STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
MEDICINE,

Petitioner,

vs. Case No. 18-0430PL

NEELAM UPPAL, M.D.,

Respondent.
_______________________________/

RECOMMENDED ORDER

On May 3, 2018, Administrative Law Judge J. Lawrence Johnston of the Florida Division of Administrative Hearings ("DOAH") conducted a disputed-fact hearing by video teleconference in St. Petersburg and Tallahassee, Florida.

APPEARANCES

For Petitioner: Virginia Edwards, Esquire
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For Respondent: Neelam Uppal, M.D., pro se
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STATEMENT OF THE ISSUES

Whether the Respondent, a licensed physician, should be subject to discipline under section 458.331(1)(x), Florida Statutes (2016),[1/] for violating the Final Order entered by the

Board of Medicine in case DOH-15-0017-FOF-MQA by failing to pay the administrative fine and costs, as required; and, if so, the appropriate discipline.

PRELIMINARY STATEMENT

On November 6, 2017, the Petitioner filed an Administrative Complaint against the Respondent alleging violations of the Final Order. The Respondent disputed the charges and requested a hearing. The matter was forwarded to DOAH.

Allegations of a failure to verify completion of a medical records course were dropped, leaving the charge of failure to pay the fine and costs.

The hearing was held on May 3, 2018.

At the hearing, the Petitioner called one witness, and the Petitioner's Exhibits A through C, E through I, and L were received in evidence. The Respondent testified on her own behalf and offered her Exhibits 1 through 7, which were received in evidence. A Transcript of the final hearing was filed, and each party filed a proposed recommended order. The Respondent also filed a memorandum of law. The post-hearing submissions have been considered.

FINDINGS OF FACT

1. On January 8, 2015, the Florida Board of Medicine rendered Final Order DOH-15-0017-FOF-MQA. The Final Order resolved charges against the Respondent, a licensed physician who

holds license ME 59800, in the administrative complaints in DOH cases 2009-13497, 2011-06111, and 2011-17799.

2. The Final Order suspended Respondent's license for six months and required her to: pay a $10,000 administrative fine and $74,323.56 of costs within a year from reinstatement of her license; and document completion of a medical records course sponsored by the Florida Medical Association and five hours of continuing medical education in the area of ethics within a year from the filing of the Final Order. The Final Order also placed the Respondent on probation for two years, subject to specific supervision and board appearance requirements, and included the following tolling provision:

> In the event the Respondent leaves the State of Florida for a period of 30 days or more or otherwise does not or may not engage in the practice of medicine in the state of Florida, then certain provisions of the requirements in the Final Order shall be tolled and shall remain in a tolled status until Respondent returns to the active practice of medicine in the state of Florida.
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> * * *
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> Unless otherwise set forth in the Final Order, the following requirements and only the following requirements shall be tolled until the respondent returns to active practice:
>
> (A) The time period of probation shall be tolled.
>
> (B) The provisions regarding supervision whether direct or indirect by the

monitor/supervisor, and required reports from the monitor/supervisor shall be tolled.

3. It is clear from the language of the tolling provision that it did not apply to: the requirement to pay an administrative fine and costs within a year of license reinstatement; or the requirement to document completion of the medical records course and five hours of continuing medical education in ethics within a year of license reinstatement.

4. After entry of the Final Order, the Respondent left Florida and moved to New York. Initially, she practiced medicine in New York, using her New York license, and earned income doing so. However, New York initiated license disciplinary proceedings based on the Florida Final Order, and she was unable to continue to practice medicine in New York. She also had health issues that inhibited her practice of medicine.

5. By the terms of the Final Order, the Respondent's medical license was reinstated on July 8, 2015, and the fine and costs were due to be paid on July 7, 2016. The fine and costs were not paid by the due date.

6. Towanda Burnett, medical compliance officer employed by the Petitioner, contacted the Respondent in July and August 2017 concerning her apparent failure to comply with the terms of the Final Order.

