STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH,
BOARD OF DENTISTRY,

Petitioner,

vs. Case No. 18-0659PL

MATTHEW MOYE, D.D.S.,

Respondent.
_____/

RECOMMENDED ORDER

On April 23, 2018, a final hearing was held in Tallahassee, Florida, before E. Gary Early, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Octavio Simoes-Ponce, Esquire
John A. Wilson, Esquire
Department of Health
Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265

For Respondent: Edwin A. Bayó, Esquire
Paul Drake, Esquire
Grossman, Furlow & Bayó, LLC
2022-2 Raymond Diehl Road
Tallahassee, Florida 32308

STATEMENT OF THE ISSUES

The issues to be determined are whether Driving Under the Influence (DUI) with property or personal damage and DUI manslaughter, are crimes that relate to the practice of, or the

ability to practice, dentistry, within the meaning of section 466.028(1)(c), Florida Statutes, as alleged in the First Amended Administrative Complaint and, if so, the appropriate penalty.

PRELIMINARY STATEMENT

On January 23, 2018, Petitioner, Department of Health (Department or Petitioner), filed its First Amended Administrative Complaint (Administrative Complaint) against Respondent, Matthew Moye, a licensed doctor of dental surgery. The complaint charged Respondent with having pled guilty and having been convicted of two counts of misdemeanor DUI with property or personal damage and two counts of felony DUI manslaughter, alleged to be crimes that relate to the practice of, or the ability to practice, dentistry, in violation of sections 456.072(1)(c) and 466.028(1)(c) and (mm).

On February 1, 2018, Respondent filed a Petition for Hearing Involving Disputed Issues of Material Fact (Petition) in which he disputed that the crimes pled in the Administrative Complaint related in any manner to his practice of dentistry, or that they serve as a reasonable indication of Respondent's ability to safely practice dentistry, and requested an administrative hearing.

On February 9, 2018, the Petition was referred to the Division of Administrative Hearings. The final hearing was scheduled for April 23, 2018.

On April 13, 2018, Petitioner filed a Request for Official Recognition/Judicial Notice with regard to a number of Florida Statutes, Florida Administrative Code rules, Florida state appellate court opinions, and the certified court records in Hillsborough County Case Number 10-CF-016865. The Request was granted on the record of the final hearing. At the final hearing, Respondent requested official recognition of a final order in Department of Health Case No. 2002-25325. The request was granted.

On April 18, 2018, the parties filed their Joint Pre-hearing Stipulation (JPS), which contained 10 stipulated facts. Those facts have been incorporated in this Recommended Order. The JPS also contained nine stipulations regarding issues of law on which there was agreement. Those stipulations, which are determined to accurately set forth applicable issues of law, are incorporated in this Recommended Order. Among the issues of law was a stipulation that Petitioner's expert witness is qualified to testify as to the practice of dentistry in Florida, and he is so accepted.

The final hearing was convened on April 23, 2018. At hearing, the Department offered the testimony of Jay Andrew Johnson, D.D.S. who is, by stipulation and credentials, accepted as an expert in the practice of dentistry. The Department offered Petitioner's Exhibits A through C in evidence.

Petitioner's Exhibit B is the deposition transcript of Respondent. Respondent is currently incarcerated, and was unavailable to attend the hearing, and is a party to this proceeding. The use of the deposition is authorized by Florida Rules of Civil Procedure 1.330(a) and Florida Administrative Code Rule 28-106.206, and will be considered and given weight as though Respondent testified in person at the final hearing.

Respondent offered no witnesses, and one exhibit.

The one-volume final hearing Transcript was filed on May 4, 2018. Both parties timely filed Proposed Recommended Orders that were considered in preparation of this Recommended Order.

This proceeding is governed by the law in effect at the time of the commission of the acts alleged to warrant discipline, i.e., Respondent's November 7, 2013, plea and conviction. See McCloskey v. Dep't of Fin. Servs., 115 So. 3d 441 (Fla. 5th DCA 2013). Thus, references to statutes are to Florida Statutes (2013), unless otherwise noted.

FINDINGS OF FACT

1. The Department of Health, Board of Dentistry, is the state agency charged with regulating the practice of dentistry in the state of Florida, pursuant to section 20.43, and chapters 456 and 466, Florida Statutes.

