

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
MEDICINE,

Petitioner,

vs.

Case No. 18-4558PL

ORLY PENA-SANCHEZ, M.D.,

Respondent.

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RECOMMENDED ORDER

Administrative Law Judge F. Scott Boyd, of the Division of Administrative Hearings, conducted the final hearing in this case in West Palm Beach on January 8 and 9, 2019, and via video teleconference at sites in West Palm Beach and Tallahassee, Florida, on February 22, 2019.

APPEARANCES

For Petitioner: Christina Michelle Smiekle, Esquire
Ross Daniel Vickers, Esquire
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For Respondent: Julie Gallagher, 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 medicine, in violation of section 458.331(1)(j), Florida Statutes; and, if so, what is the appropriate sanction.

PRELIMINARY STATEMENT

On November 20, 2017, the Florida Department of Health (Petitioner or Department) filed an Administrative Complaint against Orly Pena-Sanchez, M.D. (Respondent or Dr. Pena-Sanchez). Respondent disputed material facts alleged in the complaint and requested an administrative hearing. After a Joint Motion for Continuance was granted, the hearing began as scheduled on January 8 and 9, 2019. After a recess, the case was reconvened by video teleconference on February 22, 2019, to receive the testimony of Ms. Monica Gonzalez, unavailable on the earlier dates.

Two joint exhibits, J-A and J-B, were admitted at the hearing. Petitioner offered seven additional exhibits: Exhibits P-1, P-2, P-4, P-5A, P-5B, P-6, and P-7, all of which were admitted. Exhibit P-1 was admitted over objection that it was hearsay, because it was found to be a record of regularly conducted business activity, but only for those portions of its contents that reflected direct observations of the counselors or recorded statements of Patient H.P.-B. made to the counselors for

purposes of medical diagnosis or treatment. The balance of that document, as well as Exhibit P-5A, a police interview of Patient H.P.-B., were admitted with the understanding that they were hearsay, and so could not alone support findings of fact, but could be used only to supplement or explain other competent evidence. Petitioner also offered the live testimony of Patient H.P.-B. (the complainant); R.P., Patient H.P.-B.'s sister; Detective Frank Milow of the Palm Springs Police Department; and Ms. Monica Gonzalez, a victim's services therapist for Palm Beach County; as well as the telephone testimony of Dr. Katina Bonaparte, formerly the chief medical officer at FoundCare, Inc. (FoundCare), a nonprofit Federally Qualified Health Center.

Respondent offered five exhibits. Page 6 of Exhibit R-3, Exhibit R-4 (with the exception of page 8), and Exhibit R-7 were admitted. Petitioner's objections to Exhibits R-5 and R-6, a polygraph report and the curriculum vitae of the polygraph examiner, were sustained, and they were not admitted. Respondent testified on his own behalf and presented the testimony of Ms. Duvis Vasquez, Respondent's wife; Mr. Charles Cox, investigations manager at the Department of Health; and three employees from FoundCare--Dr. Oneka Marriott, a pediatrician and chief medical officer; Mr. Rik Pavlescak, chief operating officer; and Ms. Ivette Ortiz, medical assistant and X-ray technician.

The final volume of the three-volume Transcript was filed with the Division of Administrative Hearings on March 5, 2019. After a motion to extend the time for filing was granted, both parties timely filed proposed recommended orders by April 1, 2019, which were considered in the preparation of this Recommended Order. Citations to statutes and administrative rules are to the versions in effect in May 2017, except as otherwise indicated.

FINDINGS OF FACT

1. The Department and Board of Medicine are charged with regulating the practice of medicine in the State of Florida, pursuant to section 20.43 and chapters 456 and 458, Florida Statutes.

2. Dr. Pena-Sanchez is licensed to practice medicine in areas of critical need within the State of Florida, having been issued license number ACN 232.

3. Dr. Pena-Sanchez went to medical school in Colombia, was first licensed in Puerto Rico, and has been licensed to practice medicine in Florida in areas of critical need since 2006.

Dr. Pena-Sanchez is subject to the jurisdiction of the Board of Medicine. He worked for the Florida Department of Corrections in a St. Lucie Health Clinic from 2008 to 2010, and in a clinic in Okeechobee until June of 2012, when he joined FoundCare, a federally qualified health center, in West Palm Beach.

