

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
CHIROPRACTIC MEDICINE,

Petitioner,

Case No. 20-0052PL

vs.

JEREMIAH LEE KENNEY-WRIGHT, D.C.,

Respondent.

_____ /

RECOMMENDED ORDER

The final hearing in this matter was conducted before Brian A. Newman, Administrative Law Judge of the Division of Administrative Hearings (DOAH), pursuant to sections 120.569 and 120.57(1), Florida Statutes (2019), in Tallahassee, Florida on May 26, 2020, and by Zoom video conference in Tallahassee, on May 29, 2020.

APPEARANCES

For Petitioner: Rose L. Garrison, 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 committed sexual misconduct as charged in the Administrative Complaint; and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On November 12, 2019, the Department of Health (Department) filed an Administrative Complaint before the Board of Chiropractic Medicine (Board) against Jeremiah Lee Kenney-Wright, D.C. (Respondent). Respondent was charged with committing sexual misconduct while treating a patient identified as W.H., in violation of sections 460.412 and 460.413(1)(ff), Florida Statutes.¹ Respondent timely filed a Petition for Hearing Involving Disputed Issues of Material Fact in response to the Administrative Complaint.

On January 6, 2020, the Department transmitted the Administrative Complaint and Petition for Hearing to DOAH for assignment of an administrative law judge to conduct the requested hearing.

The final hearing scheduled for January 29, 2020, was continued at Respondent's request for good cause and was rescheduled for April 14, 2020. The final hearing was continued again, at the request of Respondent, for good cause shown, and rescheduled before the undersigned for May 26, 2020.

Prior to the hearing, the parties filed a Joint Pre-hearing Stipulation, in which they identified their proposed witnesses and exhibits, set forth their objections to the other party's proposed exhibits, and agreed to several statements of fact and law. The parties' agreed facts have been incorporated in the Findings of Fact below to the extent relevant.

¹ All references to statutes and rules are to the 2015 version unless otherwise indicated.

Both parties filed motions in limine a few days before the hearing, which were addressed on the record at the outset of the hearing.

At the hearing, the Department presented the live testimony of Darrel T. Mathis, D.C., who was accepted as an expert in chiropractic medicine. The Department also offered testimony by video deposition of W.H. The Department's exhibits 1 through 7 were admitted. Respondent testified on his own behalf and also presented the live testimony of Tara Wright, D.C., by Zoom conference on May 29, 2020. Respondent offered testimony by deposition of Toka Culbertson. Respondent's Exhibits 4 through 6 were admitted.

The three-volume Transcript of the hearing was filed on July 10, 2020. Both parties timely filed Proposed Recommended Orders (PROs) on July 25, 2020, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

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

2. At all times material to this matter, Respondent was licensed as a chiropractic physician in the State of Florida, having been issued license number CH 11126 on February 17, 2014.

3. Respondent, for all times material to this case, worked at and owned Wright Choice Chiropractic, located at 70 East 1st Street, Corning, New York 14830. Respondent and his wife, Tara Wright, D.C., were the only chiropractors who practiced at Wright Choice Chiropractic.

4. W.H. presented to Wright Choice Chiropractic in early May 2016, seeking to enroll in a nutritional weight-loss program offered by Respondent.

5. On May 11, 2016, W.H. went to Wright Choice Chiropractic to learn about Respondent's weight-loss program. She was wearing shorts and a t-shirt. W.H. enrolled in the weight-loss program, and Respondent took W.H.'s body measurements. This was the first time W.H. and Respondent met. The appointment took no longer than 30 minutes.

6. Thereafter, W.H. called Wright Choice Chiropractic to inquire about receiving chiropractic treatment to address low back and hip pain. W.H. was assigned to Respondent for a chiropractic appointment.

May 19th Office Visit

7. On May 19, 2016, W.H. went to Wright Choice Chiropractic, at approximately 4:30 p.m., to receive chiropractic treatment for her complaints of low back and hip pain. Respondent and Dr. Tara Wright were at the front desk when W.H. arrived.

