.'s appointment with him. There is no evidence as to Respondent's employment from September 2011 until he went to Advantacare in March 2012.

Patient A.H.

37. Patient A.H. presented to Advantacare (Daytona Beach office) on January 9, 2013, in an effort to address pain she was suffering as a result of an automobile accident that occurred in October 2012. She wanted to reduce her pain while also reducing the amount of medications she was taking. A.H. had a job which required driving, so she needed to be as drug-free as possible.

38. A.H. was escorted to the examination room. She remembers that Respondent came in, closed the door, and propped it shut. Respondent remembers the door to that room being open, that it would open by itself unless something was placed against it. The medical technician assigned to Respondent said the door did not have any problems, but it would always be half open. There is no corroborated evidence as to whether the door to the room was open, closed, or ajar when A.H. was being examined.

39. Respondent examined A.H. and began to show her some exercises and stretches that he thought might alleviate some of her pain. As she was sitting in a chair being shown how to stretch, A.H. felt Respondent's erect penis pushing against her back. She quickly told Respondent "I've got it" in order to stop his actions. She got up quickly and moved to another chair in the office. A.H. clearly described what she had felt and had no confusion or doubt about what happened. Her testimony about the incident was credible.

40. Respondent then told A.H. to lie on the table on her side with her arms stretched out in front of her. Despite what had just happened, A.H. complied with his directions.[5/] When she got into position, Respondent had A.H. move her body over to the very edge of the table and began to manipulate her back. As his hands continued down her back, she felt his hands go down inside her panties. As this happened, she could feel Respondent "humping" her, grinding his groin area against her backside. Respondent then told A.H. to change positions on the table, moving her feet to the opposite end. Amazingly, she again complied with his instructions. Respondent began touching her upper thigh near her vagina and "did the same thing he had done before." At that, A.H. quickly moved off the table and onto a chair, where she sat rigid and refused to move. Respondent seemed calm and relaxed, showing no sign of having acted inappropriately.

41. A.H. did not tell anyone at Advantacare about the incident on that day because she could not fully grasp what had happened. As she began to understand the situation better, she was worried about reporting the incident because it would be her word against the doctor's. A.H. did tell another doctor (Dr. Jacobson) about the incident when she saw him the next day for a regularly scheduled appointment. Dr. Jacobson had been an employee with Advantacare and presumably relayed A.H.'s

allegations to the center. A.H. also reported the incident to the Board of Health and to law enforcement. She later contacted an attorney about filing a civil lawsuit against Respondent.

42. A.H. did not return to Advantacare for treatment after this event because of the traumatic impact of the incident. Respondent has no independent recollection of A.H. as a patient, but said he did not touch her inappropriately.

43. A.H.'s testimony was believable. She was a credible witness and articulated her testimony clearly. It is strange that A.H. would continue to obey Respondent even after he had touched her inappropriately, but she was obviously a compliant person, especially as it relates to physicians.

Respondent's defenses to allegations by patients

44. Respondent claims he never saw a written chaperone policy at the Back Center but that he knew that it existed. According to him, there was insufficient staff available to make it possible to comply with the policy. Respondent's testimony in this regard is rejected as being contrary to better, more persuasive evidence.

45. Respondent said he was on several medications for "five or six years" prior to the final hearing, including Zoloft for mild depression, Lisinopril for hypertension, and Toprol for hypertension. One of the possible side effects of those medications is impotence or erectile dysfunction. However,

during the time he was taking these drugs, Respondent fathered his two children. There is no competent evidence that Respondent suffered from impotence or erectile dysfunction during the time of any of the allegations about sexual misconduct.

46. Respondent usually wore a lab coat when treating patients. The coat is long and had large pockets in the front, at about groin level. Respondent would keep empty syringes in his coat pocket. He suggests that female patients who said they felt his erect penis were actually feeling the syringes. His suggestion is not very plausible or persuasive.

