

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
MEDICINE,

Petitioner,

Case No. 20-2098PL

vs.

SUBHASH GUPTA, M.D.,

Respondent.

_____ /

RECOMMENDED ORDER

On August 25, 2020, a final hearing was held via Zoom video teleconference, before Robert S. Cohen, an Administrative Law Judge assigned by the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Amanda M. Godbey, Esquire
Major Ryan Thompson, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399

For Respondent: Gregory A. Chaires, Esquire
Richard Jay Brooderson, Esquire
Chaires Brooderson & Guerrero, P.L.
283 Cranes Roost Boulevard, Suite 165
Altamonte Springs, Florida 32701

STATEMENT OF THE ISSUES

The issues to be determined are whether Respondent engaged in sexual misconduct and/or sexual activity in the practice of medicine in violation of

section 456.072(1)(v), Florida Statutes (2019); and, if so, what is the appropriate sanction.

PRELIMINARY STATEMENT

On January 27, 2020, the Department of Health, Board of Medicine (“Petitioner” or “Department”), issued an Administrative Complaint (“Complaint”) against Subhash Gupta, M.D. (“Dr. Gupta” or “Respondent”), a medical doctor. The Complaint charged Respondent with sexual misconduct in violation of section 456.072(1)(v). Respondent disputed material facts alleged in the Complaint and requested an administrative hearing.

The case was forwarded to the Division of Administrative Hearings, and a final hearing was set for June 25, 2020. After one joint continuance and the granting of Petitioner’s Unopposed Motion to Change Location of the Final Hearing to a Remote Zoom Hearing, filed August 10, 2020, the final hearing was rescheduled for August 25, 2020, at 9:00 a.m. by Zoom conference.

Prior to the final hearing, the parties filed a Joint Pre-hearing Stipulation, in which they stipulated to certain facts. To the extent relevant, the parties' stipulated facts have been incorporated in the findings below.

At the hearing, Petitioner presented the testimony of S.L., the patient in this matter, and Kenneth Burke, M.D. Petitioner’s Exhibits B, C, and E were admitted into evidence, without objection. The objection to Exhibit A was sustained, and Petitioner did not submit its Exhibit D into evidence. Respondent testified on his own behalf and also presented the testimony of Ms. Elisa Ramirez. Respondent's Exhibit 1 was admitted into evidence. Respondent’s Exhibit 2 was not offered into evidence. Joint Exhibits A and B were also admitted into evidence.

The Transcript of the final hearing was filed on September 10, 2020. The parties timely filed proposed recommended orders, which have been considered in preparing this Recommended Order. Citations to statutes and administrative rules are to the versions in effect in September 2019, except as otherwise indicated. Hearsay evidence was only considered to supplement or explain other competent evidence and was not used to support a finding of fact, unless it would be admissible over objection in a civil action, pursuant to section 120.57(1)(c), Florida Statutes.

FINDINGS OF FACT

Stipulated Facts

1. The Department is the state agency charged with regulating the practice of medicine in Florida, pursuant to section 20.43 and chapters 456 and 458, Florida Statutes.
2. At all times material to this proceeding, Respondent was a licensed medical doctor in the State of Florida, having been issued license number ME 43566. Respondent's address of record with the Department is 601 East Sample Road, Suite 105, Pompano Beach, Florida 33064.
3. Respondent, at all times material to this case, had medical staff privileges at North Broward Hospital located at 201 East Sample Road, Pompano Beach, Florida 33064. Respondent, at all times material to this case, also worked at Broward Specialty Group located at 4515 Wiles Road, Suite 201, Coconut Creek, Florida 33073.
4. On or about September 7, 2019, S.L. presented to the emergency room at North Broward Hospital with symptoms of colitis of the sigmoid colon. S.L. was consulted by the attending physician to attend to her as her gastroenterologist.
5. Respondent performed an abdominal exam on S.L. on September 7, 2019. During the exam, Respondent palpated S.L.'s abdomen.

6. On or about September 8, 2019, Respondent performed another abdominal exam on S.L. During Respondent's examination, he palpated S.L.'s abdomen.

7. On or about September 13, 2019, S.L. presented to Broward Specialty Group for a follow-up examination. Respondent performed another abdominal exam on S.L. at that time.

8. A physician intentionally touching a patient's breasts is not within the scope of an abdominal examination. Intentionally touching a patient's breasts is outside the scope of generally accepted abdominal examination performed by a gastroenterologist.

9. Respondent had no medical reason to touch S.L.'s breasts on September 7, 2019; September 8, 2019; and/or September 13, 2019.