Stipulated Facts

2. At all times material to this proceeding, Respondent, Matthew Moye, D.D.S., was a dentist within the State of Florida, having been issued license number DN16032 on August 2, 2002.

3. Respondent's address of record with the Department is Marion Correctional Institution, Post Office Box 158, Lowell, Florida 32663.

4. Respondent began his private dental practice, Big Bend Dental, in 2009.

5. Respondent offered the following procedures in his practice: composite fillings; crown and bridgework, including preparing teeth for crowns; root canals; dentures; extractions, including molar and wisdom teeth extractions; Botox; and lip fills.

6. Respondent has never been the subject of a disciplinary action against his license to practice dentistry.

7. On or about October 31, 2010, while under the influence of alcohol, Respondent was involved in a motor vehicle collision in which he lost control of his vehicle on the Harbor Island Bridge in Tampa, Florida.

8. Respondent struck three people with his vehicle, killing two, and caused property damage.

9. On November 7, 2013, Respondent pled guilty to, and was convicted of, two counts of first-degree misdemeanor DUI with

Property or Personal Damage and two counts of second-degree felony DUI Manslaughter based on the above incident.

10. Respondent's sentence included:

a. 12 years of incarceration;

b. 10 years of probation following release from incarceration; and

c. Permanent revocation of driver's license.

11. Respondent has not practiced dentistry since being incarcerated.

Other Findings of Fact

12. Dr. Johnson testified that dentists operate from a position of trust, and that there is an expectation of professionalism and good judgment on the part of persons holding a license to practice dentistry. Upon his review of the police reports and court documents related to Respondent's crime, he opined that the acts described therein evince recklessness and a lack of good judgment. As a result, he believed that the crimes affected Respondent's practice or ability to practice dentistry.

13. On cross-examination, Dr. Johnson candidly admitted that his opinion as it related to DUI Manslaughter was based on how he felt about that crime, and on his personal principles. He reviewed no journals or professional publications. He did not review court decisions or Board of Dentistry final orders. He was aware of no general consensus in the dental community as

to whether DUI Manslaughter is a crime related to the practice or ability to practice dentistry. He had no training in substance abuse impairment, and could not state whether a single DUI could be used to diagnose alcohol abuse or impairment. As to evaluating whether an act affects the practice of dentistry, Dr. Johnson testified that "at some point along the way, there's always going to be personal opinion. You know, could be somebody like mine. Could be a personal opinion on the Board of Dentistry."

14. What is clear from the totality of Dr. Johnson's testimony is that his opinions reflect his personal belief as to whether DUI Manslaughter affects the practice or ability to practice dentistry, an opinion influenced by his self-perception as "a very black-and-white person." Despite the stipulation as to his expertise, Dr. Johnson could identify nothing in his education or experience that made him an expert in crimes that affect the practice of dentistry, other than his years as an experienced, well-regarded, and respected oral and maxillofacial surgeon.

15. The legislature's 2013 amendment of section 90.702, Florida Statutes, was intended to replace the Frye standard of opinion testimony, which allows "pure opinion" testimony, with the Daubert standard, which does not. Chapter 2013-107, sections 1 and 2, Laws of Florida. In 2017, the Supreme Court

declined to adopt the legislative change under its authority over procedural matters in Florida courts. In re: Amendments to the Fla. Evidence Code, 210 So. 3d 1231 (Fla. 2017). Whether the Supreme Court's decision to decline to adopt the Legislature's Daubert amendment bears on the issue at DOAH, an executive branch agency, is an interesting question, but one for another day. In this case, Dr. Johnson's testimony comes down to a matter of weight. Were his testimony directed to a particular standard-of-care on the part of a licensed dentist, the undersigned would have no problem accepting his years of experience as a suitable basis for an opinion on that issue.

16. Dr. Johnson's opinion that the "act" of deciding to drive a vehicle while intoxicated is evidence of recklessness or lack of judgment that can reasonably affect the ability to practice dentistry. However, Dr. Johnson's subjective belief that the unintentional outcome of that act evinces a greater lack of trustworthiness, or shows a higher degree of reckless behavior or poor judgment, does not rise to the level of competent, substantial evidence to support a finding that DUI Manslaughter is any more related to the practice of dentistry than is a DUI.

