

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
DENTISTRY,

Petitioner,

vs.

Case No. 17-2747PL

JUAN FRANCISCO SANCHEZ, R.D.H.,

Respondent.

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RECOMMENDED ORDER

On July 13, 2017, Administrative Law Judge J. Lawrence Johnston held the final hearing in this case by video teleconference at locations in Fort Myers and Tallahassee.

APPEARANCES

For Petitioner: Rob F. Summers, Esquire
Emily Bruno, Esquire
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For Respondent: Juan C. Santos, Esquire
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STATEMENT OF THE ISSUES

The issues are whether the Respondent, a licensed dental hygienist, should be disciplined for violating section 456.072(1)(v), Florida Statutes (2015),^{1/} by engaging or

attempting to engage in sexual misconduct, as defined by section 456.063(1); and, if so, the appropriate discipline.

PRELIMINARY STATEMENT

In 2016, the Petitioner, the Department of Health (Department), filed an Administrative Complaint alleging that the Respondent engaged or attempted to engage in sexual misconduct with five different patients. The Respondent disputed the allegations and asked for a disputed-fact hearing.

The hearing request was referred to the Division of Administrative Hearings for assignment of an Administrative Law Judge. Discovery was conducted, and the parties filed a Joint Pre-hearing Stipulation, which included a number of agreed facts. At the hearing, Dr. Juan Castellanos, the dentist who employed the Respondent as a dental hygienist, testified as did two patients. Three other patients were deposed, and their deposition transcripts were admitted in lieu of live testimony as Joint Exhibits 11, 12, and 13. Joint Exhibits 1 through 9 also were admitted in evidence. Joint Exhibit 10 was the transcript of the Respondent's deposition. It was admitted except for the parts relating to an alleged incident in 2003 because they were ruled inadmissible as similar fact evidence under section 90.404(2), Florida Statutes (2017), as were the Petitioner's proposed Exhibits 1 and 2. The Respondent also testified, and the Respondent's Exhibit 1 was admitted.

A Transcript of the final hearing was filed, and the parties filed proposed recommended orders (PROs). The Respondent's PRO was untimely, and the Respondent moved for acceptance of his late PRO. No opposition to the late PRO was filed, and both PROs have been considered.

FINDINGS OF FACT

1. Respondent is licensed as a dental hygienist in the state of Florida, having been issued license DH 16819.

2. Between November 2015 and February 2016, the Respondent was working as a part-time (Monday, Wednesday, Friday) dental hygienist at Coral Dental and Denture in Cape Coral (Coral Dental). Coral Dental is owned and operated by Juan Castellanos, D.D.S.

3. On January 13, 2016, a patient identified in the hearing transcript as B.M.1, a 77-year old female, had a cleaning performed by the Respondent. This was the patient's second visit to Coral Dental, but the first time having work done by the Respondent. Her first cleaning was performed by a female dental hygienist named Marley (sometimes spelled Marly in deposition transcripts), who is Dr. Castellanos' wife. The patient was not used to having cleanings done by a male dental hygienist and preferred the female dental hygienist. She asked the Respondent why he was doing the cleaning, and he told her it was because she was on his schedule.

4. During the course of the cleaning performed that day, the patient felt the Respondent touch her upper chest near her breasts with the back of his forearm once or twice. This made her feel uncomfortable. She also had several other complaints about the cleaning. When she checked out at the front desk after the appointment, she began crying. When asked why, she told the office manager what happened. (The office manager was Traci Roesler. Her name is misspelled Tracey in the hearing transcript and Rustler in Joint Exhibit 12, which is patient G.Z.'s deposition transcript.)

5. The office manager reported B.M.1's complaints to Dr. Castellanos. Dr. Castellanos, his wife, and his office manager viewed video taken by a surveillance camera in the cleaning room, but the Respondent was positioned with his back to the camera during the cleaning so that the view of what he was doing to the patient was blocked, and the video did not show any sexual misconduct.

6. Dr. Castellanos then went to the Respondent to ask if everything went alright with B.M.1's cleaning. The Respondent told him everything was fine, but the patient complained about everything. Dr. Castellanos told him about the complaint of sexual misconduct, which the Respondent denied. Dr. Castellanos told him that he had viewed the surveillance video, which did not show sexual misconduct. The Respondent understood that the video

exonerated him and that Dr. Castellanos was going to preserve the video in case the patient pursued her complaint. This was a misunderstanding. The video did not exonerate him, and it was not preserved. It operated on a 90-day loop, and the video would be erased and re-recorded 90 days later. In any event, there was an electrical fire in the office in late March of 2016, and the surveillance tapes were destroyed along with many other things in the office. No video recording was available for the Petitioner's eventual investigation or for evidence at the hearing.

