STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,
BOARD OF MEDICINE,

Petitioner,

vs. Case No. 15-4486PL

BRIAN MITCHELL LEE, M.D.,

Respondent.
_____/

RECOMMENDED ORDER

On September 29, 2015, Administrative Law Judge Lisa Shearer Nelson of the Florida Division of Administrative Hearings (DOAH) conducted a disputed-fact hearing pursuant to section 120.57(1), Florida Statutes (2015), in Pensacola, Florida.

APPEARANCES

For Petitioner: Louise Wilhite-St. Laurent, Esquire
Brynna J. Ross, Esquire
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For Respondent: Brian Mitchell Lee, M.D., pro se
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STATEMENT OF THE ISSUES

The issues to be determined are whether Respondent has been convicted of crimes related to the practice or the ability to practice medicine in violation of section 456.072(1)(c), Florida

Statutes (2013), by virtue of being found guilty of traveling to meet a minor to engage in sexual contact; unlawful use of a two-way communications device to facilitate the commission of a felony; and using a computer to facilitate or solicit the sexual conduct of a child; and if so, what penalty should be imposed.

PRELIMINARY STATEMENT

The Department of Health (the Department or Petitioner) filed an Administrative Complaint against Respondent, Brian Mitchell Lee (Dr. Lee or Respondent), alleging that he violated section 456.072(1)(c) as a result of the jury verdict of guilty with respect to the crimes identified above. Respondent filed an Election of Rights form on June 1, 2015, indicating that he did not dispute the facts alleged in the Administrative Complaint and requested a hearing before the Board of Medicine. However, during that hearing, Respondent apparently indicated that he did not believe that his convictions were related to the practice of medicine. As a result, the proceedings were terminated with directions that the Department refer the case to DOAH. The Department filed an Amended Administrative Complaint on August 13, 2015, and forwarded the case to DOAH for assignment of an administrative law judge the same day.

By notice issued August 18, 2015, the case was scheduled for hearing on September 29, 2015. The parties participated in a pre-hearing telephone conference on September 8, 2015, in order

to explain to Respondent the procedures for the hearing and to give him the opportunity to ask any procedural questions. On September 21, 2015, the Department filed a Motion for Official Recognition, requesting official recognition of several statutes and rules, as well as the transcripts of proceedings in Escambia County Case No. 2014-CF-000027, and the Information, Jury Verdict, Jury Judgment, Judgment and Sentence, and Order of Probation from the same file. The Department also moved to seal Respondent's Response to Interrogatories, which was filed on DOAH's docket and contain the identities of patients. Both motions were granted at hearing, and Respondent's responses to interrogatories are part of the record but not available to the public for viewing.

The hearing proceeded as scheduled. Petitioner presented no witnesses and Petitioner's Exhibits 1-12 were admitted into evidence. Respondent also presented no witnesses but Respondent's Exhibits 2 and 6 were admitted into evidence.

The Transcript of the hearing was filed with DOAH on October 14, 2015. Respondent and Petitioner filed Proposed Recommended Orders on October 23 and 26, 2015, respectively. Both submissions have been carefully considered in the preparation of this Recommended Order. All references are to the 2015 codification of the Florida Statutes unless otherwise indicated.

FINDINGS OF FACT

1. The Department is the state agency charged with the licensing and regulation of physicians pursuant to section 20.43 and chapters 456 and 458, Florida Statutes. The Board of Medicine is the professional licensing board charged with final agency action with respect to physicians licensed pursuant to chapter 458.

2. At all times relevant to these proceedings, Respondent was licensed as a physician by the State of Florida, and holds license number ME 79663.

3. Respondent is an internist in Perdido Key, where he practices as a solo practitioner. Respondent considers himself to be an "old fashioned physician" who spends 30-45 minutes with each patient. This pace necessitates that he see fewer patients per day than the apparent norm.

4. In mid-to-late 2013, Respondent had reached a cross-roads in his life. He was in the midst of a drawn-out divorce proceeding, and was coming to terms with his sexuality as a gay man. He felt like he was drowning in the paperwork associated with his practice, and was in debt. He was also mildly depressed about his life.

5. While Respondent had come to terms with his homosexuality, he had not told his family and friends and was unsure of their response. Respondent does not drink or smoke,

and does not go to bars, so his venues for meeting other men with whom to build any kind of relationship were limited. He decided to post ads on Craig's List in the "Casual Encounter Section." One of his ads read in part, "I prefer younger Men. Under 30 is a big plus . . . . No reciprocation required if you come to me, are fit and under 25."