17. There is insufficient evidence to support a finding that the act of driving under the influence of alcohol, regardless of the outcome of that act, is directly related to

Respondent's ability to provide effective and safe treatment of his patients.

18. As it pertains to this case, the behavior that reflects on Respondent was his decision to get behind the wheel of his car while intoxicated. That is the conduct for which there is some evidence that demonstrates that Respondent exhibited "reckless behavior" and a "lack of judgment."

19. Counsel for Petitioner presented a well-researched and articulate analysis of the reasons underlying the legislature's policy decision to classify incidents of impaired driving resulting in death as manslaughter. The basis for that policy decision is that a death resulting from DUI is the result of a presumptively negligent and culpable act, i.e., getting behind the wheel of a vehicle. However, the cases cited by Petitioner highlight the "policy choice" made by the Legislature to impose a heightened penalty for a DUI that results in death. The citation to State v. Hubbard, 751 So. 2d 552 (Fla. 1999), is certainly apropos, and worthy of repeating:

> We recognize that the Legislature accords disparate treatment to DUI and DUI manslaughter, for example. On the one hand, driving while drunk is a misdemeanor which requires at least three convictions to earn a year's imprisonment. § 316.193(2)(a) 2.c., Fla. Stat. (1995). It will only become a third-degree felony carrying a potential of five years' imprisonment upon a fourth or subsequent conviction. § 316.193(2)(b), Fla. Stat. (1995). In

> contrast, a drunk driver whose operation of his or her automobile causes the death of another is guilty of a second-degree felony, carrying a potential fifteen-year prison term. The Legislature clearly has made the policy choice to impose more severe sanctions on the drunk driver who kills someone than on the drunk driver who is fortuitously caught before possibly killing someone. While that may seem a bit unfair, it is hardly irrational.

Id. at 565 n. 29. (emphasis added).

20. There has been no such express legislative "policy choice" here. Rather, as it relates to this case, the Legislature has chosen to sanction conduct only to the extent that it relates to the practice of dentistry.[1/]

21. The motivation for legislative policy decisions and regulatory decisions are entirely different. See, Nadia N. Sawicki, Character, Competence, and the Principles of Medical Discipline, 13 J. Health Care L. & Pol'y 285, 295 (2010). ("Unlike criminal law, which is aimed at punishing wrongdoers, or civil law, which is aimed at victim compensation, professional discipline seeks to protect public welfare by incapacitating or rehabilitating dangerous physicians.").

22. The fact that the Legislature elected to punish DUI Manslaughter more severely than DUI based on the result of the act is not sufficient grounds to impose a different regulatory penalty for the same "act" based on the result. There has been no express "policy choice" by the Department that an act is more

worthy of a different regulatory sanction based on its result. Again, it is the voluntary act of driving while intoxicated that reflects on the ability to practice dentistry, not the unintended, even tragic, result.

23. The tragic outcome of Respondent's reckless act of driving while impaired, though it certainly affects how Respondent's behavior is treated from a criminal perspective, has little to do with whether it affects the clinical quality of his work, the quality of his patient care, or his ability to practice dentistry.

24. The nature of the violation in this case has fairly been characterized as one of "character," and not "competence." As observed by Professor Sawicki, "many of the most serious disciplinary actions taken on the basis of criminal convictions involve criminal misconduct with no immediately apparent impact on patient safety or public health." Sawicki, supra at 304.

25. The incident here was not shown to have any effect on Respondent's technical qualifications or abilities to practice dentistry. There was no suggestion that the DUI was the result of a broader pattern of alcohol abuse that affected Respondent's practice of dentistry at the time of the incident. Given the terms of his probation after he is released -- neither driving nor alcohol consumption will be allowed -- there will be no possibility of a recurrence of the violation. Thus, the

violation is directed to societal issues of trust and judgment, rather than ability and competence.

26. The evidence in this case is sufficient to demonstrate that the act of driving while impaired is one that generally demonstrates recklessness and a lack of good judgment, and that such attributes can be correlated to one's ability to effectively practice dentistry.

27. The evidence in this case was not sufficient to demonstrate that the crime of DUI Manslaughter involves any greater degree of recklessness, or a heightened degree of poor judgment than does a DUI.