8. Respondent examined W.H. in the examination room. In the examination room, Respondent told Patient W.H. that she was "beautiful," asked her if she was single, and asked her if she "ever went out?" W.H. replied that she does not usually go out because she has kids. At the time, W.H. thought Respondent's comments and questions about her personal life were awkward, but she was not offended.

9. Respondent's findings included low back pain that was reproduced with pressure, left hip pain, some misalignment, and muscle ache or muscle pain. Respondent recommended soft tissue work with the Graston technique and a chiropractic adjustment. The Graston technique utilizes stainless steel tools to apply pressure to joints and tissues to promote healing by causing a micro-trauma or an inflammatory response. W.H. consented to the recommended procedures.

10. Respondent led W.H. to the treatment room and gave her a gown to change into. Respondent left the room and Patient W.H. changed into the gown, leaving on her underwear and bra. The gown was tied in the back.

11. Respondent returned to the examination room after W.H. changed into the gown. W.H. testified that she heard Respondent close the door but she could not see whether it was, in fact, closed. Other witnesses testified, credibly, that the door remained slightly ajar, and that testimony is accepted here over that of W.H., because she could not see whether the door was open or closed. Although the door was ajar, the patient on the table was not visible to someone standing in the hallway, outside Respondent's treatment room.

12. Respondent placed W.H. on a flexion-distraction chiropractic table. The table included Velcro straps for the patient's ankles, which were applied to W.H. without objection. Respondent then performed the Graston technique, using a series of stainless steel tools (that resemble a handlebar and large butter knife) to glide over the muscles from mid-back to lower back, at the top part of the glutes. Respondent applied grapeseed oil to W.H.'s skin to help the tools glide over the skin. Respondent stood at the side of the table when performing the Graston technique on W.H. The procedure was performed on both sides of W.H.'s back. Respondent told W.H. to expect bruising on her back in the area where the Graston tools had been applied.

13. Respondent performed a chiropractic adjustment on W.H. using a Gonstead side posture adjustment and a Thompson Drop. This entailed popping up and dropping a section of the table to adjust the sacrum. After the treatments were finished, W.H. paid her co-pay and scheduled a follow-up appointment for May 24, 2016, before leaving the office.

May 24th Office Visit

14. On May 24, 2016, W.H. returned to Wright Choice Chiropractic at approximately 4:30 p.m., for a follow-up chiropractic appointment. She was greeted by Dr. Tara Wright and Respondent at the front desk. No one else was present in the office at that time.

15. W.H. changed into a gown, as she had done during her last visit, outside of Respondent's presence. The gown tied in the back. The door to the treatment room was ajar as it had been during her last visit.

16. Respondent repeated the Graston procedure and chiropractic adjustment that he performed on May 19, 2016.

The Alleged Sexual Misconduct

17. W.H. testified that Respondent also asked her out on a date, made multiple sexually-explicit comments to her, and made sexual contact with her in two separate ways during the May 24, 2016, office visit.

18. According to W.H., at the beginning of the treatment, Respondent instructed her to bend over, and she complied, believing it was necessary for chiropractic treatment. Respondent then grabbed W.H.'s hips and thrust his groin into her buttocks in a humping motion. Surprised, W.H. jumped up straight. Respondent snickered and told W.H. he was "just playin."

19. W.H. testified that Respondent commented to her about the fact that it was her birthday and again told her she was beautiful. W.H. testified that Respondent asked her "what kind of guys [she] was interested in ..." and asked if she would go out for drinks with him that night. W.H. told Respondent she could not go out for a drink because she was on the weight-loss program, and because Respondent was married. Respondent told W.H. that his wife was pregnant and that she would not have sex with him. Respondent told W.H. that he was going to get her to go over to the "dark side." Respondent is African American and W.H., who is Caucasian, interpreted this comment to mean that Respondent would convince her to date or have sex with an African American. W.H. also testified that Respondent leaned forward and whispered in her ear that she had a beautiful "ass" and that he wanted to bury his face in it.