7. After the episode with B.M.1, Dr. Castellanos decided to investigate by having his office staff conduct what he called a quality control survey of the Respondent's patients to determine whether any other patients had similar complaints. In the meantime, the Respondent continued to work for Coral Dental part-time.

8. Another patient seen by the Respondent for a cleaning on January 13, 2016, was identified in the hearing transcript by the initials L.B. At the time, L.B. was a 65-year old woman. L.B. testified by deposition that, during the cleaning, she was fully reclined in the dental chair, and the Respondent was positioned on her right side, near her torso rather than her head. The Respondent asked the patient to hold the suction hose instrument with her right hand while he was doing the cleaning. This opened

a space between her arm and her right breast. The Respondent placed a bib on the patient and patted the bib in place across her breasts, touching the area of and around her nipples. The Respondent also wiped his instruments rapidly over the patient's breast, using a stroking motion over her nipple. L.B. estimated that he did this approximately 30 times during the cleaning. Then, while the patient rinsed her mouth, the Respondent placed his hand under the bib, pinched the nipple of the patient's right breast, and pulled on it. L.B. estimated that he continued doing this for about a minute while saying, "very nice, very nice." Then, when Dr. Castellanos entered the room to examine the patient's mouth, the Respondent stood behind him and rubbed a folder against the insides of the patient's legs, which the dentist could not see. When the dentist turned around, the Respondent quickly removed the folder from between the patient's legs, pretended to be reviewing it, and acted as if everything was normal.

9. L.B. was in shock and disbelief at what the Respondent did during the cleaning. At first, she gave him the benefit of the doubt, but she became convinced as his actions escalated that they had to be intentional. She did not report them to Dr. Castellanos or his office staff at the time because she was afraid they would not believe her due to her age. She did tell her husband later the same day. She was going to stop using

Coral Dental and cancelled her next appointment, but she changed her mind and decided instead to continue going to Coral Dental but to stop being seen by the Respondent.

10. The next time L.B. was at Coral Dental was on February 11, 2016. On that visit, she noticed what appeared to be a surveillance camera in the examination room. It occurred to her that images captured by the camera could show the Respondent's sexual misconduct on January 13. When the office staff confirmed to her that there was a surveillance camera in the examination room, she decided to report the sexual misconduct.

11. When Dr. Castellanos was given L.B.'s report, he decided to terminate the Respondent. He did not look for video evidence from his surveillance system before making this decision.

12. Coincidentally, on the very next day, which was Friday, February 12, the Respondent was offered full-time employment as a dental hygienist for another dentist. He reported this to Dr. Castellanos when he arrived at work that day and gave notice that his last day working for Coral Dental would be February 26, 2016. He overheard Dr. Castellanos immediately ask his office manager to start calling potential replacements for the Respondent.

13. The Respondent went to work the following Monday, February 15, and was introduced to a woman who was going to be his replacement. Dr. Castellanos told the Respondent to show her all the tools and orient her on the job. When the Respondent left the office at the end of the day, he told Dr. Castellanos he would see him Wednesday, February 17, which was his next scheduled work day. Dr. Castellanos told him not to return on Wednesday because his employment with Coral Dental was over.

14. The Respondent thought his abrupt termination after giving two weeks' notice was unfair. Unaware of L.B.'s report, he mistakenly thought Dr. Castellanos was terminating him in retaliation for quitting and taking a job with another dentist. Dr. Castellanos denied this and maintained that he actually terminated the Respondent's employment because of the allegations of sexual misconduct.

15. After the Respondent's termination, Dr. Castellanos had his office manager continue with the quality control survey of the Respondent's patients, which was conducted by telephone. Dr. Castellanos instructed the office manager to ask a neutral, open-ended question about the quality of the Respondent's work and see what kind of response was given.

