

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF  
CHIROPRACTIC MEDICINE,

Petitioner,

vs.

Case No. 18-5636PL

ENRIQUE RODRIGUEZ, D.C.,

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 on December 10, 2018, and January 22, 2019, by video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida.

APPEARANCES

For Petitioner: Kimberly Lauren Marshall, Esquire  
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For Respondent: Michael D. Weinstein, 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; and, if so, what is the appropriate sanction.

PRELIMINARY STATEMENT

On December 15, 2016, the Florida Department of Health (Petitioner or Department) served an Administrative Complaint before the Board of Chiropractic Medicine (Board) against Enrique Rodriguez, D.C. (Respondent or Dr. Rodriguez). Dr. Rodriguez disputed material facts alleged in the complaint and requested an administrative hearing. The case was forwarded to the Division of Administrative Hearings (DOAH) and set for hearing as DOAH Case No. 18-2472PL. On August 30, 2018, jurisdiction was relinquished back to the Board for the conduct of a section 120.57(2), Florida Statutes, hearing in response to a joint motion by the parties. That same day, the First Amended Administrative Complaint was filed. On November 2, 2018, the case was reopened as DOAH Case No. 18-5636PL and set for hearing on December 10, 2018. The hearing was partially held on that date and was concluded on January 22, 2019.

At the hearing, Petitioner offered two exhibits: P-A and P-B, which were admitted with the understanding that Exhibit P-B, a police report from the Broward County Sheriff's

Office (BCSO), was hearsay, except as to statements made by Dr. Rodriguez, and that hearsay could not in itself support a finding of fact but could only be used to supplement or explain other competent evidence. Petitioner also presented the testimony of Patient D.H., a patient of Dr. Rodriguez; Ms. J.-H., the mother of Patient D.H.; Detective Sylvia Wernath of the BCSO; and Mr. Kurt Rhodes, a DNA analyst at BCSO. Respondent offered two exhibits: R-2 and R-3, which were admitted and late-filed electronically on March 28, 2019. Respondent testified on his own behalf and presented the testimony of three persons who worked at his office during the time of the allegations: Ms. Cassandra Izaguirre, Ms. Jessica Rosario, and Ms. Lazara Sanchez.

The first volume of the two-volume Transcript was filed with DOAH on February 12, 2019, and the second on February 22, 2019. Petitioner timely filed a Proposed Recommended Order; Respondent filed a Proposed Recommended Order shortly after the filing deadline. No prejudice to Petitioner is found, and both were considered in the preparation of this Recommended Order.

Citations to the Florida Statutes and the Florida Administrative Code are to the versions in effect in June 2012, the time of the alleged offense, except as otherwise indicated.

## FINDINGS OF FACT

1. The Board 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. Rodriguez was a licensed chiropractor in the State of Florida, having been issued license number CH 9812 on September 17, 2009.

3. Dr. Rodriguez's address of record with the Department is 1840 Northwest 122nd Terrace, Pembroke Pines, Florida 33026.

4. Patient D.H. was a 22-year-old patient of Dr. Rodriguez. She had been referred to Dr. Rodriguez by her mother, also a patient.

5. Patient D.H. was the one who suggested initial treatment with Dr. Rodriguez. She had seen him about six times over a period of two months.

6. On or about June 6, 2012, Patient D.H. presented to Dr. Rodriguez for chiropractic treatment.

7. Dr. Rodriguez began treating Patient D.H. in one of the treatment rooms in his practice.

8. As she was turning over on the examination table, Patient D.H.'s left breast was exposed. Dr. Rodriguez commented on her breast being exposed. Patient D.H. replaced her breast under her tank top. As Dr. Rodriguez continued with his

treatment, her breast was again exposed, prompting Dr. Rodriguez to say that Patient D.H. was getting him excited, or words to that effect. Dr. Rodriguez touched both of her breasts with his hands. He then kissed her breasts. Patient D.H. testified that she was in shock because his actions were sudden and caught her off guard. Dr. Rodriguez left the room.

