

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
CHIROPRACTIC MEDICINE,

Petitioner,

vs.

Case No. 18-0263PL

HAMED KIAN, D.C.,

Respondent.

RECOMMENDED ORDER

Administrative Law Judge F. Scott Boyd, of the Division of Administrative Hearings, conducted the final hearing in this case on June 12, 2018, by video teleconference at sites in West Palm Beach and Tallahassee, Florida.

APPEARANCES

For Petitioner: Mary A. Iglehart, Esquire
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For Respondent: David W. Spicer, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent engaged in sexual misconduct in the practice of chiropractic medicine, in violation of section 460.412, Florida Statutes, or whether Respondent engaged in sexual misconduct while acting as a health care professional in violation of section 456.072(1)(v), Florida Statutes; and, if so, what is the appropriate sanction.

PRELIMINARY STATEMENT

On November 16, 2017, the Florida Department of Health (Petitioner or Department) served an Administrative Complaint against Hamed Kian (Respondent or Dr. Kian). Respondent disputed material facts alleged in the complaint and requested an administrative hearing. Two motions to continue were granted, after which the hearing was held as scheduled on June 12, 2018.

At the hearing, the parties offered two joint exhibits: J-1 and J-2. Petitioner offered 17 additional exhibits: P-1, the deposition testimony of Dr. Michael Shreeve, a chiropractor, as limited by pre-hearing Order; and P-2 through P-17. All exhibits were admitted, Exhibits P-2, P-3, and P-11 through P-16 over objection, with the caveat that hearsay would be used only to supplement or explain other competent evidence, and would not be sufficient in itself to support a finding of fact. Petitioner offered the live testimony of three witnesses: Patient J.K., a registered nurse and former patient of Dr. Kian; Detective Brian

Panczak of the Jupiter Police Department; and Robert Lorezca, a friend of J.K.'s family and independent massage therapist operating out of Dr. Kian's office. Respondent testified on his own behalf and presented the testimony of Dr. Stephen Alexander, a psychologist.

The one-volume Transcript was filed with the Division of Administrative Hearings on July 10, 2018. Both parties timely filed proposed recommended orders, which were considered in the preparation of this Recommended Order.

References to the Florida Statutes are to the 2016 version, unless otherwise indicated.

FINDINGS OF FACT

1. The Florida Department of Health, Board of Chiropractic Medicine, is the state agency charged with regulating the practice of chiropractic medicine in the state of Florida, pursuant to section 20.43 and chapters 456 and 460, Florida Statutes.

2. At all times material to this proceeding, Dr. Kian was a licensed chiropractic physician in the state of Florida, holding license number CH10343. He is subject to jurisdiction of the Board of Chiropractic Medicine. Dr. Kian has also been licensed to practice in the states of Kentucky and Kansas, and has practiced chiropractic medicine in Germany.

3. Dr. Kian's current address of record is 901 West Indiantown Road, Suite 20, Jupiter, Florida 33458. He received his chiropractic degree in 2009 from Life University in Georgia.

4. Dr. Kian operates a chiropractic clinic named Capstone Chiropractic, renting office space at that location to an acupuncturist named Kelvin Yu (Mr. Yu) and a massage therapist named Robert Lorezca (Rob). Dr. Kian has not previously been subject to disciplinary action by the Board of Chiropractic Medicine.

5. Patient J.K. has been recently licensed as a registered nurse. At the time of the incidents alleged in this case, she was a licensed practical nurse. Patient J.K. had received chiropractic treatment from three or four different chiropractors on about 20 to 30 occasions prior to meeting Dr. Kian. Patient J.K. frequently receives treatment by Rob for muscle soreness. Rob was a friend of Patient J.K.'s family, and they have known each other for many years.

6. Patient J.K. first met Dr. Kian after an appointment with Rob for a massage therapy session at Capstone Chiropractic. That meeting occurred months before the incident at issue. On that earlier occasion, Dr. Kian gave Patient J.K. a free chiropractic adjustment as a favor to Rob. The treatment was administered in an open area.

7. On April 25, 2017, when Patient J.K. first entered Capstone Chiropractic, she had a brief conversation with Rob, Dr. Kian, and Mr. Yu, and they discussed that they could open a spa because they offered so many different treatment options. She discussed a chiropractic adjustment with Dr. Kian, and he indicated he would adjust her after her massage with Rob. She also had an appointment with Mr. Yu.