47. Respondent demonstrated at final hearing the normal physical stance he took when doing an injection of a patient in an examination room setting. He suggested that his body would be turned at a 45-degree angle from the patient rather than facing them directly, thus eliminating the possibility of full frontal contact with the patient. He also said that he generally stood four or five inches away from the patient, but might come into contact with the patient occasionally. Neither the statements nor his demonstration were persuasive.

48. Respondent's contention is that each and every one of the patients who alleged sexual misconduct was lying. He suggests that patient D.K. was overweight and thus would not have sexually aroused him. Also, he maintains that her description of the injections being performed while Respondent was rubbing

against her would have necessarily resulted in horrible pain at best or a broken needle at worst. He claims that since patient M.B. was married to a policeman, she would have necessarily taken photographs of her numerous injections to preserve a record and she would have complained immediately. Her failure to do so, he suggests, impugns her testimony. Respondent contends that patient T.J.'s tardiness in reporting her allegations suggests the allegations were false. Respondent refutes A.H.'s allegations on the basis that there was a disagreement as to the physical layout of the medical office. Respondent contends there is no evidence that patient S.D. (his alleged lover) was his patient, even though there is a stipulation to that effect. Despite these speculative defenses, the evidence presented by the alleged victims is credible and accepted as fact.

Failure to update practitioner profile

49. A letter dated March 27, 2013, advising Respondent of his termination from participation in the Medicaid Program, was mailed to Respondent at two separate addresses: 2222 South Harbor City Boulevard, Suite 610, Melbourne, Florida 32901, i.e., the address of the Back Center, and 930 South Harbor City Boulevard, Melbourne, Florida 32901, the address for Osler (the company with whom the Back Center merged at some point in time). The letter to 2222 South Harbor City Boulevard was received on April 1, 2013, and an acknowledgement was signed by

Chandra Carrender, a Back Center employee. Respondent's employment with the Back Center had been terminated some 16 months previously, i.e., in August 2011. The letter mailed to 930 Harbor City Boulevard was returned as undeliverable. The termination letter provided Respondent notice of his right to contest the decision. He was given 21 days from receipt of the letter to file a Petition if he wanted to challenge the termination.

50. Respondent did not file a challenge, so on or about June 21, 2013, a Termination Final Order was filed by the Agency for Health Care Administration (AHCA), setting forth Respondent's termination from participation in the Florida Medicaid Program. The termination was issued pursuant to section 409.913, Florida Statutes. By law, Respondent was required to update his Florida practitioner profile within 15 days of receipt of the Termination Final Order.

51. The Termination Final Order was mailed to Respondent, return receipt requested, at two different addresses: The 930 South Harbor City Boulevard address and the 2222 South Harbor City Boulevard address. Respondent denies having received the letter or TFO until just prior to the formal administrative hearing in this matter.

52. Licensed physicians in the State of Florida are required to maintain a current address of record with the Agency

for Health Care Administration (AHCA) and the Department of Health. Neither Respondent nor the Department provided evidence as to what Respondent's official address of record was at the time the TFO and the letter were sent to Respondent at the two Harbor City Boulevard addresses. According to the deposition testimony of Michael West of the AHCA Medicaid Program Integrity office, the notices were sent to Respondent's "address of record" per section 409.913(6), Florida Statutes. West's testimony, however, did not specify what address that was. It might be logically presumed that one or both of the Harbor City Boulevard addresses were the "address of record," because that is where the notices were mailed. However, there is no clear and convincing evidence as to Respondent's official address of record at the time the Termination Final Order was mailed.

53. The statutory section referred to by West states:

> Any notice required to be given to a provider under this section is presumed to be sufficient notice if sent to the address last shown on the provider enrollment file. It is the responsibility of the provider to furnish and keep the agency informed of the provider's current address. United States Postal Service proof of mailing or certified or registered mailing of such notice to the provider at the address shown on the provider enrollment file constitutes sufficient proof of notice. Any notice required to be given to the agency by this section must be sent to the agency at an address designated by rule.