20. Finally, W.H. testified that near the end of the treatment, Respondent had W.H. slide back on the table while her feet were still strapped to the table, her buttocks was in the air, and her face was down. Respondent slid

W.H.'s underwear down halfway on her buttocks and touched the top of her intergluteal cleft with a Graston tool, using enough pressure to separate the intergluteal cleft down her entire buttocks to the front of her vagina in one continual motion. W.H. told Respondent to "stop" several times, saying it louder each time. Respondent then stopped and said "oh, you're serious" and "snickered."

21. When the appointment was over, W.H. got dressed, went to the front desk, and paid her co-pay. W.H. testified that when she got to the door to exit the office, Respondent pointed to the phone that was in his hand and mouthed the words, "can I call you" or "can I text you" or other words to that effect. W.H. did not respond and left the office.

22. W.H. subsequently canceled her next appointment with Respondent and never returned to Wright Choice Chiropractic.

23. W.H. testified that in early June 2016, Respondent called her and asked if he had made her uncomfortable and if she was going to return for another appointment. W.H. hung up on Respondent.

24. Respondent denies that he made any sexually-explicit comment to W.H., denies that he thrust his groin into her buttocks in a humping motion, and denies that he touched W.H.'s intergluteal cleft and vagina with a Graston tool.

Respondent's Witnesses

25. Dr. Tara Wright's treatment room is next door to Respondent's treatment room. Dr. Tara Wright testified that the walls in the Wright Choice Chiropractic office were "paper thin," and that she could hear people talking in Respondent's treatment room when she was in her treatment room, or in any other part of the office. Although she could hear people talking, the words spoken were unintelligible.

26. Dr. Tara Wright testified that on May 24, 2016, she was treating another patient in her treatment room next door when Respondent treated

W.H. Dr. Tara Wright testified that she did not hear W.H. say “stop” or “no” or shout or yell at any time during her May 24, 2016, office visit.

27. Dr. Tara Wright testified that on May 24, 2016, she entered Respondent’s treatment room after she finished with her patient, and Respondent was still performing the Graston technique on W.H. when she entered. Dr. Tara Wright testified that she did not see anything unusual, and W.H. did not appear to be upset. Dr. Tara Wright testified that she engaged in small talk with W.H. after she entered Respondent’s treatment room, including asking her whether she was going out for drinks later to celebrate her birthday.

28. Dr. Tara Wright testified that she checked W.H. out at the front desk after her appointment was over, and scheduled another appointment for May 31, 2016. She testified that W.H. did not appear to be stressed or upset, and did not complain about her visit that day.

29. Dr. Tara Wright appeared credible when she testified. That said, Dr. Tara Wright has a personal and financial stake in the outcome of this case; she is married to Respondent, and Respondent provides approximately 40 percent of the household income as a practicing chiropractor. For these reasons, W.H.’s testimony is accepted over the testimony of Dr. Tara Wright where there is conflict.

30. Even if all of Dr. Tara Wright’s testimony was completely accurate, it does not rule out sexual misconduct in this case. Dr. Tara Wright testified that she could hear talking from Respondent’s treatment room, but admits the words spoken were unintelligible. W.H. testified that Respondent whispered inappropriate comments in her ear; Dr. Tara Wright could not have heard a whisper. W.H. *told* Respondent to “stop” three times; she did not claim that she yelled “stop.” Dr. Tara Wright did not testify that she was in Respondent’s treatment room the entire time, so the inappropriate conduct could have occurred before she entered.

31. Respondent also presented the testimony of Tolka Culbertson, the mother of the patient Dr. Tara Wright treated at the same time W.H. was being treated by Respondent on May 24, 2016. Ms. Culbertson stood in the hallway, outside of Respondent's treatment room during her daughter's appointment. Ms. Culbertson could hear a male and female voice in Respondent's treatment room, but did not testify that she could hear what was said. The door to Respondent's treatment room was ajar, but she could not see the people inside. Like Dr. Tara Wright, Ms. Culbertson never heard anyone from Respondent's treatment room say "stop," or shout.