7. As to the obligation to take approved courses of education, the Respondent took the position that she had taken the required courses, or had tried to take them, but was prevented from doing so by the Petitioner. However, she did not document her completion of the required courses, which resulted in one of the charges in the Administrative Complaint filed on November 6, 2017. Eventually, during preparation for the hearing in this case, the Petitioner determined that the Respondent was in compliance with that obligation, and that charge was dropped.

8. As to the fine and costs, the Respondent took the position that her obligation to pay was stayed because she filed for bankruptcy. Information regarding the Respondent's bankruptcy proceedings was reviewed by attorneys in the Petitioner's Prosecution Services Unit, who determined that the Respondent's obligation to pay was not stayed. The Respondent disagreed and declined to make any payments.

9. One of the Respondent's defenses relies on her direct appeals from the Final Order in the Florida courts. However, at no time did any of the appellate courts stay the Final Order. Ultimately, the direct appeals were denied.

10. The Respondent also argues that the Final Order is "void," "invalid," or "moot" for "non-compliance of the mandate" issued by the Second District Court of Appeal after her appeals were denied. This argument is confusing and unpersuasive.

11. At times, the Respondent seems to be arguing that the tolling provision applied to the fine and costs and that the "mandate of the Final Order" was violated by the Petitioner by its attempt to enforce the fine and costs assessment in the Final Order before the Respondent resumed the practice of medicine in Florida. This argument has no merit because the tolling provision clearly only applies to her probation--i.e., her two-year probation runs from the time she resumes the practice of medicine in the state of Florida.

12. At other times, the Respondent seems to be saying her two-year probation was not tolled, but rather began when she resumed the practice of medicine in New York for a period of time, and was already over, placing the Petitioner in violation of the "mandate of the Final Order" by taking the position that the Respondent was still on probation. This argument also has no merit.

13. It is possible that the Respondent's argument relates to her testimony that an employee of the Petitioner prevented her from taking a continuing education course required by the Final Order. However, the charge of failure to document the required course has been resolved and dropped. In any event, whatever happened with regard to the Respondent's attempts to take the course did not "void" or "moot" the Final Order.

14. The Respondent also attempted to attack the Final Order in litigation she filed as case 1:16-cv-03038-VSB in federal district court in New York on April 25, 2016. The Respondent's complaint named the Florida Board of Medicine and the Florida Department of Health as defendants, along with the New York Department of Health. The Florida agencies contested the court's jurisdiction over them, and an amended complaint filed on September 22, 2016, dropped the Florida Department of Health and Florida Board of Medicine as parties. On February 14, 2017, the Respondent sought a stay and injunctive relief against the remaining defendant in that case, but the New York court denied the request on September 30, 2017. On October 16, 2017, the Respondent appealed this ruling to the United States Court of Appeals, Second Circuit, in case 17-3358, listing the Florida Department of Health and the Florida Board of Medicine as appellees. (At the hearing in this case, the Respondent expressed that she was surprised to learn that the Florida agencies had been dropped from this litigation and that she intended to further amend to add them back.) The Respondent has repeatedly requested extensions of time, and the matter was still in court at the time of the hearing in this case. Neither federal court ever stayed the Final Order. This federal litigation is not an impediment to enforcement of the Final Order by the Petitioner.

15. The Respondent also defends against the charges in this case based on various bankruptcy filings she has made.

16. In 2015, the Respondent filed for chapter 13 bankruptcy in the United States Bankruptcy Court, Middle District of Florida, Tampa Division, in case number 8:15-bk-00594-CPM. She listed the Department of Health as a creditor. On June 3, 2015, the case was dismissed on motion of the trustee, and any funds held by the trustee were ordered to be returned to the debtor.

17. On August 15, 2016, the Respondent filed for bankruptcy under chapter 13 in United States Bankruptcy Court for the Southern District of New York (Manhattan Division) in case 16-12356-cgm. The Respondent again listed the Department of Health as a creditor, and the Respondent believed the bankruptcy automatically stayed her obligations to pay the fine and costs under the Final Order, as she told the Petitioner's compliance officer, Ms. Burnett, when she contacted the Respondent in the summer of 2017.