16. Apart from the telephone survey, Dr. Castellanos' office received a complaint from another patient, identified in the hearing transcript as B.M.2, on February 18, 2015. At the

time, B.M.2 was just shy of 64 years old. On that day, she accompanied her husband to an appointment and, while there, told Marley about the Respondent's sexual misconduct during the cleaning she received from him at her appointment a few weeks earlier, on February 5. Similar to L.B.'s experience, the Respondent positioned himself next to her waist instead of near her head, as other dental hygienists did, and he brushed over the nipple area of her right breast with the side of his arm every time he reached over her to perform work in her mouth, which no other dental hygienist ever did to her while performing a cleaning. The brushing motion would continue for several seconds to a minute at a time. This happened ten to 20 times during the cleaning. The Respondent also cleaned the mirror he was using by reaching under the bib that was laying on her chest, thereby touching her breast, and using the bib as a cloth to clean the mirror. This happened twice during the cleaning. This conduct made the patient very uncomfortable. She believed it was intentional because it was so repetitive. She did not say anything at the time because she was in shock that it would happen to her at a dentist's office.

17. On February 24, 2016, a 64-year old female patient, who is identified in the hearing transcript by the initials G.Z., responded to Coral Dental's telephone survey. When asked about her experience with the Respondent, she told Traci the office

manager that she had an appointment with the Respondent on December 2, 2015. While performing a deep cleaning, the Respondent stroked her right breast 20-30 times with his palm and forearm as he moved toward her face. She believed the motion was deliberate and intentional, but she did not react or say anything at the time. After the appointment, she told her husband about it. She testified that it made her feel uncomfortable, but she decided to give the Respondent the benefit of the doubt and made another appointment for the Respondent to finish the deep cleaning, which she was made to understand had to be done promptly.

18. G.Z. returned to complete her deep cleaning by the Respondent on December 16, 2015. The Respondent began to repeat the sexual misconduct by stroking the patient's breast several times. This time, the Respondent angrily sat up, moved his hand away from her breast, and swore at him, saying something like, "You touch me like that again, and you'll be wearing your balls like earrings." The Respondent pushed or guided her back down into the chair and finished the deep cleaning without further incident. When the patient left, the Respondent followed her to the front desk, tried to hug her, and referred to her as his "friend." She did not report the sexual misconduct at the time because she "just wanted to get out of there." Later that day, she told her husband what happened.

19. In the weeks following the deep cleaning, G.Z. had a "gradual reckoning" as the import of the Respondent's actions sunk in. She struggled to admit to herself that she had let herself be the victim of a sexual assault. She decided not to show for her next dental appointment at Coral Dental.

20. Another patient who responded to Coral Dental's telephone survey was a 66-year old female identified in the hearing transcript by the initials B.C. She reported what happened to her at her appointment on December 11, 2015. During the cleaning the Respondent performed on that day, he touched her breasts several times. First, he touched them with his hand while placing the bib on her. Then, he brushed his arm or wrist against her breast over and over as he cleaned her teeth. Sometimes, he lifted the patient's breast while reaching for his instruments. He also rested his arm on her breast. Altogether, he touched her breasts six to nine times. He also placed his elbow between the patient's thighs while scraping her teeth and moved his elbow up and down against the patient's crotch for 30 to 40 seconds, as if trying to stimulate her. After the cleaning, the Respondent walked B.C. to the front desk with his hand on the small of her back. At the front desk, the patient tried to avoid scheduling another appointment, but the Respondent put his arms around her from behind, pressed against her back, and told her she had to come back for more work. At the

Respondent's insistence, B.C. made another appointment. When she turned to leave, the Respondent patted and squeezed her buttocks. The office staff was unable to see what the Respondent was doing on the other side of the high front desk.

21. B.C. felt embarrassed, ashamed, and bad about herself in response to the Respondent's actions. She did not protest to the Respondent, saying she just squirmed in the dental chair and tried to "make [her]self smaller." She did not tell anyone at the dental office about the Respondent's sexual misconduct because she felt humiliated. She broke down crying on the way home in the car and told her husband about it.

22. Before the telephone survey was completed, with 50 more patients of the Respondent yet to be contacted, Dr. Castellanos notified the Petitioner what had been discovered so far. On March 24, 2016, the Petitioner's investigator spoke to Traci the office manager. On May 5, 2016, the investigator interviewed each of the five patients by telephone. The information they gave the investigator was consistent with their testimony at the final hearing and by deposition.