32. Ms. Culbertson's testimony does not rule out sexual misconduct in this case. She could not see into Respondent's treatment room, and, like Dr. Tara Wright, could not hear what was said in Respondent's treatment room. Finally, Ms. Culbertson was not standing outside Respondent's treatment room during W.H.'s entire visit. She went in and out of Dr. Tara Wright's treatment room, and her daughter's visit ended before W.H.'s visit concluded.

Testimony of Dr. Mathis

33. The Department offered expert testimony from Darrel Thomas Mathis, D.C., to prove there was no medical reason for Respondent to thrust his groin into W.H. or touch her intergluteal cleft and vagina with a Graston tool. Dr. Mathis's testimony in this regard is accepted.²

The Controlled Call

34. W.H. reported Respondent's conduct during the May 24, 2016, visit to the Corning Police Department in early June 2016. On June 27, 2016, at 12:05 p.m., W.H. called Respondent on a controlled call, at the request of law

² Expert testimony on this issue is unnecessary because Respondent did not attempt to justify the inappropriate touching as a necessary component of the chiropractic treatments he offered to W.H.; rather, he denied that any of it happened.

enforcement, to discuss Respondent's behavior during W.H.'s May 24, 2016, office visit. Respondent was not aware that the call was being recorded by law enforcement.

35. The following is a verbatim transcript of the controlled call, with all inaudible portions of the call so noted:

Dr. Wright: Hello

W.H.: Hi, Dr. Jay.³ This is [W.H.].

Dr. Wright: Hey [W.H.], how are you?

W.H.: I'm alright, how are you?

Dr. Wright: I am doing just fine. What can I do for you (inaudible)?

W.H.: Do you have a few minutes? I just need to talk to you about something.

Dr. Wright: Yes, ma'am, go right ahead.

W.H.: Okay. I am just -- I need to talk about what happened last time we were at the office.

Dr. Wright: Absolutely.

W.H.: I haven't had -- it's been kind of driving me crazy.

Dr. Wright: Yeah.

W.H.: I just want to know -- I guess the -- I guess I want to know why you were acting the way you were with me.

Dr. Wright: I don't know -- and I do apologize. It was very unprofessional of me, and I promise you that would not happen again. (Inaudible) made you uncomfortable and I am deeply, deeply, deeply

³ Respondent was known to his patients as "Dr. Jay."

sorry for anything that happened that made you feel uncomfortable. So I am really sorry, [W.H.].

W.H.: I know. I just -- like I said you did -- I mean, you put your knuckle down my rear to my vagina, and it is like why would you -- why did you pick me to do that? That is all I keep thinking of, like why did you pick me to make all those appropriate comments. And I kept saying, you are married. Why did you do that?

Dr. Wright: Well, I did not -- and I did not do any of that. It was a tool and very, very unprofessional. I didn't go down to your vagina, but I really am sorry.

W.H.: Yes, you did actually, but that is --

Dr. Wright: Okay, well I --

W.H.: -- neither here nor there.

Dr. Wright: I -- I am really, really, really extremely sorry and it was really unprofessional of me and -- and I just -- my mind was not in the right place and I just can't express to you how deeply sorry I am -- and -- and I do apologize for any of that.

W.H.: So what am I--

Dr. Wright: And I know an apology doesn't really do it justice and it shouldn't never happen. It will never happen again and like I don't -- I am just really sorry.

W.H.: I know. I just -- I guess what is driving me crazy is why me. Why did you pick me? I am like 48 years old and I am -- it is like you are young and you have all these other patients that come in there.

Dr. Wright: I -- I -- I don't have an answer for you, [W.H.], I really don't. I am so, so horrible, I am so horrible for that and I tried to call and make it

right, and I when I called you before I kind of got a sense of just uncomfortableness and I didn't want to stir it up and I -- I don't have an answer for you. I am just really sorry that that happened.

W.H.: All right. Well, you know I am not going to be coming back, because like I said I really thought that you were a really good doctor and then you just took it way too far.

Dr. Wright: Yes, ma'am.

W.H.: And I don't understand why you did that and it really -- like I said, it was extremely inappropriate.

