

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF  
CHIROPRACTIC MEDICINE,

Petitioner,

vs.

Case No. 16-2313PL

STEVEN READ, D.C.,

Respondent.

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RECOMMENDED ORDER

On August 3, 2016, Administrative Law Judge Lisa Shearer Nelson of the Florida Division of Administrative Hearings conducted a duly-noticed hearing pursuant to section 120.57(1), Florida Statutes (2016), in Jacksonville, Florida.

APPEARANCES

For Petitioner: Octavio Simoes-Ponce, Esquire  
Candace Rochester, Esquire  
Prosecution Services Unit  
Florida Department of Health  
4052 Bald Cypress Way, Bin C-65  
Tallahassee, Florida 32399

For Respondent: Kevin Mercer, Esquire  
Wicker Smith  
Suite 2700  
50 North Laura Street  
Jacksonville, Florida 32202

STATEMENT OF THE ISSUES

The purpose of this proceeding is to determine whether Respondent violated section 460.413(1)(i), Florida

Statutes (2013), by committing sexual misconduct, as alleged in the Administrative Complaint. In the event that a violation is established, then the appropriate penalty to be imposed also must be established.

PRELIMINARY STATEMENT

On September 2, 2015, Petitioner, Department of Health (Petitioner or the Department), filed an Administrative Complaint against Respondent, Steven Read, D.C. (Respondent or Dr. Read), alleging that he failed to perform a statutory or legal obligation placed on a licensed chiropractic physician in violation of section 460.413(1)(i), by committing sexual misconduct in his care and treatment of patient K.W., in violation of section 460.412. Respondent submitted an Election of Rights form disputing the allegations of the Administrative Complaint, and requesting an administrative hearing pursuant to section 120.57(1). He also, through counsel, filed an Answer to the Administrative Complaint. On April 25, 2016, the Department referred the matter to the Division of Administrative Hearings for assignment of an administrative law judge.

The case was originally scheduled for hearing to commence on July 1, 2016. However, at the request of both parties, the case was rescheduled for August 3, 2016, and was completed that day. On July 22, 2016, the parties filed a Joint Pre-hearing Stipulation that contained stipulations of fact which, where

relevant, have been incorporated into the Findings of Fact below. Prior to hearing, Respondent filed three motions in limine directed toward Petitioner's Exhibits 2 through 4. The motions were denied by Order dated July 26, 2016.

At hearing, the Department presented the testimony of patient K.W., and Petitioner's Exhibits A through D were admitted into evidence. Petitioner's Exhibits B through D were admitted over Respondent's objection, but with the caveat that any hearsay statements contained within the exhibits would only be used to supplement or explain other evidence, in conformance with section 120.57(1)(c), but would not serve as the sole basis for a finding of fact unless they would be admissible over objection in a civil proceeding. Respondent testified on his own behalf and presented the testimony of Pam Mobarak and Clarissa Ragsdale Brown. Respondent's Exhibit 1 and Composite Exhibit 2 also were admitted into evidence.

The one-volume Transcript of the proceedings was filed with the Division of Administrative Hearings on August 22, 2016. Both parties timely filed Proposed Recommended Orders that have been carefully considered in the preparation of this Recommended Order. All statutory references are to the 2013 codification, unless otherwise indicated.

## FINDINGS OF FACT

Based upon the testimony and documentary evidence presented at hearing, the demeanor and credibility of the witnesses, and upon the entire record of this proceeding, the following factual findings are made:

1. Petitioner is the state agency charged with the regulation of the practice of chiropractic medicine pursuant to section 20.43 and chapters 456 and 460, Florida Statutes.

2. Respondent, Steven Read, D.C., is a licensed chiropractic physician in the State of Florida, and holds license CH 5979. Respondent is the owner of Ortega Chiropractic Clinic (Ortega) in Jacksonville, Florida, and his address of record is 5367 Ortega Boulevard, Jacksonville, Florida 32210.

3. Respondent has been practicing chiropractic medicine in the Jacksonville area for 27 years. He has been running his own office since 1996. Respondent has no prior discipline against his license.

4. Ortega is located in a two-story building. The downstairs includes a waiting room and check-in area, the office manager's office, and three patient examination rooms. Upstairs, there is a large rehabilitation room. Adjacent to the rehabilitation room is a small reception area and Respondent's office.