18. The Petitioner points to filings the Respondent made in in case 16-12356-cgm as evidence of the Respondent's supposed knowledge that no automatic stay was in effect. Specifically, on September 13, 2017, the Respondent filed an Emergency Motion for Stay Pending Appeal, or in the alternative for temporary Administrative stay, which was denied by the bankruptcy court on September 19, 2017. However, the docket entries introduced into

evidence in this case are difficult to decipher, and it is not clear that they refer to a stay of the collection of the fine and costs imposed by the Final Order.

19. On November 22, 2017, the New York bankruptcy court dismissed the Respondent's case 16-12356-cgm. On November 27, 2017, the Respondent appealed the dismissal to the United States District Court for the Southern District of New York. The appeal was assigned case number 1:17-cv-09429-JGK. On December 1, 2017, the Respondent filed in case 16-12356-cgm for a stay pending appeal, which was denied by the bankruptcy court on December 21, 2017. On February 6, 2018, the Respondent moved in district court for a stay pending appeal, or in the alternative, for a temporary administrative stay. On March 21, 2018, the district court affirmed the dismissal of the bankruptcy case, and denied the motion for a stay pending appeal as moot.

20. On March 30, 2018, the Respondent sought review of the district court's affirmance in the federal Second Circuit Court of Appeals. The case number of the circuit court appeal is 18-890. On March 30, 2018, the Respondent filed in case 18-890 for an emergency injunction and stay; the filing was defective, for unspecified reasons, according to a court docket entry. On April 6, 2018, the Respondent filed in case 18-890 for a stay pursuant to 11 United States Code section 362(c)(4)(c); this

filing also was defective, for unspecified reasons, according to the docket.

21. In December 2017, after the New York bankruptcy court dismissed case 16-12356-cgm, the Respondent filed a second bankruptcy case in the United States Bankruptcy Court for the Middle District of Florida, Tampa Division. That filing was designated case 8:17-bk-10140. On January 11, 2018, the Florida bankruptcy court dismissed case 8:17-bk-10140 with prejudice; labeled the Respondent an "abusive serial bankruptcy filer"; "enjoined, barred, and prohibited [the Respondent] from commencing any bankruptcy petition" for a period of two years; and caused notice to be given that state courts should not halt debt collection proceedings based on any bankruptcy petition the Respondent attempted to file in violation of the court's injunction against her. On January 31, 2018, the Florida bankruptcy court denied the Respondent's motion for reconsideration.

22. The Respondent's bankruptcy filings are not a complete defense against the Petitioner's charges. The Respondent was in violation of the Final Order for failure to pay the fine and costs as of July 7, 2016. No bankruptcy stay was in effect at that time. However, the Petitioner's collection of those debts was stayed from August 8, 2016, through November 22, 2017. See 11 U.S.C. § 362(a) (2016).

23. The Petitioner’s compliance office has a procedure for a payment plan when fines and costs cannot be paid at once. In order to obtain a payment plan, the licensee must propose a payment plan, with specific amounts and due dates, and submit documentation, including: two denial letters from any financial or loan institutions; a copy of the 1040 tax return; copies of bank statements; and any other relevant financial information. Once that information is received, it is sent to the chairperson of the Probation Committee of the Board of Medicine, who either approves or denies the payment plan. The Respondent did not submit the required information, pay anything towards the fine and costs, or express her intention to pay.

CONCLUSIONS OF LAW

24. Because the Petitioner seeks to impose license discipline, it has the burden to prove the 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).

25. Disciplinary statutes and rules "must be construed strictly, in favor of the one against whom the penalty would be imposed." Munch v. Dep't of Prof'l Reg., Div. of Real Estate, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992); see Camejo v. Dep't of Bus. & Prof'l Reg., 812 So. 2d 583, 583-84 (Fla. 3d DCA 2002); McClung v. Crim. Just. Stds. & Training Comm'n, 458 So. 2d 887, 888 (Fla. 5th DCA 1984)("[W]here a statute provides for revocation of a license the grounds must be strictly construed because the statute is penal in nature. No conduct is to be regarded as included within a penal statute that is not reasonably proscribed by it; if there are any ambiguities included, they must be construed in favor of the licensee." (citing State v. Pattishall, 126 So. 147 (Fla. 1930)).

