

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF  
MEDICINE,

Petitioner,

vs.

Case No. 16-1796PL

DROR M. PELED, M.D.,

Respondent.

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RECOMMENDED ORDER

On June 1, 2016, Administrative Law Judge J. Lawrence Johnston held the final hearing by video teleconference, with sites in Tampa and Tallahassee.

APPEARANCES

For Petitioner: Francis A. Carbone, II, Esquire  
Rob F. Summers, Esquire  
Louise Wilhite-St Laurent, Esquire  
Department of Health  
Prosecution Services Unit  
4052 Bald Cypress Way, Bin C-65  
Tallahassee, Florida 32399

For Respondent: No Appearance

STATEMENT OF THE ISSUES

The issues in this case are whether, and how, the Board of Medicine should discipline the Respondent based on charges set out in the Second Amended Administrative Complaint filed by the Petitioner.

PRELIMINARY STATEMENT

On February 24, 2016, the Petitioner, Department of Health, filed an Amended Administrative Complaint against the Respondent alleging: in Count I, that the Respondent was unable to practice medicine with reasonable skill and safety to patients, in violation of section 458.331(1)(s), Florida Statutes<sup>1/</sup>; and in Count II, that he was terminated from a Professionals Resource Network (PRN) treatment program for impaired practitioners, in violation of section 458.331(1)(hh). The Respondent requested a hearing, and the matter was referred to Division of Administrative Hearings, where the Respondent has vacillated between wanting a hearing and not wanting a hearing, and between disputing the facts and not disputing the facts. Ultimately, it was determined that disputed issues of material fact existed, and that a final hearing was required.

On May 11, the Petitioner's request for the Respondent to undergo a second, updated mental and physical examination by Debra Barnett, M.D., was granted, over the Respondent's objection. Respondent failed to appear for the examination.

On May 17, the Petitioner noticed the taking of Dr. Barnett's deposition on May 23 in lieu of live testimony at the final hearing. The Respondent did not appear for the deposition.

The Petitioner moved for leave to file a Second Amended Administrative Complaint based on Dr. Barnett's deposition testimony. The Respondent's barely coherent response was considered, and leave to amend was granted on May 24.

At the final hearing, the Petitioner's Composite Exhibits 1, 2 (the Respondent's deposition testimony), and 3 (Dr. Barnett's deposition testimony) were admitted in evidence. The Respondent did not appear for the final hearing and did not present any evidence.

Two hours after the final hearing ended, the Respondent filed a Motion to Reschedule the final hearing, which was denied. The Respondent filed another Motion to Reschedule on June 8, which is denied.

The Transcript of the final hearing was filed on June 14. The parties filed proposed recommended orders that have been considered.

#### FINDINGS OF FACT

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

2. At all times material to the allegations in the Second Amended Administrative Complaint, the Respondent was a licensed medical doctor within the State of Florida, having been issued license ME 77763.

3. The Respondent's address of record with the Petitioner is 5035 Mile Stretch Drive, Holiday, Florida 34690.

4. Since his early childhood, the Respondent has suffered from psychiatric conditions. The Respondent has not received consistent treatment for his psychiatric issues for at least the past two years. Respondent attempted to self-treat his psychiatric conditions with a variety of medications, including lithium, levothyroxine, Paxil, and Prozac.

5. Such self-prescribing and self-treatment is inappropriate.

6. Respondent's psychiatric conditions came to light after an employee filed a regulatory complaint with the Occupational Health and Safety Administration. The result of this complaint was a mediated settlement that required Respondent to pay \$10,000.

7. The Respondent went to the former employee's new place of employment and held a knife to his neck. The Respondent then returned to his office to treat patients. He did not think it was his patients' or their caregivers' business what he did on his lunch break.

8. Law enforcement was notified, which resulted in the Respondent being taken into custody under Florida's Baker Act. The Respondent self-reported his Baker Act Hospital Admission, to PRN.