10. No physician may engage in sexual misconduct with his or her patient.

Additional Findings of Fact

11. Respondent, 72 years old, was born in 1947 and grew up, and went to school, in a small village in India. He wanted to become a physician because there was no doctor in his village. Dr. Gupta then moved and graduated from medical school in Rajasthan.¹ He completed his residency and two years of a fellowship in gastroenterology in Pittsburgh, and his training concluded in 1983.

12. Respondent has lived in South Florida since 1984. He has been married to his wife for 44 years² and she is also a physician. He has three children, ages 42, 36, and 32, and all are also physicians. He has six grandchildren. He lives with his wife, his son, and four grandchildren.

13. When his brother's wife unexpectedly died, Dr. Gupta and his wife began caring for his brother's three children, who then were 2, 6, and 9. Those children are now grown, with two being physicians and one an attorney. All practice in South Florida.

¹ The hearing Transcript incorrectly indicated Pakistan.

² The hearing Transcript incorrectly indicated 34 years.

14. Dr. Gupta practices in both the office and North Broward Hospital. He has medical staff privileges in gastroenterology at Broward Health North and has held those privileges since 1984. His privileges have been renewed every two years since 1984.

15. Dr. Gupta described an abdominal exam as a four-quadrant exam where he feels for the spleen and liver in the left upper quadrant. Dr. Gupta also asks patients to take a deep breath to facilitate feeling the spleen in the left upper quadrant and to facilitate feeling the liver in the right upper quadrant.

16. Dr. Gupta has performed tens of thousands of abdominal exams during his more than 40-year career. Dr. Gupta performs abdominal exams in a routine fashion, and there is no difference between the abdominal exams he performs in the office and in hospital settings. The exams are so routine for him that they are just automatic.

17. Dr. Gupta had no independent recollection of S.L., and his testimony was based both upon his routine pattern of practice over 40 years and S.L.'s medical records.

18. Respondent first provided care to S.L. on September 7, 2019, at North Broward Hospital, upon request for gastroenterology consultation.

19. S.L. was on a regular level floor in a double-bedded room.

20. Respondent's routine practice is to review the patient's chart and presentation and speak with the nurse involved with the patient's care to learn about any complaints. Respondent then invites the nurse to join him during the examination, and, if free, the nurse will join him in the patient's room.

21. Respondent's practice is to always leave the hospital door open when he sees a patient in the hospital. This is to allow entry and exit by staff related to care for the patient and/or the other patient in the room, as well as their respective family members.

22. At no time during this visit did Respondent touch S.L.'s breasts, as he testified:

Q. Since you have no independent recollection of the exam, how can you be sure you didn't touch her breasts?

A. It doesn't matter whether there's recollections or not or whether chart or not. I don't touch patient's breasts.

23. Respondent next provided care to S.L. on September 8, 2019, at North Broward Hospital, and, again, the door remained open for the duration of the visit. Respondent entered the room, asked S.L. about the progress of her symptoms, and then performed the same four-quadrant abdominal examination and answered any questions.

24. Respondent described the left upper quadrant of a patient as where the spleen lies. When a patient takes a deep breath, it expands the chest wall and lowers the diaphragm, which moves the spleen, so the edges can be felt. The right upper quadrant is where the liver lies and with deep inspiration, the chest expands and lowers the diaphragm and moves the liver, so the liver edge and tenderness can be felt.

25. Respondent did not touch S.L.'s breasts on September 8, 2019. Even though he does not specifically recall the visit, he is certain that he did not touch S.L.'s breasts. As he testified:

Q. Again, how can you be certain if you don't really remember this visit?

A. I am certain because it's not part of the examination, or [sic] it's not me. There's no reason to touch S.L.'s breast. Breast is not a part of the examination. And I don't need any chart, or I don't need any recollection for that exam.

26. Respondent next evaluated S.L. at his office, Broward Specialty Group, on September 13, 2019, during a follow-up examination. Respondent

was accompanied by his scribe, Ms. Elisa Ramirez, for the entirety of the visit. The examination took place in a small exam room. During the exam, Ms. Ramirez was located approximately five or six feet away from Respondent. Ms. Ramirez testified that she is curious, observant, and wants to go to medical school upon her graduation from college in December 2020 with a degree in biology. She closely watches and listens to Respondent, asks a lot of questions, and Respondent teaches her.