23. The Respondent does not deny that the conduct attributed to him by these patients constitutes intentional sexual misconduct. (This is clearly true as to the conduct attributed to him by L.B., B.C., G.Z., and B.M.2; it is less clear as to the conduct attributed to him by B.M.1.) Rather, he

claims that none of the reported conduct ever happened. Instead, he claims that Dr. Castellanos was angry at him for quitting and taking a full-time job working for another dentist, and that he had his office staff solicit and obtain false claims of sexual misconduct from these patients. The Respondent testified that he only heard about one of the patient complaints before he was fired and that he was fired right after he gave his two-week notice. He thought those facts would help him prove his defense. But the much stronger evidence was that the victims were telling the truth; that they did not complain sooner because they were embarrassed and ashamed; and that the timing of the termination of the Respondent's employment was merely coincidental with his giving two-weeks' notice.

CONCLUSIONS OF LAW

24. Section 456.072(1)(v), Florida Statutes (2015), authorizes the Board of Dentistry to discipline a licensee for engaging or attempting to engage in sexual misconduct, as defined and prohibited in section 456.063(1).

25. Section 456.063(1) defined sexual misconduct in the practice of a health care profession as a "violation of the professional relationship through which the health care practitioner uses such relationship to engage or attempt to engage the patient . . . in, or to induce or attempt to induce such person to engage in, verbal or physical sexual activity

outside the scope of the professional practice of such health care profession.”

26. Because the Petitioner 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 Elec. Corp. v. Shuler Bros., Inc., 590 So. 2d 986, 988 (Fla. 1st DCA 1991) (citations omitted).

27. The Petitioner proved by clear and convincing evidence that the Respondent violated section 456.072(1)(v) by, engaging or attempting to engage patients L.B., B.C., G.Z., and B.M.2 in, or attempting to induce them to engage in, verbal or physical sexual activity outside the scope of the professional practice of

dental hygiene, which is sexual misconduct, as defined by section 456.063(1). The evidence as to patient B.M.1 was not clear and convincing.

28. Under section 456.072(2), the Board of Dentistry can impose the following penalties for violations of section 456.072(1)(v): suspension or permanent revocation; restriction of practice; an administrative fine; a reprimand or letter of concern; probation; corrective action; and/or remedial education.

29. Florida Administrative Code Rule 64B5-13.005 (2015),^{2/} provided guidelines for the discipline to be imposed on a dental hygienist by the Board of Dentistry. The guidelines provided a penalty range for a first violation of section 456.072(1)(v) from a \$2,500.00 fine to revocation, or probation with conditions, and a \$10,000 fine. The penalty range for a second offense was from probation with conditions and a \$5,000 fine to suspension followed by probation with conditions, or revocation, and a \$10,000 fine. The penalty range for a third offense was from suspension followed by probation with conditions and an \$8,000 fine to revocation and a \$10,000 fine. Fla. Admin. Code R. 64B5-13.005(1)(uu).

30. Rule 64B5-13.005(2) set out aggravating and mitigating factors that can justify a deviation from the penalty guidelines. Consideration of those factors supports the penalty sought by the Petitioner, which is revocation and a \$2,500 fine.

31. Section 456.072(4), Florida Statutes (2017), provides that the costs of investigation and prosecution must be assessed when a violation is proven. At the end of the hearing, the Respondent argued that he should only be required to pay the costs relating to one of the two attorneys who represented the Petitioner at the final hearing. It is premature to decide issues relating to the reasonableness of the Petitioner's costs. Jurisdiction is retained for that purpose in the event the parties cannot reach an agreement as to costs, and a hearing becomes necessary.

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, Board of Dentistry: finding the Respondent guilty of four violations of section 456.072(1)(v), by violating section 456.063(1); revoking his license to practice dental hygiene; fining him \$2,500; and imposing the costs of investigation and prosecution. Jurisdiction to determine the costs of investigation and prosecution is retained for 30 days after rendition of the final order, in the event the parties cannot agree on them.

DONE AND ENTERED this 19th day of September, 2017, in
Tallahassee, Leon County, Florida.



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 19th day of September, 2017.

ENDNOTES

^{1/} Unless otherwise noted, statutory references are to the 2015 codification of the Florida Statutes, which was in effect at the time of the alleged offenses.

^{2/} Unless otherwise noted, rule references are to the 2015 codification of the Florida Administrative Code, which was in effect at the time of the alleged offenses.

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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.