9. Pursuant to section 456.076, Florida Statutes, and Florida Administrative Code Rule 64B31-10.001, PRN is the approved Impaired Practitioner Treatment Program and a consultant to the Petitioner. PRN consults with the Petitioner regarding practitioners' impairment and their ability to safely practice their profession safely. The purpose of PRN is to ensure the public health and safety by assisting practitioners who may suffer from chemical dependency; psychiatric illness; psychosexual illness, including boundary violations; neurological/cognitive impairment; physical illness; HIV infection/AIDS; and behavior disorders.

10. PRN participants are responsible for complying with the recommendations of the evaluator and/or treatment provider in consultation with the PRN medical director, complying with the terms of the PRN monitoring contract, and meeting financial obligations to treating practitioners, including toxicology testing and PRN facilitator group fees.

11. As part of the intake process, PRN required the Respondent to undergo a psychiatric evaluation performed by Dr. Jamie Smolen, M.D., and a neurocognitive evaluation performed by Dr. Benjamin Phalin, Ph.D.

12. Dr. Phalin diagnosed the Respondent with dysthymic disorder, history of major depressive disorder, social anxiety disorder, anxiety disorder not otherwise specified, attention-

deficit hyperactivity disorder, and schizoid and paranoid personality features.

13. Dr. Phalin opined that Respondent's emotional instability, limited insight, and poor judgment raised significant concerns regarding Respondent's ability to practice as a physician with reasonable skill and safety.

14. Dr. Smolen agreed with Dr. Phalin's diagnostic impression. Dr. Smolen was concerned with the Respondent's strange behavior regarding alcohol use at work. Dr. Smolen opined that the Respondent was not able to practice medicine with reasonable skill and safety due to his limited insight, limited coping abilities, undertreated mental illness, and attempts to self-treat and self-diagnose his mental illness.

15. Dr. Phalin opined that the Respondent would need to abstain from all controlled and mood-altering substances and medications, engage in individual psychotherapy, cease self-diagnosing and self-prescribing psychotropic medications, seek treatment with a psychiatrist to include psychotropic medication management, enter into a monitoring contract with PRN, and demonstrate compliance for two weeks in order to return to practice.

16. After considering the evaluation reports, PRN determined that the Respondent needed to refrain from practice. In order to return to practice, PRN required Respondent to

execute a monitoring contract, confirm psychiatric and therapeutic appointments, demonstrate compliance with those appointments, refrain from alcohol and stimulant medication use, refrain from self-prescribing psychotropic medication, and submit two negative urine drug screens.

17. Because the Respondent disagreed with PRN's requirements, he immediately attempted to circumvent PRN by placing repeated phone calls to the Board of Medicine and PRN. Christina Gaudiana took over as the Respondent's case manager at this point as a result of his behavior.

18. On December 9, 2014, the Respondent signed a two-year monitoring contract with PRN requiring random urine drug and alcohol testing, weekly group therapy, monthly psychiatry appointments, and abstinence from alcohol and drugs not prescribed by another physician, among other conditions.

19. The Respondent was cleared to return to practice shortly after signing his contract and demonstrating initial compliance with the above requirements.

20. Immediately after being cleared to return to practice, the Respondent again began initiating numerous harassing and discourteous telephone calls and emails to PRN staff and others. Email recipients included PRN staff members, the American Board of Pediatrics, The New York Times, The Tampa Bay Times, a United

States Senator from Florida, and the President of the United States.

21. On January 7, 2015, PRN held a staffing meeting due to the Respondent's behavior. The result of the staffing meeting was to advise the Respondent to stop his behavior or he would have to be withdrawn from practice until he could have a recovery status evaluation due to the threats of self-harm contained within his emails.

22. PRN advised the Respondent to stop the repeated telephone calls and emails and informed him that his behavior was inappropriate. The Respondent agreed and apologized.

23. Courteousness and respect toward PRN staff is a requirement of the PRN monitoring contract and participant manual.

24. On January 8, 2015, the Respondent's psychotherapist informed PRN that the Respondent had only attended one session in the previous month and missed an appointment. The Respondent's psychotherapist struggled to get the Respondent to attend the required weekly meetings.