Dr. Wright: Yes, ma'am, I am sorry about that. Okay.

W.H.: All right.

Dr. Wright: I hope -- I wish you well and -- and if you do need me I can promise you that nothing like that will ever, ever happen again, and I will have someone come in with me when I treat you or I can just give you to Dr. Tara and that can work from there. And again, I do apologize for that. It was really out of my -- like way out of my character and I am not like that. I don't know what happened; I don't know why it happened. It is way out of my character.

W.H.: I know, but that is what you say, but I also know that you kind of been extremely flirty with other patients, too. I just don't know if you took it that far.

Dr. Wright: I am sorry, you say you don't know what now?

W.H.: That you have been like flirty with other patients and said inappropriate things to other patients as well. I just don't know. Like I said, I

don't know if you took it as far with them as you did me.

Dr. Wright: (Inaudible).

W.H.: All right. All right, thank you. I guess thank you for the closure. I think that is what I needed, I just needed to hear an apology.

Dr. Wright: (Inaudible). Like right now (inaudible) and I am really sorry. Is everything okay now?

W.H.: Yes, I think so, I just needed an apology because it has been driving me crazy. I can't like sleep or anything.

Dr. Wright: Yes mam, I am really sorry.

W.H.: Thank you.

Dr. Wright: (Inaudible). If there is anything you need from me please just let me know. I am terribly sorry.

W.H.: Yes.

Dr. Wright: I am terribly sorry.

W.H.: Uh-huh.

Dr. Wright: You have a good day.

W.H.: You too, bye.

Female Voice: This concludes the recording portion of the [W.H.] talking to Jeremiah Wright. The time is now 12:05 p.m. on June 27, 2016, and this concludes the controlled call between [W.H.] and Jeremiah Wright.

36. On July 5, 2016, following the controlled call, Respondent added a note to W.H.'s chart for the stated purpose of documenting what was said during the controlled call. In this note, Respondent recites, generally, W.H.'s

complaint was about inappropriate touching and denies those allegations.

Respondent also states in the note that he:

apologized for [W.H.'s] uncomfortableness during the treatment and the overall discomfort [W.H.] feels that she had during her visit but I completely deny that accusation that I have touched my patient improperly and the only thing that I would regret is the engaging in some small talk the patient herself initiated.

Conspicuously absent from the note are the incriminating statements Respondent made during the controlled call, after W.H. accused him of improperly touching her buttocks and vagina, including:

I am really, really, really extremely sorry and it was really unprofessional of me and -- and I just -- my mind was not in the right place and I just can't express to you how deeply sorry I am -- and -- and I do apologize for any of that.

* * *

And I know an apology doesn't really do it justice and it shouldn't never happen. It will never happen again and like I don't -- I am just really sorry.

* * *

I -- I -- I don't have an answer for you, [W.H.], I really don't. I am so, so horrible, I am so horrible for that and I tried to call and make it right, and I when I called you before I kind of got a sense of just uncomfortableness and I didn't want to stir it up and I -- I don't have an answer for you. I am just really sorry that that happened.

* * *

I hope -- I wish you well and -- and if you do need me I can promise you that nothing like that will ever, ever happen again, and I will have someone come in with me when I treat you or I can just give

you to Dr. Tara and that can work from there. And again, I do apologize for that. It was really out of my -- like way out of my character and I am not like that. I don't know what happened; I don't know why it happened. It is way out of my character.

37. Respondent offered multiple excuses for why these damning statements do not mean what they say. First, Respondent claims he profusely apologized to W.H. without knowing what he was really apologizing for, and that he apologized to her because he bruised her when he applied the Graston technique during the May 19, 2016, office visit. Setting aside that these two excuses are somewhat contradictory, the factual predicate for both is patently false. Respondent stated that his conduct was “unprofessional” and “way out of [his] character” *after* W.H. made it clear that she was accusing him of inappropriately touching her buttocks and vagina. W.H. did not complain about bruising from the Graston technique or anything else that happened during the May 19, 2016, office visit.