4. In August of 2013, FoundCare instituted a Medical Provider Chaperone Policy. The policy provided, among other things, that any clinical provider conducting a physical examination of a patient of the opposite sex had to have a chaperone present during the exam and that the medical assistant had to be present until the physical examination was complete. Dr. Bonaparte, Dr. Pena-Sanchez's supervising physician, counseled him on the policy.

5. Over a period of approximately five years, Patient H.P.-B., a 47-year-old female, saw Dr. Pena-Sanchez for treatment at FoundCare.

6. In early 2017, FoundCare issued a standing order to staff requiring routine testing for HIV and hepatitis C under Center for Disease Control guidelines in order to comply with the terms of a focus grant FoundCare had received through the Gilead Foundation.

7. On April 24, 2017, Patient H.P.-B. presented at FoundCare for a well-woman examination, including a PAP smear and other routine testing for laboratory analysis. Patient H.P.-B. had specifically requested that Dr. Pena-Sanchez conduct these tests, even though usual FoundCare practice was to have a female doctor conduct them. She testified that she requested him because he had been her doctor for several years, she believed he was a good doctor, and she trusted him. Dr. Pena-Sanchez

conducted the tests in the presence of Ms. Yvette Ortiz, his medical assistant. Patient H.P.-B. was scheduled for a follow-up appointment a few weeks later.

8. On or about May 15, 2017, Patient H.P.-B. presented to Dr. Pena-Sanchez at a scheduled appointment to discuss the blood work and procedure results. Ms. Ortiz checked H.P.-B.'s vital signs and then left the room. Then Dr. Pena-Sanchez came in and informed Patient H.P.-B. of the test results, telling her first that she was not HIV positive. This upset her, because she had not specifically authorized that test and believed Dr. Pena-Sanchez had no authority to conduct it. No one had informed Patient H.P.-B. that FoundCare had implemented the new policy requiring AIDS/HIV testing as part of a well-woman examination.

9. During the appointment, Patient H.P.-B. informed Dr. Pena-Sanchez that she had pain in her side and requested that he examine the area. Patient H.P.-B. testified that at first, Dr. Pena-Sanchez did not respond and she had to ask him several times what he was going to do about her pain.

10. Dr. Pena-Sanchez, sitting on a stool, then asked Patient H.P.-B. to stand in front of him and indicate the location of the pain. Patient H.P.-B. stood in front of Dr. Pena-Sanchez and indicated her side.

11. Patient H.P.-B. testified that she was facing away from Dr. Pena-Sanchez, as he had directed, when he reached up and

grabbed her above the hips on each side and pulled her down to sit on his lap. She testified that he began rubbing her back and that she tried to get up, but he pulled her back down. She said he then moved his hands around and started to rub her breasts, so she spanked his hands, jumped up, and asked him where the nurse was. She said that she then went back to sit in her chair. She testified that he came over to her, unzipped his pants, pulled out his penis, and told her that she was going to have sex with him or give him oral sex. She said that she told him no, but that Dr. Pena-Sanchez took her hand, made her touch his penis, and asked her if his penis was big enough, or something similar. She said she clearly saw the color of his boxers, which were navy blue with white, black, and red or maroon colored designs. She testified that she asked for his phone number twice, wanting to later call his wife, but he would not give it to her. She testified he then suddenly stopped his behavior, went back to his chair, and acted as if nothing had happened, saying he was going to order refills on her prescriptions.

12. Patient H.P.-B. testified that she left without reporting the incident to anyone at FoundCare, but called her sister and told her what had happened as soon as she got to her car. She said she went to her job as a home health care aide, where the wife of her patient told her she needed to report the incident to the Palm Beach County Division of Victim Services

hotline, which she did the next morning. She reported the incident to Detective Carpentier at the Palm Springs Police Department that same day, but did not write a statement, preferring to be recorded. About a week later, she returned to the police station to provide a sworn taped statement to Detectives Milow and Hudson. She was referred by the police for counseling and began talking with Ms. Gonzalez, a therapist at the Palm Beach County Division of Victim Services, on June 15, 2017.

13. After the Palm Springs Police Department found no probable cause for criminal charges, Patient H.P.-B. contacted a civil attorney, who later sent a letter to FoundCare asking them to preserve evidence. She filed a written statement with the Department on September 1, 2017, and was interviewed later that month by Investigator Cox.

14. When Patient H.P.-B. told her story to these various people, she was not always consistent.^{1/} It is not easy to communicate with Patient H.P.-B. Even during the final hearing, questions addressed to her needed to be repeated and answers she gave were sometimes unclear. Some inconsistencies involved minor details, others more substantial points.