25. This is an instance of material non-compliance and a violation of the PRN monitoring contract.

26. PRN could not ensure the Respondent's ability to practice medicine safely due to his behavior, and suspected the



Respondent had relapsed, fallen out of compliance with his medication management, or both.

27. On January 14, 2015, the Respondent again sent a bizarre, erratic and discourteous email to PRN, prompting PRN to require that the Respondent withdraw from practice and undergo a recovery-status evaluation.

28. PRN sent the Respondent an agreement to withdraw from practice and required that the Respondent execute and return the agreement. The Respondent did not, which is an instance of material non-compliance with the PRN monitoring contract.

29. The Respondent stopped checking into Affinity, a computerized monitoring system, on January 21, 2015, and had three missed check-ins by January 23, 2015.

30. Failure to check into the Affinity system is considered a violation of the monitoring contract and material non-compliance.

31. The Respondent continued to send erratic and discourteous emails to PRN and multiple other recipients.

32. Due to the Respondent's several simultaneous instances of material non-compliance with his PRN contract, the Respondent's case manager requested a staffing meeting to determine the future course of the Respondent's participation in PRN. The staffing meeting determined that the Respondent had several instances of material non-compliance and could not be

monitored, which warranted contract termination and referral to the Petitioner.

33. PRN terminated its monitoring contract on January 26, 2015, and notified the Respondent the same day.

34. PRN's termination of the Respondent's monitoring contract was due to his failure to comply with the contract's terms. The Respondent's failure to comply was without good cause.

35. Because there was probable cause to believe that the Respondent was unable to practice medicine safely, the State Surgeon General's designee compelled the Respondent to an examination on July 21, 2015, with Dr. Debra Barnett, M.D., a board-certified physician in psychiatry, addiction psychiatry, and a medical review officer.

36. As part of her July 21, 2015, evaluation, Dr. Barnett reviewed the PRN file, including the chronology report, and additional medical records that the Petitioner compelled the Respondent to produce, which included the clinical progress notes from the Respondent's PRN mental health counselor and the medication record from his pharmacy.

37. As part of her July 21, 2015, evaluation, Dr. Barnett administered clinical questionnaires, a urine drug and alcohol screen, and conducted a clinical interview and a background check on the Respondent.

38. The July 21, 2015, evaluation took significantly longer to complete than the standard time for interviews due to the Respondent's minimalized, nonsensical, and sarcastic answers.

39. Throughout the July 21, 2015, evaluation, the Respondent provided odd rationales, such as using the vodka he kept hidden in his desk as a mouthwash to explain and minimize his drinking at work. He made an additional odd request for a sample of his own urine, which he submitted in connection with the July 21, 2015, evaluation.

40. The Respondent also claimed that the samples submitted to Dr. Smolen that were positive for metabolites of alcohol must have been adulterated because the urine results were positive for metabolites of alcohol in his urine, but the blood results were not. The Respondent continues to hold this belief. Not only are such results possible, but they are consistent with the Respondent's method of drinking alcohol.

41. Dr. Barnett opined that the Respondent's erratic emails in the PRN file exemplified his "magical thinking"; his request to have a sample of his own urine demonstrated eccentricity and paranoia, indicative of schizoid personality disorder; and his self-prescription of levothyroxine due to the Fukushima, Japan, nuclear accident demonstrated poor judgment and inappropriate practice because there was no evidence of radioactive fallout in

Florida from Fukushima, Japan, and levothyroxine is not an approved treatment for radiation exposure.

42. The Respondent later claimed that he self-prescribed levothyroxine as a supplemental medication to his antidepressant medications. Dr. Barnett opined that this motive is also medically inappropriate and incorrect. There is a lack of scientific evidence that levothyroxine functions in this manner. The Respondent apparently confused levothyroxine and a similar, but distinctly different thyroid medication, Cytomel, which does have antidepressant-boosting properties in certain cases. Both medications have to be taken consistently in order for the medications to work in concert.