5. The rehabilitation room includes three examination tables, as well as several pieces of exercise equipment used to assist patients with stretching and strength-building exercises. Patients routinely receive treatment in the rehabilitation area as their condition warrants.

6. Ortega has what was described as an open-door policy when it comes to examination rooms. In other words, with the exception of when a patient is in an examination room changing clothes, the examination room doors remain open during treatment. This policy was in place at the time of the events giving rise to this case.

7. At the time of her initial visit to Ortega, patient K.W. was a 52-year-old female. She was in a car accident on or about April 4, 2014, and presented to Ortega on April 7, 2014, with pain in the neck, right shoulder, lower back, right hip, and right buttocks, along with persistent stiffness and pain in her lower right back and right posterior thigh. She described the constant pain as sharp and shooting, and stiffness with aching, at a level of 6 out of 10.

8. K.W. had nine treatments at Ortega related to her post-accident pain. Typically, she would receive electric muscle stimulation, moist heat, and massage therapy from a massage therapist. Respondent would provide chiropractic adjustments. Those adjustments were spinal adjustments, including her cervical

spine, thoracic spine, and lumbar spine, as well as the sacroiliac joint, and were done with K.W. lying on her back, stomach, and side.

9. During each visit, Dr. Read examined K.W., including performance of palpation and range of motion assessments, and performed an adjustment. K.W.'s condition improved over the course of her treatment with Dr. Read.

10. By all accounts, the first eight appointments consisted of the treatments described above and were unremarkable.

11. K.W.'s ninth appointment was April 23, 2014. Her appointment was at 8:30 in the morning. K.W. was wearing sweatpants and a tee shirt. Consistent with her normal practice, she was not wearing underwear.

12. Dr. Read was late coming to the office because of an issue related to his daughter's health. Dr. Read's massage therapist, Clarissa (then Ragsdale) Brown, began K.W.'s treatment that day with electric muscle stimulation, moist heat, and massage therapy. Dr. Read then came in, apologized for his tardiness, and began palpating K.W.'s glute muscle in her right buttocks. He worked on the glute muscle into the thigh both over and under her sweatpants. Patient K.W. had pulled down her sweatpants on the right-hand side to show Dr. Read the location of the pain in her buttocks.

13. While he was working on her glute muscle, K.W. believed that Respondent "swiped across my vagina lips a couple of times." K.W. could not say whether what she felt was actually Dr. Read's hands or whether it was contact between her body and her sweat pants. Either way, she considered the contact to be accidental. K.W. did not say anything to Dr. Read about this perceived contact.

14. At this visit, K.W.'s pain level had improved. As a result of this improvement, Dr. Read asked K.W. if she would like to begin active strengthening of her lower back on the flexion-extension machine in the rehabilitation center. She indicated her willingness to do so, and the two of them left the examination room and walked upstairs to the rehabilitation room.

15. As they walked up the stairs, Respondent noticed that K.W. was moving slowly going up the stairs. He asked her what was wrong, and K.W. told him that she had a pulling feeling in the back of her right leg.

16. The pulling that K.W. described was a new symptom to Dr. Read, and concerned him. He told her he needed to assess this symptom before they went further.

17. Dr. Read testified that he had K.W. lie face down on one of the examination tables to assess the pulling in her leg. In his assessment, Respondent wanted to differentiate between a sciatic nerve problem from the low back and a hip pathology. He

also wanted to rule out a deep vein thrombosis (DVT), which can be quite dangerous.

18. As part of his assessment, Dr. Read performed a Homan's test to check for DVT. To perform a Homan's test, K.W. lay prone on the table and Dr. Read rolled up her right pant leg and applied pressure to the calf. He also forcibly flexed the leg and dorsiflexed the ankle. The test involves stretching the calf and squeezing it: if the patient had a DVT, heat would most likely be detected, as well as excruciating pain.

19. Dr. Read also performed a FABRE Patrick test, which is for sacroiliac joint pathology. For this test, K.W. was lying on her back and Respondent flexed the right leg then abducted the right hip joint, while externally rotating the right hip. Dr. Read described it as being like sitting Indian-style, except that the patient is lying on their back. He would then flex one leg up toward the chest and then rotate the leg out, while at the same time applying downward pressure to the knee. If the patient has a hip-joint pathology, he or she would experience sharp pain in the hip as a result of this move.