28. Furthermore, the undersigned rejects the contention that Respondent's inability to practice dentistry during his period of incarceration is a basis for revocation of his license. Petitioner pointed to no requirement that a licensed dentist engage in any minimum number of practice hours to maintain a license. Any necessary practical experience can be addressed in reasonable conditions as addressed herein.

CONCLUSIONS OF LAW

A. Jurisdiction

29. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 456.073(5), 120.569, and 120.57(1), Fla. Stat. (2016).

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

B. Standards

31. Sections 466.028(1)(c) and (mm) provide, in pertinent part, that:

> (1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):
>
> * * *
>
> (c) Being convicted or found guilty of or entering a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction which relates to the practice of dentistry or dental hygiene. A plea of nolo contendere shall create a rebuttable presumption of guilt to the underlying criminal charges.
>
> * * *
>
> (mm) Violating any provision of this chapter or chapter 456, or any rules adopted pursuant thereto.

32. Section 456.072(1)(c) provides that:

> (1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:
>
> * * *
>
> (c) Being convicted or found guilty of, or entering a plea of guilty or nolo contendere to, regardless of adjudication, a crime in any jurisdiction which relates to the practice of, or the ability to practice, a licensee's profession.

C. Burden and Standard of Proof

33. The Department bears the burden of proving the specific allegations that support the charges alleged in the Administrative Complaint by clear and convincing evidence. Dep't of Banking & Fin., Div. of Sec. & Inv. Prot. v. Osborne Stern & Co., 670 So. 2d 932 (Fla. 1996); Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987); Fox v. Dep't of Health, 994 So. 2d 416 (Fla. 1st DCA 2008); Pou v. Dep't of Ins. & Treasurer, 707 So. 2d 941 (Fla. 3d DCA 1998).

34. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" In re Graziano, 696 So. 2d 744, 753 (Fla. 1997). The clear and convincing evidence level of proof:

> [E]ntails 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.
>
> 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 explicit and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such 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 Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting, with approval, Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)); see also In re Henson, 913 So. 2d 579, 590 (Fla. 2005). "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., 590 So. 2d 986, 989 (Fla. 1st DCA 1991).

35. 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). Penal statutes must be construed in terms of their literal meaning and words used by the Legislature may not be expanded to broaden the application of such statutes. Thus, the provisions of law upon which this disciplinary action has been brought must be strictly construed, with any ambiguity construed against Petitioner. Elmariah v. Dep't of Bus. & Prof'l Reg., 574 So. 2d 164, 165 (Fla. 1st DCA 1990); see also Griffis v. Fish & Wildlife Conserv. Comm'n, 57 So. 3d 929, 931 (Fla. 1st DCA 2011); Beckett v. Dep't of Fin. Servs., 982 So. 2d 94, 100 (Fla. 1st DCA 2008); Whitaker v. Dep't of Ins., 680 So. 2d 528, 531 (Fla. 1st DCA 1996); Dyer v. Dep't of Ins. & Treasurer, 585 So. 2d 1009, 1013 (Fla. 1st DCA 1991).

36. The allegations of fact set forth in the Administrative Complaint are the grounds upon which this proceeding is predicated. Trevisani v. Dep't of Health, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005); see also Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996). Thus, the scope of this proceeding is properly restricted to those matters as framed by Petitioner. M.H. v. Dep't of Child. & Fam. Servs., 977 So. 2d 755, 763 (Fla. 2d DCA 2008).

D. Analysis

Count I

37. Count I of the First Amended Administrative Complaint alleges that:

> Respondent pled guilty to, and was convicted of, two counts of first degree misdemeanor DUI with Property or Personal Damage and two counts of second degree felony DUI Manslaughter, crimes which relate to the practice of dentistry.

Based thereon, Petitioner alleged that Respondent committed a crime that "relates to the practice of dentistry" in violation of section 466.028(1)(c).

38. As set forth in the findings of fact herein, the act that reflects "reckless behavior" and "poor judgment" was Respondent getting behind the wheel of his car after a night out. Thus, Petitioner proved that Respondent violated section 466.028(1)(c) as alleged in Count I of the Administrative

Complaint, as a result of his driving under the influence of alcohol. The record does not support an enhancement of either the violation or the penalty as a result of the tragic but unintended consequence of his act.

Count II

39. Count II of the First Amended Administrative Complaint alleges that:

> Respondent pled guilty to, and was convicted of, two counts of first degree misdemeanor DUI with Property or Personal Damage and two counts of second degree felony DUI Manslaughter, crimes that relate to the practice, or the ability to practice, Respondent's profession.