6. On December 22, 2013, Respondent received a response from a person identified as "Matt." Respondent corresponded by e-mail with Matt over the next couple of weeks. From the very beginning, Matt described himself as "kinda young." Respondent responded by saying, "I like young," to which Matt revealed he was not yet 18. The following day, Matt stated that he had just turned 14 and was inexperienced. Respondent wrote that he would love to meet Matt and "show [him] a few things," and stated that "I love inexperienced guys that I can take my time with and see them experience the joy of sex for their first time." Many of the e-mails are quite graphic and reciting their contents would serve no purpose. These e-mails lasted from December 23, 2013, through January 2, 2014.

7. In reality, the person responding to the ad and identified as Matt was not a 14-year-old boy. Matt was actually Zach Ward, an undercover police officer.

8. During Respondent's e-mail communications with Detective Ward, he offered to meet Matt eight separate times. He was aware

that his conduct had criminal implications and noted this fact several times. For example, he advised Matt not to save a photo that he sent to Matt and not to save any of their messages "in case anyone gets ahold of your phone," and he advised Matt to "be careful what they text," but that there is "nothing illegal with us kissing and making out."

9. Respondent even attempted to justify his actions in an e-mail, stating:

> I have rationalized that it is morally ok if you are the one who instigates it. Clearly doesn't make it legal. But I think it is almost preferable for a young guy to be able to experiment and play safe and learn from an older person as opposed to playing with a girl your age and ending up getting her pregnant. Yet that is somehow socially accepted but older with younger is not . . . . I have given this much consideration. I feel if the opportunity came knocking at my door, I wouldn't chase it away.

10. Respondent also spoke to Matt about his practice as a physician. He told Matt that he was a family doctor, and communicated with him by e-mail between seeing patients. He discussed a 16-year-old patient with Matt, identifying the patient by first name; stating that he had seen the patient naked; that he thought the patient was "cute"; and that he wished the patient was gay. In talking about this patient, Respondent told Matt he always asks teenagers about their sexual preference, and also stated:

> Some people make jokes about pedophiles becoming doctors and teachers. But, as long as they don't act on their desires and don't make advances and seduce their patients, I don't see any harm in it. I think it actually makes me a better doctor. I screen teens for issues like depression, drug use, sexual activity and orientation. I spend a little more time with them than most doctors. But I treat them like a person and don't just push them out the door. To me, a sexual predator uses their influence to coerce a child into sexual acts. I would never do that . . . .

11. Eventually, Matt and Respondent agreed to meet at a bowling alley near Matt's purported home. On January 2, 2014, Respondent left his office and traveled to the pre-arranged meeting location at a bowling alley. Upon his arrival, Respondent was arrested.

12. On April 25, 2014, the State Attorney for Escambia County filed a three-count Information against Respondent. The Information alleged that on January 2, 2014, Respondent knowingly traveled within the state to engage in unlawful sexual conduct with a person Respondent believed to be a child less than 18 years old, in violation of section 847.0135(4)(a), Florida Statutes (2013); that between December 23, 2013, and January 1, 2014, Respondent knowingly used a cell phone or two-way communication device to facilitate or further the commission of a felony, i.e., traveling to meet a minor to engage in sexual conduct, in violation of section 934.215, Florida Statutes

(2013); and that between December 22, 2013 and January 1, 2014, Respondent knowingly used a computer or internet service to attempt to seduce or solicit another person Respondent believed to be a child less than 18 years old to engage in unlawful sexual conduct, in violation of section 847.0135(3)(a). The Information was filed in Escambia County Circuit Court and docketed as Case No. 1714CF000027A. For some reason that has not been explained, the documents also bear docket no. 2014-CF-000027.

13. Respondent was tried before a jury on January 12, 14, and 15, 2015. Respondent testified on his own behalf during the criminal trial, and claimed that he was aware that Matt was not a young boy, but was in fact an undercover police officer posing as an underage male. He felt law enforcement was targeting homosexuals, and he wanted to use the opportunity presented to him to bring attention to this social issue that he felt needed to be addressed. He also claimed that he was aware there was a good chance that he would be arrested, but viewed it as a way to deal with his growing dissatisfaction with his practice and his need to admit to his family and friends his decision in terms of his sexuality. By its finding of guilt, the jury clearly did not find his claim to be credible.