15. Patient H.P.-B. was clearly confused as to some of the details about which she was absolutely adamant at hearing, including the date of her examination prior to the lab tests.

Detective Milow recorded that she told him that the appointment was the week of May 8. She repeatedly insisted at hearing that the date was May 2. FoundCare records indicate that it was in fact on April 24. While a mistake as to the date something occurred is not in itself either unusual or significant, her unshakeable conviction on the point detracts from the weight that her own confidence might otherwise have given to other portions of her testimony about which she was equally certain.

16. After Patient H.P.-B.'s initial telephone call to the hotline and counseling service a day after the examination, Ms. Earlene Boone wrote that Patient H.P.-B. reported that she had asked Dr. Pena-Sanchez to examine her left side. Detective Milow's report also said she had experienced pain on her left side. Investigator Cox wrote in his report that she told Dr. Pena-Sanchez that the pain was on her right side. In her testimony at hearing, she was absolutely sure that the pain was on her right side and that she never told Ms. Boone or anyone else otherwise.

17. In her initial intake assessment for counseling, Patient H.P.-B. told Ms. Gonzalez that Dr. Pena-Sanchez "pulled down his pants" and then pulled out his penis. At hearing, she testified that he unzipped his pants to pull out his penis.

18. Patient H.P.-B. told Detective Milow that she could not get the incident out of her mind and kept seeing his boxers and

his penis, and told Ms. Gonzalez that she kept having "visions" of his penis and boxers. Later, however, she could not tell Investigator Cox if Dr. Pena-Sanchez was circumcised or not, saying, "I didn't see it [his penis] that good."

19. Patient H.P.-B. told Ms. Gonzalez that when the incident was over, Dr. Pena-Sanchez said, "I'm done with you," and that a nurse walked in and that is when Dr. Pena-Sanchez suddenly acted like nothing had happened. But Patient H.P.-B. never again said that anyone came into the room in her report to Detective Milow or at hearing. Ms. Ortiz testified that she did not go back into the room.

20. Patient H.P.-B. told Investigator Cox that after the assault, "I ran out of the room." However, she testified at hearing that she stayed in the room after the assault because she wanted to make sure Dr. Pena-Sanchez was going to send her prescriptions.

21. Patient H.P.-B. testified that she did not see anyone when she left the room and that she was crying. She reiterated later in her testimony that "tears was rolling." Ms. Ortiz testified that when Patient H.P.-B. left, she saw her in the hallway, that they made eye contact, and that Patient H.P.-B. was not crying and did not seem upset.

22. Patient H.P.-B. told Detective Milow on May 25, 2017, ten days after the appointment, "When I left there I went to the

pharmacy" to pick up her medications, including the pain pills, but the pharmacy informed her that no pain pills had been prescribed. Later, at hearing, Patient H.P.-B. testified that when she left FoundCare, she immediately called her sister. She testified that after that, she went to work and picked up the prescriptions the following day or the day after.

23. Although Patient H.P.-B. was consistent in her allegations that Dr. Pena-Sanchez groped her, exposed himself, and demanded sex from her, these many discrepancies in Patient H.P.-B.'s testimony as to the details and timing of the surrounding events raise troublesome questions as to her testimony. While it may be only that Patient H.P.-B. was confused or no longer remembered the exact course of events, the lack of precision in her accounts significantly detracts from the weight of the evidence.

24. Dr. Pena-Sanchez testified that before the date of the incident, Patient H.P.-B. had flirted with him and made him uncomfortable. He said that he told his assistant, Ms. Ortiz, about this and asked her to always be present when he was seeing Patient H.P.-B. He stated that Patient H.P.-B. had specifically requested he perform the PAP smear. He testified that on May 15, 2017, he gave Patient H.P.-B. the test results and that she complained of pain. He testified he did rub her back through her clothing for diagnostic purposes, but never touched her breasts.

He said that she was standing the entire time and he never pulled her onto his lap. He said she asked for his cell phone number, but he would not give it to her. He denied ever exposing himself, asking her for sex, or making her touch his penis. He testified that he did not own any boxer shorts that were navy blue with black and white and red or maroon colored designs. He completely denied that he ever acted unprofessionally.

25. The testimony of Dr. Pena-Sanchez was difficult to understand at times because he is not fluent in English. His testimony did not hold together well, and he was not completely credible. There were inconsistencies between the records of his interview by Detective Milow, his deposition testimony, and his testimony at hearing.