54. Respondent did not update his Florida practitioner profile because he claims never to have received a copy of the TFO or the letter. Neither Respondent nor the Department provided direct evidence of Respondent's "address last shown on the provider enrollment file" as of March 27, 2013.[6/]

Other factual considerations

55. Respondent was terminated from employment at the Back Center in September 2011. The termination occurred as follows: T.J. reported the alleged October 29, 2010 incident in April 2011. Dr. Hynes was already aware of another incident (from D.K. in January 2011). Dr. Hynes met with Respondent to discuss his alleged behavior. Respondent denied the allegations, saying that people just seem to like him and take advantage of him. He said the patients were lying about the incidents. Dr. Hynes mandated at that time that Respondent have a chaperone in the examining room with every female patient. Rather than being allowed to exercise "medical judgment" like other doctors in the clinic, Respondent was ordered to always use a chaperone with all female patients. After patient C.J.'s allegations came to light in May 2011, Dr. Hynes told Respondent that three times was enough; something had to be done. The Back Center commenced preparation of a termination letter. The letter was to tell Respondent that, pursuant to his Employment Agreement, the Back Center was providing him the 180-day notice of termination of

employment "without cause." The purpose of that letter was to allow Respondent time to find a job and not have a blemish on his record. One of the bases for the termination letter was that Respondent had been referred to the Physicians Recovery Network (PRN) for counseling to address his behavior. Dr. Hynes presumed Respondent was obtaining that counseling. However, when C.J. reported the incident on May 4, 2011, Dr. Hynes found out that Respondent had not been going to PRN as he had previously indicated. At about the time the 180-day letter was being drafted, another incident (by patient M.B.) was reported to the Back Center. Upon hearing of that allegation, Dr. Hynes verbally fired Respondent, effective immediately, with cause. The 180-day letter was not actually delivered to Respondent until after the verbal termination, so the letter was moot when it arrived. Respondent did not tell his next employer, Advantacare, that he had been terminated from employment by the Back Center. He also did not advise Advantacare about the sexual allegations made by patients at the Back Center.

56. In summary, Respondent engaged in activities of a sexual nature with patients at the Back Center in December 2010, January 2011, May 2011, and August 2011 (in addition to his relations with S.D. in 2008-2010). He engaged in sexually related touching of a patient at Advantacare in January 2013. His employment with the Back Center was terminated in

September 2011; his employment with Advantacare was terminated in April 2013.

57. Former patients of Respondent expressed dismay that he was being charged with the violations set forth in the Administrative Complaint. They found Respondent to be a caring and professional doctor. It is clear Respondent did not treat all his patients the same way he treated the victims identified herein. Some of his co-workers said they did not see Respondent engage in any of the alleged actions. They did not receive any complaints from other patients. Respondent obviously has a stellar reputation with some of his patients and co-workers. That status, however, does not excuse his behavior with the victims in the present cases. It is also alleged that Bobbi McDonald was a rumor-mongerer and a liar. She appeared credible at final hearing and there is no competent, substantial evidence to support the dispersions cast by others.

58. It should be noted that several witnesses identified by Respondent were displeased with the manner in which they were questioned by Department personnel prior to the final hearing. The witnesses expressed extreme discomfort when Department employees (attorneys) suggested that Respondent was "an addict" or a sociopath. While a state agency is bound to pursue all claims against individuals which it is responsible for licensing and monitoring, it is improper to harangue or disparage such

persons in order to sway potential witnesses' testimony. Upon full review of the evidence in this case, the potential witnesses who complained about the Department's aggressive nature did not provide substantive testimony on the issues of this case. Thus, any harm which may have resulted from the Department's statements would not affect the final decision herein.