Based thereon, Petitioner alleged that Respondent committed a crime that "relates to the practice of, or the ability to practice [dentistry]" in violation of sections 456.072(1)(c) and 466.028(1)(mm).

40. As set forth in the Findings of Fact herein, the act that reflects "reckless behavior" and "poor judgment" was Respondent getting behind the wheel of his car after a night out. Thus, Petitioner proved that Respondent violated sections 456.072(1)(c) and 466.028(1)(mm) as alleged in Count II of the Administrative Complaint, as a result of his driving under the influence of alcohol. The record does not support an enhancement of either the violation or the penalty as a result of the tragic but unintended consequence of his act.

41. The undersigned is cognizant of Department of Health, Board of Medicine v. Joseph Piotrowski, P.A., Case No. 11-3138PL (Fla. DOAH Nov. 4, 2011; Fla. DOH Dec. 16, 2011). In that case, the ALJ concluded that "[d]riving while intoxicated by its nature exhibits a reckless disregard for the lives of those who may cross one's path. In this instance, the death of a woman and her unborn child occurred as a result of Respondent's reckless behavior. The Department has demonstrated a violation of section 458.331(1)(c) by clear and convincing evidence," citing to the following passage from Doll v. Department of Health, 969 So. 2d 1103, 1106 (Fla. 1st DCA 2007):

> Several cases demonstrate that, although the statutory definition of a particular profession does not specifically refer to acts involved in the crime committed, the crime may nevertheless relate to the profession. In Greenwald v. Department of Professional Regulation, the court affirmed the revocation of a medical doctor's license after the doctor was convicted of solicitation to commit first-degree murder. 501 So. 2d 740 (Fla. 3d DCA 1987). The Fifth District Court of Appeal has held that although an accountant's fraudulent acts involving gambling did not relate to his technical ability to practice public accounting, the acts did justify revocation of the accountant's license for being convicted of a crime that directly relates to the practice of public accounting. Ashe v. Dep't of Prof'l Regulation, Bd. of Accountancy, 467 So. 2d 814 (Fla. 5th DCA 1985). We held in Rush v. Department of Professional Regulation, Board of Podiatry, that a conviction for conspiracy to import marijuana is directly related to the practice or ability to practice podiatry.

> 448 So. 2d 26 (Fla. 1st DCA 1984). These cases demonstrate, in our view, that appellee did not err by concluding Doll's conviction was "related to" the practice of chiropractic medicine or the ability to practice chiropractic medicine.

The Recommended Order and Final Order in Piotrowski do not establish the factual basis for the determination that DUI Manslaughter was considered to be a crime directly related to the practice or the ability to practice dentistry. As stated herein, the evidence in this case supports, barely, that the two counts of DUI exhibited recklessness and a lack of judgment that reflects on Respondent's ability to practice dentistry.[2/] However, the evidence does not support a finding that the crime of DUI Manslaughter warrants a heightened violation or a penalty beyond that of the act of the DUI.

E. Penalty

42. Pursuant to section 456.072(2), the Board of Dentistry may impose one or more of the following penalties: suspension or permanent revocation of a license; restriction of practice of 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 remedial education.

43. Florida Administrative Code Rule 64B5-13.005(1)(c) establishes the range of penalties against an existing license for a first offense of section 466.028(1)(c) or section

456.072(1)(c) as a minimum of a $1,000 fine, to a maximum of two years' suspension; two years' probation with conditions and $10,000 fine; or revocation.

44. Florida Administrative Code Rule 64B5-13.005(1)(ll) establishes the range of penalties against an existing license for a first offense of section 466.028(1)(mm) as a minimum of a $750 fine, to a maximum of probation with conditions and $10,000 fine.

45. Rule 64B5-13.005(2) establishes the following aggravating and mitigating circumstances:

> (a) The danger to the public;
>
> (b) The number of specific offenses, other than the offense for which the licensee is being punished;
> (c) Prior discipline that has been imposed on the licensee;
>
> (d) The length of time the licensee has practiced;
>
> (e) The actual damage, physical or otherwise, caused by the violation and the reversibility of the damage;
>
> (f) The deterrent effect of the penalty imposed;
>
> (g) The effect of the penalty upon the licensee;
>
> (h) Efforts by the licensee towards rehabilitation;
>
> (i) The actual knowledge of the licensee pertaining to the violation;

(j) Attempts by the licensee to correct or stop the violation or refusal by the licensee to correct or stop the violation; and,

(k) Any other relevant mitigating or aggravating factor under the circumstances.