38. At the hearing, Respondent also claimed he was an abused child who learned to say anything to please people, and that he apologized to W.H. because he had started a new business and did not want to lose a patient. If true, these circumstances could provide a credible explanation for a denial accompanied by a generic apology. But Respondent did not offer W.H. a generic apology; he admitted that his conduct was “really unprofessional,” “horrible,” and “way out of [his] character.” Likewise, Respondent offered no credible explanation for why he promised W.H. that “nothing like that will ever, ever happen again,” and that he would either have someone in the room with him the next time he saw W.H., or that she could be seen the next time by Dr. Tara Wright.

39. W.H.’s testimony as to the sexual misconduct committed by Respondent during the May 24, 2016, office visit is accepted in its entirety. Respondent’s testimony denying W.H.’s sexual misconduct allegations is not credible, and is not accepted where it conflicts with the testimony of W.H.

40. The undersigned finds that Respondent meant what he said and said what he meant during the controlled call. That is, Respondent apologized for unprofessional conduct and promised to have someone in the office with him the next time he saw W.H., because on May 24, 2016, he asked W.H. out on a date, made multiple sexually-explicit comments to W.H., thrust his groin into W.H.'s buttocks in a humping motion, and touched W.H.'s intergluteal cleft and vagina with a Graston tool. Respondent asked W.H. out on a date and made sexually-explicit comments to W.H. in an effort to induce W.H. to engage in sexual activity, and he engaged, and/or attempted to engage, W.H. in sexual activity when he thrust his groin into her buttocks in a humping motion, and when he touched W.H.'s intergluteal cleft and vagina with a Graston tool.

CONCLUSIONS OF LAW

41. 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). The Department therefore bears the burden of proving 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)).

42. As stated 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 Henson, 913 So. 2d 579, 590 (Fla. 2005) (quoting *Slomowitz v. Walker*, 492 So. 2d 797, 800 (Fla. 4th DCA 1983)). This burden of proof may be met where the evidence is in conflict; however, “it seems to preclude evidence that is ambiguous.” *Westinghouse Elec. Corp. v. Shuler Bros.*, 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

43. Disciplinary statutes and rules “must be construed strictly, in favor of the one against whom the penalty would be imposed.” *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, 1143 (Fla. 1st DCA 1992); *McClung v. Crim. Just. Stnds. & Training Comm’n*, 458 So. 2d 887, 888 (Fla. 5th DCA 1984).

44. Respondent may not be found guilty of an offense that was not charged in the Administrative Complaint. *Trevisani v. Dep’t of Health*, 908 So. 2d 1108 (Fla. 1st DCA 2005)(administrative complaint charged physician with a failure to create medical records; proof of a failure to retain medical records cannot support a finding of guilt). Furthermore, due process prohibits the Department from taking disciplinary action against a licensee based on matters not specifically alleged in the charging instrument, unless those matters have been tried by consent. *See Delk v. Dep’t of Prof’l Reg.*, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

45. As a threshold matter, Respondent argues that the Department has no authority to discipline his Florida license for events that occurred in another state altogether. Respondent’s argument has three parts.

46. First, Respondent argues there is no sufficient nexus between his activities in New York and the State of Florida to acquire personal jurisdiction over him in Florida under section 48.193(1)(a), Florida Statutes, known as Florida’s long arm statute. Specifically, Respondent argues that all of the events at issue here occurred in New York, and Respondent did not have a Florida office when these events took place.

47. Respondent's jurisdictional argument is easily disposed of. Respondent stipulated that "the Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding pursuant to section 120.57, Florida Statutes," in the Joint Pre-hearing Stipulation the parties filed in this case on March 18, 2020. Respondent also overlooks the fact that he has been licensed as a chiropractic physician in the State of Florida since 2014, before all of the events at issue here occurred. The Department is the state agency charged with regulating chiropractors who have been issued a Florida license. Indeed, Respondent admits he is a chiropractic physician subject to discipline by the Florida Board of Chiropractic Medicine because of his Florida license (Respondent's PRO, ¶ 100). For all of these reasons, DOAH, and ultimately the Board, have jurisdiction over Respondent and this dispute.