14. Respondent wrote a letter to his housekeeper the day before the pre-arranged meeting with Matt, telling her that he expected to be arrested and that he believed that Matt was an

undercover police officer. The housekeeper found the letter and turned it over to defense counsel. While the letter was not admitted into evidence in the criminal proceeding, it was admitted in this disciplinary case. While Respondent believes that the letter shows that he did not believe Matt to be underage, this disciplinary proceeding is not an opportunity to retry the criminal action.

15. Moreover, Respondent's claim that he knew Matt was not an underage boy, but rather a police officer, is rejected as not credible. Respondent's letter to his housekeeper could be just as easily interpreted as an attempt to provide a defense for Respondent should he get caught. Even assuming, for the sake of argument, that Respondent did in fact know Matt was an undercover officer, a finding which the undersigned does not make, his actions are not transformed into a selfless act. Both Respondent's testimony at hearing and the letter he wrote to his housekeeper evidence a total disregard of the consequences his actions could bring and what effect those actions could have on the continued vitality of his practice and the well-being of his patients.

16. On January 15, 2015, the jury found Respondent guilty of all counts charged. At his sentencing hearing on February 23, 2015, several patients, employees, and a family member testified on his behalf. The circuit court judge withheld adjudication,

and sentenced Respondent to two years of community control, followed by 13 years of probation. This sentence represents a downward departure from the criminal sentencing guidelines. Respondent was designated as a lifetime Sex Offender; required to enroll and complete Sex Offender Counseling and any recommended treatment; prohibited from caring for or treating minors without notifying the minor's parents of his Sex Offender status, and having another staff member present; prohibited from any other contact with those under the age of 18; and prohibited from using a computer unless required for the treatment of patients. Among the many conditions of probation is the requirement that Respondent must work "diligently at a lawful occupation, advise [his] employer of [his] probation status, and support any dependents to the best of [his] ability, as directed by [his] officer."

17. Respondent's conditions of community control require check-ins with his Community Control Officer approximately three times weekly, and that he keep his Community Control Officer apprised of his whereabouts at all times. Any travel outside his work schedule must be approved in writing, and Respondent must notify his Community Control Officer in advance of any travel to address a patient emergency.

18. Respondent only has one part-time staff member, a receptionist, available to be present during examination and

treatment of minor patients. His receptionist is not licensed by the Department. At hearing, he testified that he no longer sees minor patients.

19. Respondent asserts that his conviction is not related to the practice or the ability to practice medicine, because he had no intent to harm any minor. However, the evidence indicates that he went to the bowling alley for the meeting knowing that his actions would in all likelihood get him arrested. The evidence, taken as a whole, suggests that the encounter was worth the risks to him. This fact alone shows a disregard for the well-being of his patients and their continued care. Moreover, the conditions of his criminal sentence place specific restrictions on his medical practice by requiring the parents of any minor patient to be informed of his Sex Offender status, and requiring the presence of another staff person in the office during any treatment of minors. Further, as noted by Dr. Libert's testimony, Respondent is prohibited from having contact with minors outside the supervised care of underaged patients. Having a staff member available, even part-time, for supervised patient visits does not address the very real probability of children being present in his office that are related to his patients. Clearly, these restrictions that have been imposed as a result of his convictions are related to the Respondent's ability to practice medicine.

20. The personal qualities essential to the sound practice of medicine include integrity, respect for the public trust, good judgment, and respect for the well-being of others. Respondent's actions reflect extremely poor judgment and a violation of both the trust of his patients and the trust society places in physicians. His Sex Offender status undermines the confidence that the public is entitled to have in the judgment and integrity of a health care professional licensed in this state. Patients should not have to check the Sex Offender Registry before placing themselves into the care of a licensed physician.

21. Respondent's convictions for the crimes charged in the Information are convictions of crimes related to the practice or the ability to practice medicine in the State of Florida.

CONCLUSIONS OF LAW

22. DOAH has jurisdiction of the subject matter and the parties to this action pursuant to sections 120.569 and 120.57(1).