46. Given the extremely broad penalty range, deviation is not necessary. Nonetheless, the record reflects that Respondent has practiced as a dentist since 2002 without prior incident, without any incident related to the quality or effectiveness of the application of his dental skills, and without disciplinary action. The disciplinary action here involved a single incident, which would constitute mitigating circumstances. Furthermore, included in the terms of his probation upon his release from prison are conditions that Respondent's driver's license will be permanently revoked, and he will be required to abstain entirely from the use of alcohol. Thus, reasonable and enforceable measures are in place to ensure that the violation does not recur. The actual damage caused by the incident was severe and irreversible, which would constitute an aggravating circumstance.

Practical Experience

47. Petitioner argues that, because Respondent is currently incarcerated, his practical skills will deteriorate without practice, thereby constituting a basis for revocation. Having been cited to no specific requirement that a dentist

undertake a minimum number of "practical" cases over any set period, the suggestion that the inability to treat patients during his period of incarceration violates a standard of practice, or constitutes a basis for revocation, is simply unsupported by the evidence or the law.

48. The evidence establishes that Respondent is maintaining his continuing education requirements. Any concern Petitioner may have regarding Respondent's practical skills upon his release from prison after having "paid his debt to society" can be met by the application of appropriate terms of probation which, pursuant to rule 64B5-13.005(3)(d)2., may include requiring the licensee to attend additional continuing education courses or remedial education; requiring the licensee to pass an examination; and requiring the licensee to work under the supervision of another licensee. Such measures are sufficient to provide assurance as to Respondent's skills and, as importantly, are established by rule.

Applicable Comparators

49. In recommending a penalty in this case, the undersigned has reviewed actions taken by the Board of Dentistry, in order to determine a reasonable and consistently applied resolution that has been determined by the Board to be protective of public and patient health, and the practice in general.

50. The closest comparator to the matter involving Respondent is Department of Health v. Christina Martin, D.D.S., DOH Case No. 2002-25325 (Fla. DOH May 25, 2004). In that case, according to the Administrative Complaint, Respondent was, while intoxicated, involved in a fatal accident involving a pedestrian, after which she fled the scene. She pled no contest to DUI and felony Leaving the Scene of an Accident. In a charge substantially similar to the allegations in this case, the Administrative Complaint alleged that:

> Respondent's acts of driving under the influence of alcohol and leaving the scene of an accident in which she caused the death of another evince a lack of good judgment, moral character, and suggests little or no regard for the life, safety and/or welfare of the Florida public, to whom, by virtue of her license to practice dentistry in Florida, she is bound to protect.

The fact that Dr. Martin fled the scene of her fatal accident shows a greater degree of consciousness of her offense than that exhibited by Respondent in this case.

51. In a Stipulation with the Board of Dentistry, Dr. Martin admitted to the facts, and agreed to accept a penalty consisting of:

a. a reprimand by the Board of Dentistry;

b. a fine of $10,000;

c. reimbursement of costs;

d. completion of an ethics course;

e. a five year suspension of her license, of which all but 90 days were stayed;

f. 100 hours of community service to consist of the provision of free dental care to elderly, incarcerated and/or indigent persons, or children or adults on Medicaid;

g. an evaluation from the Professionals Resource Network;

h. an audit of Dr. Martin's continuing education courses; and

i. passage of the Laws and Rules Examination.

In its Final Order, the Board of Dentistry stayed the suspension of Dr. Martin's license entirely, and removed the community service requirement, replacing it with the requirement that she complete 10 orthodontic cases to their conclusion without compensation. The Final Order in Department of Health v. Christina Martin, D.D.S. constitutes the most directly analogous and comparable case in fact and law to the instant case. There is no reason why the Department should treat Respondent (who did not flee the scene of his accident) any more harshly than it treated Dr. Martin.