8. After her massage, Dr. Kian took Patient J.K. to a table in the open room to adjust her. Although she had been undressed for the massage, she had put her clothes back on afterwards, and was fully clothed during the adjustment. Patient J.K. told Dr. Kian that she had pain in her lower back, as she frequently did, and that recently her right foot also had begun to hurt.

9. Following the adjustment, Dr. Kian offered Patient J.K. an additional trigger point release treatment. This would involve a treatment of the hamstring and the psoas, a muscle which runs from the lumbar spine to the femur. To administer the trigger point release, Dr. Kian was to perform a deep massage of the affected areas.

10. Patient J.K. asked Dr. Kian if the trigger point release massage required skin-on-skin contact, and Dr. Kian told her it did. She returned to the private massage room she had been in earlier with Rob. She undressed completely and lay face

down on the massage table, covered by a sheet. When Dr. Kian returned, they were the only persons in the room.

11. When Patient J.K. was on her stomach, Dr. Kian lifted the sheet to massage her hamstrings. Patient J.K. could feel that the sheet was "pulled all the way off," exposing her buttocks, so she pulled the sheet back to cover herself. Dr. Kian then readjusted the sheet "halfway" and proceeded to massage Patient J.K.'s hamstring. When massaging Patient J.K.'s hamstring, Dr. Kian gradually moved his hand between Patient J.K.'s legs, touching her labia.

12. When Patient J.K. was touched, she flinched away, pulled the sheet down, and said "whoa." She initially thought this first touch might have been unintentional. Dr. Kian began to work on her right foot a while, and then asked Patient J.K. to flip on to her back so that he could treat her psoas muscle. She turned on to her back underneath the sheet.

13. Dr. Kian then moved the sheet, exposing the lower half of Patient J.K.'s body. Patient J.K. again pulled the sheet back over to cover herself. Dr. Kian then readjusted the sheet, leaving Patient J.K.'s vaginal area partially exposed. Dr. Kian then began to massage the psoas muscle, working from the outside toward the inside of her body. Dr. Kian kept moving his hand toward the center, between Patient J.K.'s legs, and he again touched her labia.

14. Patient J.K. immediately looked up to see Dr. Kian leaning very closely over her lower body. She pulled the sheet to cover herself and said "whoa." Patient J.K. knew at that point that his exposing her and touching her was intentional because it was the second time that it had happened, and she was shocked. Dr. Kian immediately straightened up and walked up toward Patient J.K.'s head, saying he wanted to do an adjustment. He started to massage her left shoulder area, moving toward her breast. Patient J.K. told him that was okay, that was enough, and that she needed to go. Dr. Kian said, "Well, let me adjust your back, lean forward." Patient J.K. pulled the sheet under her arms and leaned forward. She did not hear any popping and so again said that it was time for her to go. Patient J.K. testified she just wanted to get out of there.

15. She turned her legs off of the bed to sit on its edge. As soon as she leaned forward, she testified that Dr. Kian was "literally right in my face." Patient J.K. believed that Dr. Kian intended to kiss her on the lips. She turned her head to the left, and he kissed her on the cheek. Patient J.K. testified that she believed Dr. Kian would have kissed her on the lips had she not turned her head.

16. Dr. Kian exited the room, and Mr. Yu came in immediately. Even though her mother's dental appointment was actually later in the afternoon, Patient J.K. told Mr. Yu that

she had to leave to go to it and would not have time for her acupuncture treatment. She just wanted to go.

17. As soon as Mr. Yu left, Patient J.K. dressed herself and went to the counter where Dr. Kian, Rob, and Mr. Yu were standing. She said nothing about what had happened to either Rob or Mr. Yu. She paid Rob for her massage and Dr. Kian for the adjustment. Dr. Kian was surprised by the offer to pay, but Patient J.K. insisted that he accept payment.

18. As Dr. Shreeve testified, the scope of practice for chiropractors requires that they do not intentionally expose any genital area or any part of a patient's body that does not need to be open to the doctor's skin-to-skin contact. In treating Patient J.K., there was no need to expose her buttocks or vaginal area. As Dr. Shreeve's testimony indicated, when properly treating the psoas muscle, a chiropractor's hands would not be near the vaginal area, and there was no justification for touching Patient J.K.'s labia in her treatment. Under all of the circumstances, it is clear that Dr. Kian used the chiropractor-patient relationship to engage in sexual activity outside of the scope of professional practice by intentionally exposing Patient J.K.'s buttocks and vaginal area and intentionally touching her labia.