20. Both the existence of the pulling sensation in K.W.'s leg and the performance of the Homan and FABRE Patrick tests are noted in Dr. Read's medical records for April 23, 2014. Both tests were negative, although tenderness was noted for K.W.'s right posterior and lateral thigh. Dr. Read had no knowledge



that K.W. believed he had touched her inappropriately at the time he dictated and signed his patient records for this visit.

21. During these tests, K.W. thought that, once again, Dr. Read had touched her vaginal area. However, she could not state whether it was her sweatpants or Dr. Read's hand that actually made contact. She testified that at one point, her sweatpants became uncomfortable and twisted, and were getting pulled and tugged in conjunction with the assessment that Dr. Read was performing. K.W. believed that in all, there were five to six contacts of short duration.

22. K.W. testified that when she and Dr. Read entered the rehabilitation area, she lay on one of the examination tables face down, and Dr. Read began working on her glute muscle again, separated her butt cheeks with his fingers and thumb, and touched her vaginal area a couple of times. She felt a light brushing sensation, but, as noted above, could not say that it was actually his hand that she felt. She still considered the perceived contact as unintentional.

23. K.W. also testified that Dr. Read asked her to turn over, and started working on the lower abdomen down into the groin area and the inner thigh. She testified that he again ran his hand across her vagina, and massaged her upper thigh and leg. She claimed that because her sweatpants had become twisted, when Dr. Read pulled her leg up, her leg came out of her sweatpants.

At this point, she interpreted the contact with her vaginal area as intentional.

24. K.W. did not tell Dr. Read that she thought he had touched her inappropriately. She testified that he came around to the front of her and bent over like he was going to kiss her. At that point, she said "no, don't go there." According to K.W., she asked him if he was finished, and he said yes, so she sat up, put her leg back into her pants, and engaged in "small talk." She testified that Dr. Read asked her if she would like to see his office, and she said sure. While she was in the reception area outside his office, she testified that he apologized for coming on to her, and she again told him "not to go there." After this exchange, she walked out and down the stairs to sign out.

25. Dr. Read, on the other hand, testified that as he was finishing the FABRE Patrick test, K.W. looked startled and got up off the table, saying "don't go there." He also was startled by her reaction, and apologized if she felt uncomfortable. He did not recall her leg becoming separated from her sweatpants, but stated that the orthopedic tests that he performed could be uncomfortable, and thinks that the FABRE Patrick maneuver was what she was referencing by her comment. He also did not recall her vagina ever being exposed, but thought if it happened, it

would be when she lowered her sweatpants to show him the location of her pain.

26. Dr. Read explained that he apologized to her because he would apologize to any patient who was uncomfortable at any time during an examination. Palpation as part of the assessment of K.W.'s pain would have involved pretty much the entire buttock area, but would not have gotten close to the vagina without a clothing barrier. He denied ever engaging in or attempting to engage in any type of inappropriate conduct or sexual contact, and specifically denied attempting to kiss K.W.

27. Dr. Read further testified that after performing the Homan and FABRE Patrick tests, he told K.W. that in light of her right leg pain, she would not use the flexion-tension machine as planned, but would return to passive treatment. K.W. assented. As they left the rehabilitation room, he went toward his office to unlock it. K.W. asked whether that was his office too, and he replied that it was, and that Ortega rented the whole building. After unlocking the door, he stepped to the side, and K.W. entered the reception area. As he entered his office, he repeated that they were done for the day and he would see her the following day. He stayed upstairs and K.W. went downstairs to check out.

28. K.W. stated that while she was checking out, Ms. Brown made the comment that she did not realize that K.W. was there.

Ms. Brown, on the other hand, said that K.W.'s checkout was routine and that K.W. did not say anything to her. Ms. Brown also testified that she saw Dr. Read go to the rehabilitation area with K.W. and that it is not unusual for Dr. Read to take patients to the rehabilitation area.

29. K.W. returned to Ortega for her next scheduled appointment on April 25, 2014. At that time, she told Dr. Read that she did not feel comfortable with him and would not be seeing him any longer. Dr. Read told her that under those circumstances, it was best that she saw someone else, and that Ortega would facilitate sending her records to another chiropractor.