27. At the time of this third visit, S.L. was doing well and had been discharged from the hospital. Respondent performed an examination similar to the examinations he performed in the hospital. As he testified, at no time during this visit on September 13, 2019, did Respondent touch S.L.'s breasts:

Q. During this visit, did you touch Patient S.L.'s breast?

A. Absolutely not. I did not touch her breast neither on the 7th, 8th, or 13th. It is not part of the examination, and it's not me. I am a Hindu person I go to the temple. I am on the board of trustees at the temple. And to--touching a breast is demeaning, disgraceful and unsocial [sic]. I have beautiful family. I have loving wife. I have lovely daughter. I have granddaughters ... Absolutely not. It's not me.

28. Respondent repeatedly and consistently stated that he did not touch S.L.'s breast and that such is not part of the gastroenterological examination or evaluation:

Q. Dr. Gupta, we noted you testified you do not remember the actual three visits with this patient. But just for clarity, can you let the Court know whether or not you touched this patient's breasts?

A. I did not touch this patient's breastsThere is no way I can demean or I can degrade any woman. I did not touch Ms. S.L.'s breast on 7th, 8th or 19th [sic]. I am sorry. I did not do it, and I don't do these things.

29. As mentioned in paragraph 26 above, Ms. Ramirez serves as Respondent's scribe. In addition to her note-taking duties, she sometimes performs medical assistant duties. These consist of helping get patients ready and in a room, and asking them questions in advance of Dr. Gupta's entering the room to see the patient. She then goes into the room with Respondent to document what the patient says, what Dr. Gupta says, and creates a medical note from the conversation and examination.

30. Ms. Ramirez specifically recalls the visit of S.L. on September 13, 2019. She specifically remembers S.L., the exam room she was in, and the shirt S.L. was wearing.

31. Ms. Ramirez specifically described the layout of the examination room, which was room number three. Ms. Ramirez testified that she, Respondent, and S.L. were in an L-shaped configuration in the room. She was standing at a counter in the room, with her laptop on the counter, Respondent was seated on a stool, and S.L. was in an exam chair.

32. Ms. Ramirez testified that she watched the entire time Respondent performed the physical exam of S.L. She was located approximately five to six feet away from S.L.

33. Ms. Ramirez testified that at no time did she see Respondent touch S.L.'s breasts. At no time during the examination did she see Respondent inappropriately touch S.L. Ms. Ramirez stated that, based upon her experience with Respondent, it was a pretty normal interaction and there was nothing out of the ordinary. She admitted that she was not watching at some points during the visit, but that occurred only after Respondent had completed his physical exam of S.L.

34. S.L.'s testimony tells a different story. She first saw Respondent on September 7, 2019, while an inpatient at North Broward Hospital. S.L. testified that her room was near the nurse's station. During Respondent's examination, she had a roommate (another patient) present in her room.

35. S.L. testified that she did not tell anyone that Respondent had allegedly touched her breasts during the examination that day.

36. S.L. saw Respondent again, in the same hospital room, on the following day of September 8, 2019. Again, the other patient was present in a bed next to her.

37. S.L. testified that Respondent touched her breasts during this second abdominal examination. S.L. testified that she did not react in any way to Respondent's examination and did not tell anyone about any alleged inappropriate touching by Respondent.

38. S.L. testified that she was told she needed to follow-up with a doctor in three to five days. She stated that she selected Respondent to follow-up with because he was her doctor in the hospital and she believed it would be nearly impossible to find another gastro-intestinal ("GI") doctor in the short time frame.

39. S.L. testified that, at the time of examination in the office on September 13, 2019, Respondent entered the room with another "girl" who had a laptop. S.L. testified that, during her visit with Respondent on September 13, 2019, at his office, she did not specifically observe the other person in the room (Ms. Ramirez) for the entire time during the visit. She did not testify that the assistant was not in the room the entire time. S.L. testified that, as of the date of her appointment on September 13, 2019, she did not report to anyone that Respondent had touched her breasts during her first, second, or third examinations.

40. S.L. testified that, when she was in the hospital, her room door remained open on both occasions that Respondent examined her. She stated that nursing staff and others would come see her throughout the day while she was a patient in that room. S.L. testified that nursing staff also would come in during the day to see the other patient, who was in the room with her. S.L. testified that, from her bed, she could see out of the door.

41. S.L. testified that one day prior to seeing Respondent at his office on September 13, 2019, she saw her primary care physician and did not inform him of any alleged events in the hospital. S.L. testified that her primary care physician offered her three GI physicians that she could go and see. Her primary care physician was almost confrontational about her seeing one of the three GI physicians he recommended. S.L. testified that she had told her primary care physician that notwithstanding the names he had provided, she was going to see Respondent on the following day.