48. Next, Respondent argues that Florida Statutes do not authorize the Department to discipline him for sexual misconduct committed in another state. The prohibition on sexual misconduct in the practice of chiropractic medicine is found in section 460.312, which provides:

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.

Respondent argues that this statute does not specifically state that it applies to sexual misconduct that occurs outside the state of Florida. That much is true. But it is also true that this statute does not limit prohibited sexual misconduct to sexual misconduct that occurs in Florida only. On its face, the

statute prohibits sexual misconduct in the practice of chiropractic medicine, with regard to where it occurs. The undersigned will not add a geographic limitation to this statute where the plain language does not support it. *See Greenfield v. Daniels*, 51 So. 3d 421, 425 (Fla. 2010) (“[W]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.” (quoting *Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984))).

49. Finally, Respondent points out that section 456.063(2)(b) requires the Board to refuse to license an applicant who has committed sexual misconduct in another state, but does not require that a chiropractor who is already licensed in Florida be disciplined for sexual misconduct committed in another state. Section 456.063 has not, however, been cited as the basis for agency action in this case; rather, the Administrative Complaint cites section 460.413(1)(ff) as the authorization to discipline Respondent. Section 460.413(1)(ff) authorizes the Department to discipline a chiropractor licensed in Florida for “violating any provision of [chapter 460] or chapter 456, or any rules adopted pursuant thereto.” The Board is authorized to discipline Respondent for committing sexual misconduct in violation of section 460.412, because that is a provision of chapter 460.

50. Based on the Findings of Fact above, Petitioner proved, clearly and convincingly, that Respondent is guilty of committing sexual misconduct, as defined in, and prohibited by, section 460.412, because on May 24, 2016, he asked W.H. out on a date, made multiple sexually-explicit comments to W.H., thrust his groin into W.H.’s buttocks in a humping motion, and touched W.H.’s intergluteal cleft and vagina with a Graston tool.

51. Florida Administrative Code Rule 64B2-16.003 contains the Board’s disciplinary guidelines, setting forth penalty ranges for violations of chapter 460 and related rules. Paragraph (1) provides that the Board “shall issue a final order imposing appropriate penalties ... within the ranges

recommended” in the rule. Paragraph (2) sets out aggravating and mitigating circumstances that may be considered to determine the appropriate penalty to impose and to deviate from the penalty ranges in the rule.

52. Rule 64B2-16.003(1)(f) prescribes the normal penalty for a violation of section 460.412, ranging from a minimum of a one-year suspension followed by two years of probation and a fine of not less than \$1,000, to a maximum of permanent revocation; from a minimum of a letter of concern and/or a PRN referral for evaluation up to a maximum fine of \$10,000 and/or permanent revocation.

53. Consideration has been given to mitigating and aggravating circumstances authorized by rule 64B2-16.003(2). As for mitigating circumstances, there is only a single offense. There was no evidence offered to show that Respondent has a history of other discipline. Suspension or revocation of Respondent’s professional license would have a significant effect upon his livelihood.

54. The aggravating circumstances provide counterweight to the mitigating circumstances present here. Respondent’s conduct was intentional. He made multiple sexually-explicit comments to W.H. during an office visit, and made sexual contact with her twice during the same office visit. Sexual misconduct in the practice of chiropractic medicine, a health care profession, constitutes a great danger to the public. An appropriately serious consequence would have a deterrent effect on other practitioners, and would reinforce the important principles in the Board’s sexual misconduct statute. For all of these reasons, revocation is the appropriate penalty.

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

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Health, Board of Chiropractic Medicine, enter a final order finding Respondent guilty of violating section 460.413(1)(ff), through a violation of section 460.412, as charged in the Administrative Complaint; revoking Respondent's license to practice chiropractic medicine; and imposing costs of the investigation and prosecution of this case.

DONE AND ENTERED this 22nd day of July, 2020, in Tallahassee, Leon County, Florida.



BRIAN A. NEWMAN
Administrative Law Judge
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Filed with the Clerk of the
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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.