43. Dr. Barnett noted that the Respondent's attempts at self-diagnosis and self-treatment were inappropriate due to the Respondent's altered thinking and impulsivity. Her observations of the Respondent during her evaluation were consistent with his behavior evidenced in the PRN file, including threats of self-harm, disjointed thought processes, exaggeration, and hyperbole.

44. Dr. Barnett opined that the Respondent's insight into his issues, problem-solving ability, judgment, ability to cope with stressful situations, decision-making in a crisis, emotional control, and impulse control were all poor.

45. Dr. Barnett diagnosed the Respondent with schizoid personality disorder and alcohol abuse.

46. Dr. Barnett opined that the Respondent was not able to practice his profession with reasonable skill and safety to patients. She recommended that the Respondent participate in PRN monitoring and complete behavioral therapy.

47. The Respondent has insisted that Dr. Barnett's diagnoses are incorrect, that he does not drink, and that he is simply "shy."

48. Dr. Barnett distinguished normal shyness and the Respondent's personality disorder diagnosis, explaining that people who are shy seek out social engagement and eventually experience a decrease in their initial social anxiety. People with schizotypal personality disorder do not seek social engagement, and due to their altered thinking about and interpretation of events, struggle to build a rapport with and accommodate others.

49. As part of this proceeding, the Respondent was ordered to be re-evaluated on May 20, 2016.

50. The Respondent indicated in his deposition on May 17, 2016, and in repeated telephone calls to Dr. Barnett's office in the weeks prior to his evaluation, that he had no intention of complying with the Order that he be re-evaluated.

51. On May 20, 2016, the Respondent called Dr. Barnett's office and claimed he had a backache. He did not appear at Dr. Barnett's office for his evaluation as ordered.

52. Dr. Barnett reviewed Respondent's deposition, in addition to the materials she reviewed before, and was able to opine on the Respondent's inability to practice with reasonable skill and safety to patients to a reasonable degree of medical certainty.

53. The Respondent joked about killing patients during his deposition. According to Dr. Barnett, he had a significant enduring pattern of odd thinking.

54. According to Dr. Barnett, the Respondent's failure to appear on May 20, 2016, and his telephone calls attempting to cancel the evaluation demonstrated his "magical thinking" that his situation could simply "go away."

55. Based on the additional information she reviewed, Dr. Barnett clarified her diagnoses of the Respondent, saying he suffers from schizotypal personality disorder and alcohol abuse.

56. Dr. Barnett concluded that with his diagnoses, and previous and current lack of treatment, the Respondent is not able to practice as a physician with reasonable skill and safety to patients.

57. Dr. Barnett's testimony was credible and based on sufficient facts, data, and expertise.

58. The Respondent's Proposed Recommended Order contends that the Petitioner cannot verify alcohol abuse, schizoid personality disorder, or schizotypal personality disorder for various reasons. To the contrary, the evidence was clear and convincing that the Respondent was abusing alcohol, albeit in an odd way, and suffers from a schizotypal personality disorder, as well as other mental disorders. As a result, he is unable to practice medicine with reasonable skill and safety to patients at this time, notwithstanding his apparent ability to have done so for many years in the past. In addition, it is clear from the evidence that the Respondent was terminated from PRN for failure to comply, without good cause for his non-compliance.

59. It is possible that the Respondent will be able to resume the practice of medicine with reasonable skill and safety to patients, with appropriate conditions, after he receives and completes appropriate treatment.

#### CONCLUSIONS OF LAW

60. The Petitioner regulates the practice of medicine in Florida under chapters 456 and 458, Florida Statutes, and Florida Administrative Code Chapter 64B-8.<sup>2/</sup> In this case, the Petitioner has charged the Respondent with violations of sections 458.331(1)(s) and 456.072(1)(hh).

61. Section 458.331(1)(s) subjects a physician to discipline for being unable to practice medicine with reasonable

skill and safety to patients by reason of illness or use of alcohol, drugs, narcotics, chemicals, or any type of material or as a result of any mental or physical condition. Section 458.331(1)(s) does not require a showing of actual harm to patients. In Major v. Department of Professional Regulation, 531 So. 2d 411 (Fla. 3d DCA 1988), the court held that the Board of Medicine need not wait for actual harm to patients to occur before it acts to protect the public interest by imposing penalties and restrictions on a physician under that statute. Discipline may be imposed under the statute even if a physician has managed to not let personal problems actually affect professional performance.