30. Although she told him she was not comfortable, at no time did K.W. ever express to Dr. Read that she thought he had touched her inappropriately. She did not say anything to Dr. Read, his office manager Pam Mobarak, or Clarissa Brown that indicated anything inappropriate occurred at the April 23, 2014, office visit.

31. Approximately one month after the April 23, 2014, appointment, K.W. filed a complaint with the Department. Four months after the appointment, she filed a complaint with the Jacksonville Sheriff's Office.

32. In conjunction with the Sheriff's Office's investigation, K.W. participated in a controlled call in

September 2015. During this telephone call, there was an officer on the line giving K.W. questions to ask Dr. Read.

33. The call was answered by Dr. Read's office manager, Ms. Mobarak, who eventually transferred the call to Dr. Read. During the call, K.W. attempted to get Dr. Read to see her outside of the office. Dr. Read declined to do so. When she asked to see him, he inquired whether she was asking to see him professionally. The transcript of the controlled call does not indicate that Dr. Read ever admitted doing anything inappropriate with respect to K.W. At most, he tells her that it would not be advisable to see her given her pending complaint with the Department.

34. The Sheriff's Office did not file charges against Dr. Read.

35. This case represents the classic "he said/she said" scenario where the demeanor and credibility of the witnesses is key. No testimony was presented by the Department to establish the scope of chiropractic practice or the proper scope of a generally accepted chiropractic examination. Dr. Read testified that while a woman's private areas are in close proximity to those areas being examined and adjusted, there would be no reason to touch a woman's vagina.

36. After hearing the testimony of all of the witnesses presented and comparing the testimony with the written documents

admitted into evidence, there is no clear and convincing evidence that Dr. Read touched K.W. inappropriately, whether incidentally or on purpose.

37. K.W. acknowledged that she could not really tell what was touching her. It was just as likely that what she felt was the slide of cloth as her sweatpants moved against her skin. Moreover, her testimony conflicts with not only Dr. Read's testimony but also Ms. Brown's.

38. Dr. Read, Ms. Mobarak, and Ms. Brown all testified regarding Ortega's open-door policy. K.W., on the other hand, could not remember whether the examination room was open or closed. Similarly, the rehabilitation room, while upstairs, was clearly equipped so that multiple patients could be seen at one time. While there was no other person upstairs during K.W.'s treatment in the rehabilitation area, there was nothing to prohibit staff or others from entering or leaving the area. It is inconceivable that Dr. Read would initiate the type of inappropriate touching K.W. described in a rehabilitation room having easy access or an examination room with an open door.

39. While K.W. testified that Ms. Brown commented at check-out that she did not realize K.W. was there, Ms. Brown testified that she observed K.W. going upstairs with Dr. Read, and that it was routine practice for patients to go upstairs for rehabilitation exercise. K.W.'s testimony was not convincing.

She considered at least some of the perceived touching as unintentional, and at best could not confirm that it was in fact Dr. Read touching her. While she may have believed something or someone was touching her, her demeanor while testifying about this very intimate type of contact seemed almost casual, as opposed to exhibiting any type of distress or concern with the subject matter. She did not appear to have any real concern about much of the incident. Similarly, her testimony that she engaged in "small talk" with Dr. Read after his examination of her in the rehabilitation room is not consistent with what would be expected from a patient who believes that her physician has just touched her inappropriately or made a pass at her.

40. Dr. Read's testimony, on the other hand, was direct, consistent, and consistent with his medical records, which were dictated and signed at a time when he had no idea that K.W. perceived that he had touched her inappropriately. His description of the events is simply more plausible than K.W.'s and more believable.

41. It is found that Dr. Read did not, accidentally or otherwise, touch K.W.'s vagina during his examination of her on April 23, 2014.

42. It is found that Dr. Read did not engage or attempt to engage K.W. in sexual activity.

CONCLUSIONS OF LAW

43. The Division of Administrative Hearings has jurisdiction over the subject matter and the parties to this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016).