26. One thread in the testimony of Dr. Pena-Sanchez involved flirtatious behavior on the part of Patient H.P.-B. In his interview with Detective Milow, and at hearing, Dr. Pena-Sanchez said that Patient H.P.-B. had been acting "in a sexual attitude" towards him prior to the laboratory tests appointment and that this made him uncomfortable. He testified that he told Ms. Ortiz about this and directed her always to be present whenever he was with Patient H.P.-B. Yet Ms. Ortiz had only the vaguest recollection of anything like this, and it is undisputed that Ms. Ortiz was not in the room during the results appointment.

27. It seems curious, if Dr. Pena-Sanchez was concerned enough about this flirtation to identify Patient H.P.-B. to Ms. Ortiz and direct that she not leave them alone together, that when later asked by Detective Hudson, he initially claimed he did not even recognize Patient H.P.-B.'s name. After seeing Patient H.P.-B.'s picture, he described the results appointment in detail. He told Detective Milow that she was laughing and flirting with him when she asked for his phone number at the results appointment. Yet at hearing, he testified that she was not flirting with him at that time.

28. While Dr. Pena-Sanchez maintained that he was completely professional throughout the results appointment, his testimony as to certain details varied. He indicated at one point that he was sitting on the stool during the examination, and, at another point, that he was standing when he examined Patient H.P.-B. At hearing (perhaps, as Petitioner suggests, aware of his prior statements), he testified he was both sitting and standing during the examination.

29. At one point during the hearing, he testified that Patient H.P.-B. never lifted her shirt during the appointment, and said that if she had done so, he would have had to bring in a medical assistant, while later he indicated she did lift up her shirt, but that he palpated the area only through her clothing:

"She lift, but I didn't - when - look -- and then go down and I touch over her -- the clothes."

30. He testified consistently that he owned no paisley underwear, but indicated at one point that he had only gray and black, while at another point that he owned only gray and blue. Ms. Vasquez also testified that her husband owned only black and gray boxers. However, she fails to provide the impartial, independent perspective that sometimes serves to corroborate one side or the other between two completely irreconcilable versions of events. In the end, the color of the underwear simply becomes another parallel, but peripheral, dispute of fact between the parties, and provides no basis for resolution.

31. There is no evidence that Dr. Pena-Sanchez has ever had discipline imposed on him in connection with his professional license in Florida or any other state.

32. Revocation or suspension of Dr. Pena-Sanchez's professional license would have a great effect upon his livelihood.

CONCLUSIONS OF LAW

33. 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).

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

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). 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)).

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

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 Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)).

37. 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).

38. Respondent is charged with engaging in sexual misconduct in the practice of medicine, in violation of section 458.331(1)(j). At the time of the incident, this section prohibited:

Exercising influence within a patient-physician relationship for purposes of engaging a patient in sexual activity. A patient shall be presumed to be incapable of giving free, full, and informed consent to sexual activity with his or her physician.

39. This is a difficult case. Patient H.P.-B. was consistent in her basic accusations that Respondent pulled her onto his lap, groped her breasts, exposed his penis and forced her to touch it, and solicited her for sexual acts. Respondent was also consistent in his denials. Both had certain difficulties in communicating, and each had inconsistencies in their testimony. The burden is on Petitioner, however.

40. Patient H.P.-B. was confused at times during her testimony. It is possible that at least some of the inconsistent details among Patient H.P.-B.'s various versions of what happened did not reflect confusion, fabrication, or changes in her testimony but rather mistakes of others in telling or recording what she meant to say. In any event, these same factors,

reflected in the evidence as a whole, make it impossible to say that the events were distinctly remembered or were presented with the level of precision and clarity needed to meet the requisite standard of proof.

41. Petitioner failed to prove by clear and convincing evidence that Respondent engaged in sexual misconduct in violation of section 458.331(1)(j).

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Department of Health, Board of Medicine, enter a final order dismissing the Administrative Complaint against Dr. Orly Pena-Sanchez.

DONE AND ENTERED this 19th day of April, 2019, in Tallahassee, Leon County, Florida.



F. SCOTT BOYD
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 April, 2018.

ENDNOTE

^{1/} Documents and testimony regarding inconsistent out-of-court statements made by Patient H.P.B. are not hearsay, as they are being considered not to prove the truth of those assertions, but only as impeachment.

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.