9. Dr. Rodriguez's staff placed Patient D.H. in a massage chair in a common area of the office. After Patient D.H. stated that she still had pain, she was taken into another room for an additional treatment on her shoulder. In the new room, Patient D.H. lay down on the treatment table. After placing some patches on her shoulder, Dr. Rodriguez again touched her breasts. He placed his hand inside her pants and inserted two fingers into her vagina. She testified that she told him to stop. Dr. Rodriguez again told her how she excited him. Patient D.H. later testified that she was in shock and unable to react. Dr. Rodriguez and Patient D.H. made a "pinky promise" not to say anything, and then Dr. Rodriguez washed and dried his hands. He placed a Chinese herbal remedy above her left breast, told her to sleep, and left the room. When he returned, Patient D.H. began crying. Dr. Rodriguez gave her a hug and kissed her on the cheek.

10. While Patient D.H. was in a treatment room with Dr. Rodriguez, he engaged in sexual contact with her which was outside the scope of her medical treatment.

11. Other than as described, Patient D.H. made no complaint to Dr. Rodriguez, nor did she complain to an office staff member.

12. Patient D.H. left Dr. Rodriguez's office and started driving to her cousin's house. She then pulled over and called the police and her mother to tell what had happened.

13. Patient D.H.'s mother testified that she received a phone call from her daughter about 5:00 p.m., saying that Dr. Rodriguez had molested her, and immediately went to meet her. Patient D.H.'s parents took her to the Cooper City district office of the BCSO to report the crime.

14. On June 11, 2012, in conjunction with a criminal investigation by the BCSO, Patient D.H. made a controlled telephone call to Dr. Rodriguez while in the presence of a detective. During the conversation, Dr. Rodriguez said that he did not want to discuss things on the telephone because he could not be sure he was not being recorded, and asked Patient D.H. to come see him at the office. Patient D.H. said she would be uncomfortable seeing him and that is why she had called on the telephone. Their conversation included words to the following effect:

Patient D.H.: Do you . . . do you really do this to your other patients?

Dr. R.: I don't. That's why I'm . . . I couldn't sleep this weekend. I . . . I . . . I'm exhausted. I'm physically and mentally exhausted.

Patient D.H.: But why me?

Dr. R.: I don't know. It just happened, hon. That's what I'm telling you, it just, it just happened.

Patient D.H.: I just want to know why me?

Dr. R.: I don't . . . I don't know . . . I, I just don't know. Um . . . you know, and I wasn't sure because you know, um . . . you know you, you um, when you came about, you showed me your breasts, um . . . .

Patient D.H.: It wasn't . . . you know, it was an accident, I wasn't trying to personally . . . .

Dr. R.: No, but you know, but when you did the other part, you know, then I thought that that was . . . um.

Patient D.H.: What other part are you talking about?

Dr. R.: No dear, no, your breasts, and that was an invitation . . . or an open, you know, "here" and for some reason we were talking about stuff, it's a blank to me. I do not remember . . . if you asked me . . . it was just, I do not remember, um, how exactly everything happened, but it just happened.

Patient D.H.: Don't you remember . . . don't you remember putting your hand on my breasts and putting your two fingers in my vagina? Do you remember that?

Dr. R.: Yes.

Patient D.H.: Yes, you do remember that, right?

Dr. R.: Hon, I don't even want to, I don't even want to go there. I don't even want to be going there, because I didn't feel comfortable with that at all.

Patient D.H.: How, how do you think I feel? I'm not comfortable at all myself.

15. Dr. Rodriguez later engaged the services of a forensic audio engineer who generated an enhanced audio version of the above-described controlled telephone call. During this call, Detective Wernath's voice can be heard in the background, coaching Patient D.H. through portions of the conversation.

16. The criminal investigation also found that a DNA sample from a buccal swab taken from Dr. Rodriguez matched DNA collected from Patient D.H.'s breast. As Mr. Rhodes testified, the chance of a false positive was less than one in 30 billion.

17. Dr. Rodriguez has admitted the sexual activity, while maintaining that his conduct was invited by Patient D.H.'s actions. Specifically, Dr. Rodriguez testified that he believed that Patient D.H. intentionally made her breast "slip out" of her tank top several times, that it was not an accident. He testified that when he told her that he could see her exposed breast, she responded, "Oh, I don't mind." He testified that Patient D.H. was being flirtatious and, by her provocative actions, was encouraging his behavior.



18. Dr. Rodriguez's testimony that he believed Patient D.H. encouraged his sexual misconduct is supported by his statements directly to Patient D.H. on the recorded call, when he thought no one else was listening, and is credible. But regardless of what Dr. Rodriguez may have perceived, or the degree, if any, to which Patient D.H. was complicit in Dr. Rodriguez's sexual misconduct, her involvement would not excuse his actions. A chiropractor is not free to engage in sexual activity with his patient even if the patient encourages or consents to it. There was scant evidence in the record to suggest that Dr. Rodriguez accepts or understands this professional responsibility.