CONCLUSIONS OF LAW

59. The Division of Administrative Hearings has jurisdiction over this matter pursuant to sections 120.57 and 120.569, Florida Statutes (2014). Unless otherwise stated herein to address existing statutes as of the date of specific allegations, all references to Florida Statutes shall be to the 2014 codification.

60. This is a proceeding in which the Department seeks to revoke Respondent's license to practice medicine. Because such disciplinary actions are considered penal in nature, the Department must prove by clear and convincing evidence that Respondent's license to practice medicine should be revoked based on the facts presented. Dep't of Banking and Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996).

61. The Department must prove that Respondent engaged in the activities and behavior alleged in the administrative complaints. See Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). Clear and convincing evidence is an intermediate standard

of proof which is more than the "preponderance of the evidence" standard used in most civil cases but less than the "beyond a reasonable doubt" standard used in criminal cases. See State v. Graham, 240 So. 2d 486 (Fla. 2nd DCA 1970). Clear and convincing evidence has been defined as evidence which:

> 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 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 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) (citations omitted). See also In re Henson, 913 So. 2d 579, 590 (Fla. 2005).

62. "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).

63. The findings of fact set forth above were made as a result of clear and convincing testimony and documentary evidence presented at the final hearing. The evidence regarding Respondent's sexual behavior with his patients met the level of proof required of the Department for Case No. 14-1342PL, Counts I & II; and Case No. 14-1343PL, Counts I & II. The evidence

concerning Respondent's termination from the Medicaid Program was sufficient proof for Case No. 13-2488, Count I (only). The evidence regarding Respondent's alleged failure to update his professional profile did not meet the clear and convincing standard.

64. The Department has the right to impose discipline on physicians licensed by the State of Florida. Grounds for discipline are found in chapter 458 and Florida Administrative Code Rule 64B8-9.008. In the 2008-2012 versions of Florida Statutes, the following grounds for disciplinary actions are listed in section 458.331(1):

> (j) Exercising influence within a patient-physician relationship for purposes of engaging a patient in sexual activity. A patient shall be presumed to be incapable of giving free, full, and informed consent to sexual activity with his or her physician.
>
> * * *
>
> (nn) Violating any provision of this chapter or chapter 456, or any rules adopted pursuant thereto.

Further, section 458.329 (2008-2012), states:

> The physician-patient relationship is founded on mutual trust. Sexual misconduct in the practice of medicine means violation of the physician-patient relationship through which the physician uses said relationship to induce or attempt to induce the patient to engage, or to engage or attempt to engage the patient, in sexual activity outside the scope of the practice or the scope of generally accepted examination or treatment of the

> patient. Sexual misconduct in the practice of medicine is prohibited.

Rule 64B8-9.008 states in pertinent part:

> 1. Sexual conduct with a patient is sexual misconduct and is a violation of Sections 458.329 and 458.33(1)(j), F.S.
>
> 2. For purposes of this rule, sexual misconduct between a physician and a patient includes, but is not limited to:
>
> (a) Sexual behavior or involvement with a patient including verbal or physical behavior which . . .
>
> 1. May reasonably be interpreted as romantic involvement with a patient regardless of whether such involvement occurs in the professional setting or outside of it;
>
> 2. May reasonably be interpreted as intended for the sexual arousal or gratification of the physician, the patient or any third party; or
>
> 3. May reasonably be interpreted by the patient as being sexual.

65. The statutory language of section 458.331(1)(j) and (nn), and of section 458.329 has not changed from the 2008 version to the present. Likewise, the rule 64B8-9.008 has been in effect since 1994 and has not been amended since 1997 except for a change in the rule number.

66. Disciplinary provisions such as section 458.331 must be strictly construed in favor of the licensee. Elamariah v. Dep't of Prof'l Reg., 574 So. 2d 164 (Fla. 1st DCA 1990); Taylor v. Dep't of Prof'l Reg., 534 So. 2d 782, 784 (Fla. 1st DCA 1988).