19. Following the incident, Patient J.K. drove from Jupiter to her home in Vero Beach, a drive of about an hour and a half.

She reflected on what Dr. Kian had done. When she arrived in Vero Beach, Patient J.K. called her brother, who was a licensed chiropractor, and told him what had happened. She also called her Aunt Mary and a family friend, who was an attorney, and asked what she should do. He told her that she needed to go to the police. She tried a couple of times to contact Rob to discuss what had happened. She was unable to communicate with Rob and then decided not to try to contact him again about the incident. Patient J.K. decided to report Dr. Kian so that he could not sexually assault another patient.

20. Patient J.K. drove to the Jupiter Police Department on April 27, 2017, and reported the incident. An interview was scheduled for May 4, 2017, and conducted by Detective Panczak. Detective Panczak subsequently contacted the Department of Health.

21. Patient J.K.'s testimony was clear and convincing, and she was consistent in her recollection in all major respects. Minor differences in her accounts of events reflected that she was genuine in her efforts to tell her story as accurately as possible from her memory on each occasion and did not attempt to craft or memorize a single version of events. Patient J.K. did not struggle to remember the relevant facts. While her testimony that she believed Dr. Kian intended to kiss her on the lips following the trigger point release session was credible, it is

possible that Dr. Kian might have intended to kiss her on the cheek for a more benign purpose; and under all of the circumstances, it was not clearly and convincingly shown that his action in kissing her on the cheek constituted sexual misconduct.

22. Dr. Kian denied all allegations except kissing Patient J.K. on the cheek.^{1/} His assertions that she was never exposed, that his hands were never close to Patient J.K.'s vaginal area, and that her body shape and positioning would have prevented exposure of her vaginal area and prevented him from touching her labia were not credible and are rejected.

23. Revocation of Dr. Kian's professional license would have a very great effect upon his livelihood.

CONCLUSIONS OF LAW

24. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to sections 456.073(5), 120.569, and 120.57(1), Florida Statutes (2018).

25. The Department has authority to investigate and file administrative complaints charging violations of the laws governing licensed chiropractors. § 456.073, Fla. Stat.

26. A proceeding to suspend, revoke, or impose other discipline upon a license is penal in nature. State ex rel. Vining v. Fla. Real Estate Comm'n, 281 So. 2d 487, 491 (Fla. 1973). Petitioner must therefore prove the charges against

Respondent by clear and convincing evidence. Fox v. Dep't of Health, 994 So. 2d 416, 418 (Fla. 1st DCA 2008) (citing Dep't of Banking & Fin. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996)).

27. The clear and convincing standard of proof has been described by the Florida Supreme Court:

This intermediate level of proof entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witness 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. 1st DCA 1994).

28. Disciplinary statutes and rules "must always be construed strictly in favor of the one against whom the penalty would be imposed and are never to be extended by construction." Griffis v. Fish & Wildlife Conser. Comm'n, 57 So. 3d 929, 931 (Fla. 1st DCA 2011); Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136 (Fla. 1st DCA 1992).

29. Respondent is charged with engaging in sexual misconduct in the practice of chiropractic medicine, in violation of sections 456.072(1)(v) and 460.412. At the time of the incident, section 456.072(1)(v) prohibited health care professionals from engaging or attempting to engage in sexual misconduct as defined in section 456.063. Section 456.063 provided:

Sexual misconduct in the practice of a health care profession means violation of the professional relationship through which the health care practitioner uses such relationship to engage or attempt to engage the patient or client, or an immediate family member, guardian, or representative of the patient or client 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.

30. Section 460.413(1)(ff) provided that discipline could be imposed for violation of any provision of chapter 460. Section 460.412 prohibited sexual misconduct in the practice of chiropractic medicine and provided:

Sexual misconduct in the practice of chiropractic medicine 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.

31. Respondent's exposure of Patient J.K.'s buttocks and vaginal area and touching of Patient J.K.'s labia constitute sexual misconduct in the practice of chiropractic medicine, a health care profession.

32. Petitioner proved by clear and convincing evidence that Respondent engaged in sexual misconduct in violation of sections 456.072(1)(v) and 460.412.

33. Penalties in a licensure discipline case may not exceed those in effect at the time a violation was committed. Willner v. Dep't of Prof'l Reg., Bd. of Med., 563 So. 2d 805, 806 (Fla. 1st DCA 1990), rev. denied, 576 So. 2d 295 (Fla. 1991).