23. This is a proceeding whereby the Department seeks to revoke Respondent's license to practice medicine. The Department has the burden to prove the allegations in the Amended Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 595 So. 2d 292 (Fla. 1987). As stated by the Supreme Court of Florida,

> 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 at 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 Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)). This burden of proof may be met where the evidence is in conflict; however, "it seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

24. The Amended Administrative Complaint charges Respondent with violating section 456.072(1)(c). Section 456.072 provides in pertinent part:

> 456.072 Grounds for discipline; penalties; enforcement.--
>
> (1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:
>
> * * *
>
> (c) Being convicted or found guilty of, or entering a plea of guilty or nolo contendere to, regardless of adjudication, a crime in any jurisdiction which related to the practice of, or the ability to practice, a licensee's profession.

25. Among the penalties authorized for a violation of section 456.072(1)(c) are suspension and permanent revocation of a license. § 456.072(2)(b), Fla. Stat.

26. Whether or not a particular crime is related to a profession is not limited to its connection to the technical ability to practice the profession. As stated by the First District:

> Several cases demonstrate that, although the statutory definition of a particular profession does not specifically refer to acts involved in the crime committed, the crime may nevertheless relate to the profession. In Greenwald v. Department of Professional Regulation, the court affirmed the revocation of a medical doctor's license after the doctor was convicted of solicitation to commit first-degree murder. 501 So. 2d 740 (Fla. 3d DCA 1987). The Fifth District Court of Appeal has held that although an accountant's fraudulent acts involving gambling did not relate to his technical ability to practice public accounting, the acts did justify revocation of the accountant's license for being convicted of a crime that directly relates to the practice of public accounting. Ashe v. Dep't of Prof'l Regulation, Bd. of Accountancy, 467 So. 2d 814 (Fla. 5th DCA 1985). We held in Rush v. Department of Professional Regulation, Board of Podiatry, that a conviction for conspiracy to import marijuana is directly related to the practice or ability to practice podiatry. 448 So. 2d 26 (Fla. 1st DCA 1984). These cases demonstrate, in our view, that appellee did not err by concluding Doll's conviction was "related to" the practice of chiropractic medicine or the ability to practice chiropractic medicine.

Doll v. Dep't of Health, 969 So. 2d 1103, 1006 (Fla. 1st DCA 2007).

27. The same can be said with respect to the crime for which Respondent was convicted. Respondent's actions represent a violation of the trust placed in physicians, on whom patients rely to make life-changing decisions. His actions demonstrate such impaired judgment, that they reflect the antithesis of what is expected of a physician licensed in this state.

28. Given Respondent's lack of judgment and the practical limitations on the practice of medicine required for Respondent to be in compliance with his Community Control and probationary terms, the Department has proven a violation of section 456.072(1)(c) by clear convincing evidence.

29. As required by section 456.079, the Board of Medicine has adopted disciplinary guidelines in order to notify the public of the range of penalties typically imposed for violations of sections 458.331 and 456.072, and the rules related to these provisions. For violations of sections 456.072(1)(c) and 458.331(1)(c), the penalty for a first-time offense is the same: from probation to revocation or denial of the license; an administrative fine of $1,000 to $10,000; and 50 to 100 hours of community service. Fla. Admin. Code R. 64B8-8.001(2)(c). The rule also provides aggravating and mitigating penalties to consider should a penalty outside the disciplinary guidelines be

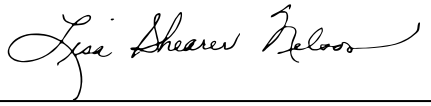
recommended. Resort to these factors is unnecessary in this case, because the recommended penalty is within the guidelines of rule 64B8-8.001(2)(c). However, imposition of a fine and community service is impractical, given the terms of Respondent's Community Control and the ultimate penalty recommended.

30. The undersigned is mindful of the sacrifices any physician makes to attain the education to become licensed as a medical doctor. All of the letters provided by patients to the trial court in Respondent's sentencing have been carefully considered. It is a shame that Respondent was willing to sacrifice his practice and the well-being of such loyal patients. However, the undersigned is also mindful of the trust that the Board of Medicine, and by extension, the people of the State of Florida, place in those who attain licensure status. Respondent's actions show a grave violation of this trust.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Medicine enter a final order finding that Respondent has violated section 456.072(1)(c), Florida Statutes, and revoking his license to practice medicine.

DONE AND ENTERED this 2nd day of December, 2015, in Tallahassee, Leon County, Florida.



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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.