19. Patient D.H.'s testimony as to Dr. Rodriguez's actions was clear and convincing. Her testimony as to his actions is credited and is confirmed by his own statements in the controlled telephone call and at hearing.

20. Respondent's touching of Patient D.H.'s breasts with his hand and mouth and insertion of his fingers into her vagina constituted engaging in sexual activity with a patient and was sexual misconduct in the practice of chiropractic medicine.

21. Patient D.H. engaged in a civil lawsuit against Dr. Rodriguez. She has since executed a release in that case.

22. Dr. Rodriguez has not previously been subject to disciplinary action by the Board.

23. Dr. Rodriguez credibly testified that he has installed video cameras in the treatment rooms to ensure that there will be no further incidents. He noted that the purpose of these cameras was to protect him.

24. Dr. Rodriguez demonstrated little or no remorse, the focus of his spirited testimony being directed towards the provocative conduct of Patient D.H., not his own inappropriate actions.

25. Revocation or suspension of Dr. Rodriguez's professional license would have a great effect upon his livelihood.

#### CONCLUSIONS OF LAW

26. 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).

27. The Department has authority to investigate and file administrative complaints charging violations of the laws governing licensed chiropractors. § 456.073, Fla. Stat. (2018).

28. 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)).

29. 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. 1994).

30. 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).

31. At the time of the incident, section 460.413(1)(ff) provided that discipline could be imposed for violation of any provision of chapter 460. Respondent is charged with engaging in sexual misconduct in the practice of chiropractic medicine, in violation of section 460.412, which provided:

Sexual misconduct in the practice of chiropractic medicine.--The chiropractic physician-patient relationship is founded on mutual trust. 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.

32. Respondent's touching of Patient D.H.'s breasts with his hand and mouth and insertion of his fingers into her vagina was engaging in sexual activity with a patient and constitutes sexual misconduct in the practice of chiropractic medicine.

33. Respondent maintains that Patient D.H. intentionally exposed herself and invited or welcomed his actions. Respondent's statements during the controlled telephone call, when he was talking, as he supposed, only with Patient D.H., are consistent with this position. But even if Patient D.H. did invite his conduct, this would not constitute a defense to the charges. Respondent's misstatement of the issue in this case as whether he engaged in "non-consensual" sexual activity is inapposite, and his spirited focus on Patient D.H.'s actions reflects a serious misunderstanding of his professional responsibilities. Respondent's sexual activity with Patient D.H. was outside of the scope of the practice of chiropractic medicine and outside of the scope of generally accepted examination or treatment of Patient D.H.

34. Petitioner proved by clear and convincing evidence that Respondent engaged in sexual misconduct in violation of section 460.412.

Penalty

35. 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).

36. Sections 456.079(1) and 460.413(4) require the Board 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).

37. Florida Administrative Code Rule 64B2-16.003(1)(f) provided the following penalty guideline<sup>1/</sup> for violation of section 460.412, or for violation of a similar provision, not charged, section 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.

38. 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)(h). 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.

39. 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 PRN referral for evaluation up to a maximum of permanent revocation.

40. Rule 64B2-16.003(2) sets forth factors to be considered in determining the appropriate disciplinary action to be imposed and in going outside of the disciplinary guidelines:

- (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.

41. There is only a single offense, 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. Respondent has taken some actions, including the installation of cameras, to reduce the likelihood that there will be future offenses. Respondent also believed that Patient D.H. invited his misconduct. Although not

a defense, this provides slight mitigation. On the other hand, this serious conduct by Respondent was intentional, and he has demonstrated little or no remorse for his actions.

42. The aggravating and mitigating circumstances present in this case do not warrant departure from the wide range of discretion already afforded by the penalty guidelines for the offense of sexual misconduct.

43. Section 456.072(4) provided 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. Enrique Rodriguez in violation of section 460.412, Florida Statutes; revoking his license to practice chiropractic medicine; and imposing costs of investigation and prosecution.



DONE AND ENTERED this 29th day of March, 2019, in  
Tallahassee, Leon County, Florida.

*F. Scott Boyd*

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F. SCOTT BOYD  
Administrative Law Judge  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 29th day of March, 2019.

ENDNOTE

<sup>1/</sup> 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.