44. This is a proceeding whereby the Department seeks to suspend Respondent's license to practice chiropractic medicine. The Department has the burden to prove the allegations in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin. v. Osborne Stern & 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, but it "seems to preclude evidence that is ambiguous." Westinghouse Elec. Corp. v. Shuler Bros., 590 So. 2d 986, 988 (Fla. 1st DCA 1991).



45. The Administrative Complaint charges Respondent with violating section 460.413(1)(i) by violating section 460.412, which prohibits sexual misconduct in the practice of chiropractic medicine. Specifically, the Administrative Complaint states:

19. Section 460.413(1)(i), Florida Statutes (2013), subjects a chiropractor to discipline for failing to perform any statutory or legal obligation placed upon a licensed chiropractic physician.

20. Section 460.412, Florida Statutes (2013), provides that sexual misconduct in the practice of chiropractic means violation of the chiropractic physician-patient relationship through which the chiropractic 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 practice or the scope of generally accepted examination or treatment of the patient. Sexual misconduct in the practice of chiropractic medicine is prohibited. Pursuant to Section 460.412, Florida Statutes (2013), sexual misconduct in the practice of chiropractic medicine is prohibited.

21. Respondent used his relationship as K.W.'s chiropractic physician to induce or attempt to induce K.W. to engage, or to engage or to attempt to engage K.W., in sexual activity outside the scope of practice or the scope of generally accepted examination or treatment by:

- a. Touching K.W.'s vagina; and/or
- b. Attempting to kiss K.W.

22. Based on the foregoing, Respondent has violated Section 460.413(1)(i), Florida Statutes (2013), by violating Section 460.412, Florida Statutes (2013).

(emphasis added).

46. As a preliminary matter, it is doubtful that the facts alleged, even if proven, could form the basis for a violation of section 460.413(1)(i). Although agencies generally have discretion in interpreting statutes they administer, "this discretion is somewhat more limited where the statute being interpreted authorizes sanctions or penalties against a person's professional license." Elmariah v. Dep't of Prof'l Reg., 574 So. 2d 164, 165 (Fla. 1st DCA 1990). Statutes that are penal in nature must be strictly construed, with any ambiguity interpreted in favor of the licensee. Id. In particular, agencies are not permitted to extend the requirements of such statutes by construction. Capital Nat'l Fin. Corp. v. Dep't of Ins. & Treasurer, 690 So. 2d 1335, 1337 (Fla. 3d DCA 1997). This restriction on agency discretion is necessary to ensure that those whose conduct is regulated by such statutes have fair notice of what conduct is proscribed. Beckett v. Dep't of Fin. Servs., 982 So. 2d 94, 100 (Fla. 1st DCA 2008).

47. Section 460.413(1)(i), by its express terms, makes "failing to perform any statutory or legal obligation placed upon a licensed chiropractic physician" a basis for discipline. This section specifically refers to "failing to perform" a statutory or legal obligation, which necessarily leads to the conclusion that the legal obligation is something that a licensee is affirmatively required to complete. Omissions such as failing to complete

continuing education, failing to update practitioner profiles, or failing to report criminal convictions would be examples of legal obligations that are appropriately charged under this section.

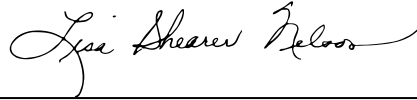
48. Section 460.412, however, prohibits sexual misconduct. It does not describe a legal obligation. To interpret this section as providing a legal obligation that has not been performed requires that the violation be characterized as failing to perform the responsibility to refrain from committing sexual misconduct. It makes little sense to cast a clear prohibition in terms of an affirmative obligation. Moreover, doing something that is prohibited is not the same as failing to do something that is required. It would make much more sense to charge sexual misconduct under section 460.413(1)(ff), which makes it a basis for discipline to "violat[e] any provision of this chapter or chapter 456, or any rules adopted pursuant thereto."

49. In any event, the facts proven at hearing do not support a conclusion that Respondent engaged in any conduct that would be a violation of section 460.412, much less a violation of section 460.413(1)(i).

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Chiropractic Medicine enter a final order dismissing the Administrative Complaint.

DONE AND ENTERED this 29th day of September, 2016, in  
Tallahassee, Leon County, Florida.



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LISA SHEARER NELSON  
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Division of Administrative Hearings  
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Filed with the Clerk of the  
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this 29th day of September, 2016.

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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.