34. Sections 456.079(1) and 460.413(4) require the Board of Chiropractic Medicine to adopt disciplinary guidelines for specific offenses. Penalties imposed must be consistent with any disciplinary guidelines prescribed by rule. See Parrot Heads, Inc. v. Dep't of Bus. & Prof'l Reg., 741 So. 2d 1231, 1233-34 (Fla. 5th DCA 1999).

35. Florida Administrative Code Rule 64B2-16.003(1)(f) provided the following penalty guideline^{2/} for violation of sections 460.412 or 456.072(1)(v):

From a minimum of one (1) year suspension followed by two (2) years probation under terms and condition set by the board to include supervision and a fine of not less than \$1,000 per violation, to permanent revocation; from a minimum of letter of concern and/or a PRN referral for evaluation up to a maximum fine of \$10,000 and/or permanent revocation.

36. The language of paragraph (f) is ambiguous and confusing. It creates two different ranges, but fails to indicate to what offense each range is applicable. A casual reader might conclude that the first range was applicable to a violation of section 460.412 and the second to a violation of section 456.072(1)(v). However, that construction is

inconsistent with the structure of the other paragraphs under subsection (1) of the rule, such as paragraphs (g), (h), (i), (k), (m), (n), (o), (p), (q), (r), (t), (w), (z), (aa), (bb), (dd), or (ll), all of which also list more than one statute, but provide the same penalty range for violation of each, only delineating multiple ranges for separate subsets of offenses, for first or subsequent offenses, or for misdemeanor or felony offenses.

37. The ambiguity in the rule is interpreted in favor of Respondent. Beckett v. Dep't of Fin. Servs., 982 So. 2d 94, 100 (Fla. 1st DCA 2008). The guideline is therefore interpreted to range from a minimum of letter of concern and/or a Physician's Referral Network referral for evaluation up to a maximum of permanent revocation.

38. Rule 64B2-16.003(2) sets forth factors to be considered in imposing disciplinary action:

- (a) The danger to the public;
- (b) The number of unrelated and distinct offenses;
- (c) The actual damage, physical or otherwise, to the patient(s);
- (d) The length of time since the date of the last violation(s);
- (e) The length of time the licensee has practiced his or her profession;

- (f) Prior discipline imposed upon the licensee;
- (g) The deterrent effect of the penalty imposed;
- (h) The effect of the penalty upon the licensee's livelihood;
- (i) Rehabilitation efforts of the licensee including remorse, restitution, and corrective actions;
- (j) Efforts of the licensee to correct or stop violations or failure of the licensee to correct or stop violations;
- (k) Related violations against the licensee in another state, including findings of guilt or innocence, penalties imposed and penalties served;
- (l) The actual negligence of the licensee pertaining to any violation;
- (m) Any other mitigating or aggravating circumstances.

39. There is only a single offense, Respondent has practiced for several years, there is no evidence of any other incident or prior discipline, and suspension or revocation of Respondent's professional license would have a very great effect upon his livelihood.

40. On the other hand, the conduct by Respondent was intentional, and sexual misconduct in the practice of chiropractic medicine, a health care profession, constitutes a very great danger to the public.

41. Section 456.072(4) provides that in addition to any other discipline imposed for violation of a practice act, the board shall assess costs related to the investigation and prosecution of the case.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Department of Health, Board of Chiropractic Medicine, enter a final order finding Dr. Hamed Kian in violation of sections 456.072(1)(v) and 460.412, Florida Statutes; revoking his license to practice chiropractic medicine; and imposing costs of investigation and prosecution.

DONE AND ENTERED this 27th day of July, 2018, in Tallahassee, Leon County, Florida.



F. SCOTT BOYD
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of July, 2018.

ENDNOTES

^{1/} Respondent denied both attempting to kiss Patient J.K. on the lips and kissing Patient J.K. on the cheek in his Election of Rights and in Respondent's Response to Petitioner's First Request for Admissions. During his May 31, 2018, deposition and at hearing, he admitted to attempting to kiss Patient J.K. on the cheek and giving her a hug after she was dressed.

^{2/} In its Proposed Recommended Order, Petitioner cited also to rule 64B2-16.003(1)(11), which establishes a penalty range for generally violating provisions of chapters 456 and 460 or Board rules. Since paragraph (1)(f) provides a penalty guideline specifically applicable to the sexual misconduct provisions and is no more stringent, it controls.

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.