52. Another applicable comparator, though not as directly analogous as Martin, may be found in Department of Health, Board of Dentistry v. John Driggers, D.M.D., Case No. 06-1503PL (Fla. DOAH Apr. 17, 2007; Fla. DOH July 19, 2007). In that case, a dentist with a long history of alcohol and drug dependency,

including multiple DUIs and violation of a Physician Recovery Network Advocacy Contract, and with prior discipline by the Board of Dentistry, was penalized by a suspension pending a new PRN evaluation and compliance, and a written reprimand. Thus, the "recklessness" and "lack of judgment," which spanned a much longer period, with a greater number of incidents, was met with a penalty that allowed the dentist to continue his practice under adequate supervision.

53. The conditions of Respondent's probation should also be considered in establishing the penalty in this case. The Order of Probation requires that, upon his release from prison, Respondent "will work diligently at a lawful occupation," and will make restitution to various persons and entities, conditions that will be advanced by Respondent's ability to practice in his trained profession. In addition, Respondent will have his drivers' license permanently revoked, and will be required to abstain from alcohol, providing assurance that the act and its predicating cause will not recur. As stated herein, the crime in this case is one related to the "character" of Respondent. It has absolutely nothing to do with his competence to practice. Thus, there is no reason not to establish a penalty that will, as with those in Martin and Driggers, allow Respondent to practice in a manner that will ensure patient safety and public health.

RECOMMENDATION

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

a) determining that Respondent violated sections 456.072(1)(c) and sections 466.028(1)(c) and (mm), as a result of the recklessness and lack of judgment exhibited by his decision to drive while under the influence of alcohol;

b) placing Respondent's license on probation for a period of one year, to commence upon his release from incarceration, with appropriate terms of probation to ensure Respondent's practical ability to perform dentistry as authorized by rule 64B5-13.005(3)(d)2.;

c) imposing an administrative fine of $10,000 to be paid within a reasonable period of time from Respondent's release from incarceration;

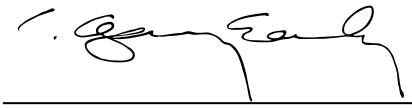
d) requiring reimbursement of costs to be paid within a reasonable period of time from Respondent's release from incarceration;

e) requiring completion of an ethics course;

f) requiring 100 hours of community service to be performed concurrently with that required as a condition of Respondent's probation; and

g) requiring an evaluation from the Professionals Resource Network.

DONE AND ENTERED this 14th day of June, 2018, in Tallahassee, Leon County, Florida.



E. GARY EARLY
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 14th day of June, 2018.

ENDNOTES

[1/] The Legislature has established 39 grounds for disciplinary action in section 466.028(1), none of which are based upon an unintended but foreseeable consequence of the specified act. Similarly, section 456.072(1) has established 41 grounds for disciplinary action (most of which are duplicative of those in 466.028(1)) which are, again, based on the act, and not the result.

[2/] It should be noted that the evidence in this case, despite its being, for all practical purposes, unrebutted, barely supported a finding that DUI showed a degree of recklessness and poor judgment sufficient to support a violation. As it related to DUI Manslaughter, Dr. Johnson's testimony was based exclusively on his personal opinion and was, thus, afforded no weight. That a determination as to whether a crime is related to the practice of a medical profession is determined by the facts of a particular case is supported by the following Department of Health orders:

In Department of Health, Board of Nursing v. Cheryl Ann Wasconis, Case No. 98-1091 (Fla. DOAH Sept. 8, 1998; Fla. DOH Nov. 17, 1998), the Respondent "entered a plea of nolo contendere to one count of driving under the influence (DUI), an offense proscribed by Section 316.193(1), Florida Statutes." Id., RO at ¶ 2. The Respondent did not testify at hearing, or offer any explanation for the incident. The ALJ determined that "it cannot be resolved, with the requisite degree of certainty, that the offense to which Respondent pled nolo contendere and was adjudicated guilty was 'a crime . . . which directly relates to the practice of nursing or to the ability to practice nursing.'" As to the crime of DUI, the ALJ concluded that misdemeanor DUI:

> was not a crime which, as a matter of law, evidences a lack of honesty, integrity, baseness or danger to the public welfare . . . . Rather, it is an offense which may or may not, depending on the surrounding circumstances and the Respondent's history, evidence an impaired practitioner or represent a danger to the public (i.e., because of an abuse of alcohol or narcotics, the practitioner is unable to practice nursing with reasonable skill and safety). Major v. Department of Professional Regulation, 531 So. 2d 411 (Fla. 3d DCA 1988). Here, there was no proof that Respondent had a history of alcohol or drug abuse, or that the subject occurrence (driving while under the influence) was other than an isolated incident in Respondent's personal life. Under such circumstances, it cannot be concluded that her conviction "directly relates to the practice of nursing or the ability to practice nursing."