62. Section 456.072(1)(hh) subjects a physician to discipline for being terminated from a treatment program for impaired practitioners, that is overseen by an impaired practitioner consultant as described in section 456.076 for failure to comply, without good cause, with terms of the monitoring or treatment contract entered into by the physician, or for not successfully completing any drug treatment or alcohol treatment program.

63. Because it seeks to impose license discipline, the Petitioner has the burden to prove its allegations by clear and convincing evidence. See Dep't of Banking & Fin. v. Osborne Stern & Co., Inc., 670 So. 2d 932 (Fla. 1996); Ferris v.



Turlington, 510 So. 2d 292 (Fla. 1987). This "entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy." In re Davey, 645 So. 2d 398, 404 (Fla. 1994). See also Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983). "Although this standard of proof may be met where the evidence is in conflict, . . . it seems to preclude evidence that is ambiguous." Westinghouse Electric Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

64. The Petitioner has met its burden of proof as to the allegations in the Second Amended Administrative Complaint.

65. The Board of Medicine (Board) may impose the following penalties under section 456.072(2): suspension or permanent revocation of a license; restriction of practice or license; imposition of an administrative fine; issuance of a reprimand or letter of concern; placement of the licensee on probation for a period of time; corrective action; and/or a requirement that the practitioner undergo remedial education. However, a licensee affected by section 458.331(1)(s) must be given opportunities at reasonable intervals to demonstrate that he or she can resume the competent practice of medicine with reasonable skill and safety to patients.

66. Florida Administrative Code Rule 64B8-8.001(2)(s) provides that the Board shall, when it finds a licensee has violated section 458.331(1)(s) for the first time, impose penalties ranging from probation, to denial or indefinite suspension until the licensee is able to demonstrate ability to practice with reasonable skill and safety followed by probation, and an administrative fine from \$1,000 to \$5,000.

67. Rule 64B8-8.001(2)(ww) provides that the Board shall, when it finds a licensee has violated section 456.072(1)(hh) for the first time, impose penalties ranging from suspension until the licensee demonstrates compliance with all terms of the monitoring or treatment contract, and is able to demonstrate to the Board the ability to practice with reasonable skill and safety to be followed by a term of probation and a fine of \$1,000 to \$2,500, to revocation.

68. Rule 64B8-8.001(3) sets out aggravating and mitigating circumstances for determining whether to deviate from the penalty guidelines. It is unnecessary to make any findings on aggravating or mitigating circumstances because the recommendation is within the penalty guidelines, and the Board should not deviate from the routine range of discipline for the proven violation.

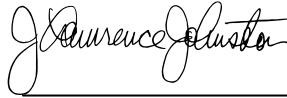
69. Under section 456.072(4), the Board, in its final order, shall assess costs related to the investigation and

prosecution of the case. Costs to be assessed under the statute 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 on this case.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that that the Board of Medicine enter a final order finding that the Respondent violated sections 458.331(1)(s) and 456.072(1)(hh); suspending his license until such time he appears before the Board of Medicine and demonstrates his ability to practice medicine with reasonable skill and safety to patients; imposing a period of probation for no less than ten years after the suspension, conditioned on compliance with a PRN monitoring contract and PRN recommendations; requiring the payment of an administrative fine in the amount of \$2,500; and awarding costs to the Department.

DONE AND ENTERED this 14th day of July, 2016, in  
Tallahassee, Leon County, Florida.



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J. LAWRENCE JOHNSTON  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 14th day of July, 2016.

ENDNOTES

<sup>1/</sup> Unless otherwise noted, all statutes refer to the Florida Statutes that were in effect in 2014 and 2015.

<sup>2/</sup> All rules are the version of the Florida Administrative Code that was in effect in 2014 and 2015.

COPIES FURNISHED:

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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.