Disciplinary statutes must be construed in terms of their literal meaning, and words used by the Legislature may not be expanded to broaden their application. Latham v. Fla. Comm'n on Ethics, 694 So. 2d 83 (Fla. 1st DCA 1997); see also Beckett v. Dep't of Fin. Svcs., 982 So. 2d 94, 100 (Fla. 1st DCA 2008); Dyer v. Dep't of Ins. & Treas., 585 So. 2d 1009, 1013 (Fla. 1st DCA 1991).

67. Based upon the evidence, including the live testimony of four of the six alleged victims, Respondent's supervisor, a fellow physician, and employees of the Back Center and Advantacare, there is clear and convincing evidence that Respondent engaged in behavior which violated the above-cited statutes and rule. The deposition testimony of the fifth alleged victim is also accepted as credible (as set forth above) due to its consistency with the testimony of other witnesses. The testimony (via deposition transcript) of C.J. was clear, precise, and explicit. The Department has met its burden.

68. Respondent's defenses concerning the allegations are not persuasive. It is clear Respondent did not suffer from erectile dysfunction or impotence during the period of time at issue in this proceeding. His suggestion that the patients felt the syringe in his lab coat and mistook it for his erect penis is rejected as not believable. Respondent's apparent disregard for the chaperone policy, along with his denial of its existence, is a concern in light of the strong evidence to the contrary. The

explanation given by Respondent as to what his emails with S.D. were meant to imply was, frankly, insulting to a person of average intelligence. The emails themselves are clear and convincing evidence that a romantic relationship existed between Respondent and his patient/co-worker. Respondent appears to be a capable physician and a well-liked person by some of his patients and co-workers, but his demeanor at final hearing and the unbelievable statements he made reduced the credibility of his testimony. In short, the allegations were clearly established by the evidence.

69. The fact that some co-workers never heard any complaints about Respondent, and that some patients were not victimized by Respondent, does not address or mitigate the violations relating to the victims. The testimony of those persons, while supportive of Respondent, is acknowledged but does not rebut or refute the charges against him.

70. The Department did not meet its burden of proof as to whether Respondent appropriately and timely updated his professional profile information. Absent clear and convincing evidence as to Respondent's address of record at the time the notices were sent to him, it is impossible to determine that he actually or effectively received the notices.

71. There was, however, clear and convincing evidence as to the sexual allegations sufficient to warrant the revocation of

Respondent's license to practice medicine in the State of Florida.

RECOMMENDATION

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

RECOMMENDED that a final order be entered by the Department of Health revoking Respondent, Albert Esmailzadeh, M.D.'s license to practice medicine in the State of Florida.

It is further RECOMMENDED that the final order assess the cost of investigating and prosecuting this case, and that payment of such costs be assessed against Respondent, Albert Esmailzadeh, M.D.

DONE AND ENTERED this 19th day of November, 2014, in Tallahassee, Leon County, Florida.

R. BRUCE MCKIBBEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of November, 2014.

ENDNOTES

[1] All patients of Respondent will be identified only by way of initials in this Recommended Order in an effort to help protect their confidentiality and privacy.

[2] See Prehearing Stipulation, Paragraph (e)18. Nonetheless, Respondent argues in its PRO that the Department failed to prove the physician-patient relationship.

[3] There was no testimony provided by either party as to the degree of pain a patient must be experiencing in order to warrant an injection.

[4] Respondent's contention that he could not slide the table away from the wall with a 165-pound person sitting on it is not persuasive. Several of the victims said Respondent moved the table. No one testified that Respondent lifted the table, only that he moved it, presumably by sliding it along the floor.

[5] While it seems somewhat peculiar that A.H. would agree to lie on the table after what had just happened, she exhibited a strong aversion to questioning authority figures. Based upon her demeanor, her testimony is accepted as given, without hesitancy.

[6] It is presumed the Department could have obtained a copy of the provider enrollment file as of March 27, 2013, but no such evidence was produced.

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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.