26. The grounds proven in support of the Petitioner's assertion that the Respondent's license should be disciplined must be those specifically alleged in the Amended Administrative Complaint. See e.g., Trevisani v. Dep't of Health, 908 So. 2d 1108 (Fla. 1st DCA 2005); Cottrill v. Dep't of Ins., 685 So. 2d 1371 (Fla. 1st DCA 1996); Kinney v. Dep't of State, 501 So. 2d 129 (Fla. 5th DCA 1987); Hunter v. Dep't of Prof'l Reg., 458

So. 2d 842 (Fla. 2d DCA 1984). Due process prohibits the Petitioner from taking disciplinary action against a licensee based on matters not specifically alleged in the charging instruments, unless those matters have been tried by consent. See Shore Vill. Prop. Owners' Ass'n, Inc. v. Dep't of Envtl. Prot., 824 So. 2d 208, 210 (Fla. 4th DCA 2002); Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

27. Section 458.331(1)(x), Florida Statutes (2016),[2/] provides that the violation of a lawful order of the Board of Medicine previously entered in a disciplinary hearing is a ground for denial of a license or disciplinary action, as specified in section 456.072(2).

28. The Petitioner alleges that the Respondent violated section 458.331(1)(x) by failing to comply with the Final Order in case numbers 2009-13497, 2011-06111, and 2011-17799 when she failed to pay, or set up payment arrangements for, the administrative fine and costs imposed by it. The Petitioner has proven the alleged violation by clear and convincing evidence. However, while the Respondent did not prove she had a complete defense to the charges, the Petitioner's collection of the fine and costs was stayed between August 16, 2016, and November 22, 2017, because of the Respondent's bankruptcy case 16-12356-cgm in New York. See 11 U.S.C. § 362(a) (2016). This means a stay was in effect from a month after the debt became due until almost a

month after the filing of the Administrative Complaint in this case.

29. The Petitioner suggests in its proposed recommended order that the appropriate discipline for this violation is a reprimand, a $1,000 administrative fine, and the suspension of the Respondent's medical license until she pays the outstanding administrative fines and costs in full. This penalty is within the broad penalty guideline in Florida Administrative Code Rule 64B8-8.001(2)(x)2. (Rev. Jan. 1, 2015),[3/] except for the $1,000 administrative fine, which is below the guideline. A deviation below the guideline can be justified by the severity of the offense, the absence of any evidence of potential for patient harm, and consideration of the aggravating and mitigating factors in section (3) of the rule, including the circumstances of the New York bankruptcy proceeding. In addition, the Board should consider allowing the Respondent to apply for a payment plan, with the required documentation as described in Finding 23, supra, and should consider lifting her license suspension if a payment plan is approved by the chairperson of its Probation Committee.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Board of Medicine enter a final order:

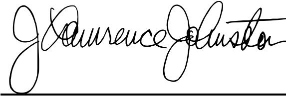
(1) finding that the Respondent violated section 458.331(1)(x), Florida Statutes (2016), by failing to pay the administrative fine and costs imposed, as required by Final Order DOH-15-0017-FOF-MQA;

(2) issuing a reprimand against the Respondent's Florida medical license;

(3) imposing an administrative fine of $1,000 (in addition to the administrative fine imposed by Final Order DOH-15-0017-FOF-MQA); and

(4) suspending the Respondent's Florida medical license until such time as she pays all outstanding administrative fines and costs in full, or until the chairperson of the Board's Probation Committee approves a payment plan.

DONE AND ENTERED this 19th day of June, 2018, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of June, 2018.

ENDNOTES

[1/] The Administrative Complaint alleged a violation of this section of the Florida Statutes (2015-2016). The alleged violation occurred when the Respondent failed to pay the administrative fine and costs by July 8, 2016. For that reason, the 2016 codification of the Florida Statutes applies to the alleged violation. In any event, there was no change in the pertinent provision of the statute between 2015 and 2016

[2/] See endnote 1.

[3/] This is the last revision of the rule, and the one that applies to the Respondent’s violation.

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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.