Id. at ¶ 9. The ALJ recommended dismissal of the Administrative Complaint. The Final Order approved, adopted, and incorporated the Recommended Order's Findings of Fact and Conclusions of Law.

In Department of Health, Board of Nursing v. Barbara Lynn Gigeeus Kahn, Case No. 97-4751 (Fla. DOAH May 8, 1998; Fla. DOH Feb. 26, 1999), the Respondent was convicted of vehicular homicide, a second-degree felony, pursuant to section 782.071, Florida Statutes. At the time of the hearing, Respondent was

serving six-and-one-half years of imprisonment in the Gadsden Correctional Institution. The following Findings of Fact are pertinent here:

> 20. The instant case demonstrates no competent evidence that Petitioner's conviction directly relates to the practice of nursing or the ability to practice nursing.
>
> 21. Respondent was not practicing nursing or even in a professional health care environment at the time of the vehicular homicide.
>
> 22. At base, Respondent was convicted of being a driver at fault in an automobile accident, and there is no reason to suppose that the severe penalty of professional license revocation sought by the Agency will protect patients or deter nurse-behavior.
>
> 23. Respondent has nursing skills that are vital to the public and to her own rehabilitation through work release. The chance[s] of a repeated vehicular homicide are virtually nonexistent.
>
> 24. Although Respondent volitionally drove a car which killed someone, there is no evidence whatsoever that she intentionally set out to commit murder as did Dr. Greenwald [in Greenwald v. Department of Professional Regulation, 501 So. 2d 740 (Fla. 3d DCA 1987) rev. den. 511 So. 2d 998 (Fla. 3d DCA 1987), cert. den. 484 U.S. 986, 108 S. Ct. 502 (1987)]. Thus, there is no depravity of mind or disregard for human life evidenced by the accident itself. Likewise, there is no special danger associated with a practicing nurse driving a car such as was present with Dr. Rush [in Rush v. Department of Professional Regulation, 448 So. 2d 26 (Fla. 1st DCA 1984)] being permitted to prescribe narcotics after having participated in the illegal drug trade.

The ALJ concluded that the evidence was "insufficient to establish a nexus between the crime of which she was convicted and either 'the practice of nursing' or 'the ability to practice nursing.' There is no reason to suppose, upon the evidence in this case, that Respondent would be guilty of mis-, mal-, or non-feasance in nursing practice or that she would be guilty of poor professional judgment." Id. at ¶ 26. The Final Order approved, adopted, and incorporated the Recommended Order's Findings of Fact and Conclusions of Law.

In Department of Health, Board of Nursing v. Rita Joy Gibbons, Case No. 90-2915 (Fla. DOAH May 21, 1995; Fla. DOH _____)(There is no record of a copy of the final order having been filed with DOAH), the Respondent pled no contest to DUI for an automobile accident involving property damage to other vehicles and personal injuries to herself. The ALJ concluded that "[t]he proof fails to clearly and convincingly establish that the crime of which Respondent was convicted, driving under the influence of alcoholic beverages, relates to the practice of nursing or the ability to practice nursing." Id. at ¶ 12.

COPIES FURNISHED:

Edwin A. Bayó, Esquire
Paul Drake, Esquire
Grossman, Furlow & Bayó, LLC
2022-2 Raymond Diehl Road
Tallahassee, Florida 32308
(eServed)

Octavio Simoes-Ponce, Esquire
John A. Wilson, Esquire
Department of Health
Prosecution Services Unit
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3265
(eServed)

Jennifer Wenhold, Executive Director
Board of Dentistry
Division of Medical Quality
Assurance Boards/Councils
Department of Health
4052 Bald Cypress Way, Bin C08
Tallahassee, Florida 32399
(eServed)

Nichole C. Geary, General Counsel
Department of Health
4052 Bald Cypress Way, Bin A02
Tallahassee, Florida 32399-1701
(eServed)

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.