42. S.L. did not contact any of the three to see if they would be available for a consultation that next day or shortly thereafter. She did state that she sought an appointment with one of the three recommended GI physicians after her third visit with Respondent on September 13, 2019.

43. S.L. subsequently saw her primary care physician, Kenneth Burke, M.D., and, for the first time, discussed the alleged encounters with Respondent.

44. S.L.'s version of her examinations by Dr. Gupta is quite different from Respondent's account. She testified that during the course of her abdominal examination on September 7, 2019, Respondent lifted her camisole to expose her abdomen and palpated her abdomen in a circular direction, starting with the upper left quadrant and working towards the lower left side, then the lower right quadrant and working towards the upper right quadrant. Respondent, she said, next placed his hand underneath S.L.'s camisole and underneath the elastic of her shelf bra and placed his bare hand on her bare left breast and, under the guise of continuing his examination, asked her to take a breath.

45. Respondent then moved his hand to S.L.'s right breast and asked her to take another breath, she stated. She claims she felt uncomfortable when Respondent touched her breasts, but trusted Respondent and assumed he needed to touch her breasts as a part of her abdominal examination. She did

not report Respondent's alleged touching of her breasts to anyone on that day.

46. S.L.'s account of the examination on September 8, 2019, was identical to the previous day's examination, with the exception of Respondent first placing his hand on her right breast while asking her to take a breath, then moved to her left breast with a similar request that she take a breath. She did not report Respondent's alleged touching of her breasts to anyone on that day.

47. S.L.'s account of her visit to Respondent's medical office on September 13, 2019, was similar to her account of the two hospital visits by Dr. Gupta on September 7 and 8, 2019. She was not in pain on that date. She again testified that Respondent performed his examination by reaching under her clothing, and, during its course, first placed his hand on her bare right breast and asked her to take a breath, then performed the same touching of her bare left breast and asked her to take a breath.

48. She noted that Ms. Ramirez was in the room during the September 13, 2019, examination. She believed that Ms. Ramirez could not see the alleged improper touching because Respondent's hand was under S.L.'s clothes throughout the abdominal examination.

49. S.L. testified that, after the September 13, 2019, examination, she felt uneasy about Respondent's conduct and no longer believed his behavior was appropriate in a medical examination.

50. She confirmed that she then spoke with Dr. Burke who, after hearing her account of Respondent touching her breasts during an abdominal examination, suggested she file a complaint with the Department.

51. Although he could not recall the exact details of his examination of S.L., due to the large number of abdominal examinations he regularly performs, Dr. Gupta's account of his examinations of S.L. was clear, concise, credible, and given without hesitation. His record as a physician, as emphasized by his testimony at hearing, supports that touching a woman's

breasts during an abdominal examination is not acceptable and not part of the routine four-quadrant examination that he has performed thousands of times.

52. Moreover, Ms. Ramirez was present during the September 13, 2019, examination of S.L. Her testimony was, similarly, clear, concise, credible, and given without hesitation. While she is a loyal employee of Dr. Gupta's and hopes to go to medical school upon her graduation from college, no evidence of her being untruthful or of fabricating any part of her account was offered, other than an unsupported conclusion that she stands to lose in this situation if she were to admit that Respondent improperly touched S.L.'s breasts during an abdominal examination.

53. S.L.'s testimony also was clear, concise, credible, and given without hesitation. She recalled the facts as she presented them as if the events had just happened, making this a clear case of "she said, he said."

CONCLUSIONS OF LAW

54. The Division of Administrative Hearings has personal and subject matter jurisdiction in this proceeding pursuant to sections 120.569 and 120.57(1).

55. This is a proceeding whereby Petitioner seeks to revoke Respondent's license to practice medicine. Petitioner has the burden of proving the allegations in its Complaint by clear and convincing evidence. *Reich v. Dep't of Health*, 973 So. 2d 1233, 1235 (Fla. 4th DCA 2008) (citing *Dep't of Banking & Fin. v. Osborne Stern & Co.*, 670 So. 2d 932, 933 (Fla. 1996)); and *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987). As stated by the Supreme Court of Florida:

[C]lear 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 lacking in confusion as to the facts at issue. The

evidence must be of such a 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*, 429 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).

56. Because the regulation of health professions and occupations, section 456.072(1)(v), authorizes suspension or revocation of a professional license, it is penal in nature and must be strictly construed in favor of the licensed physician. *Breesmen v. Dep’t of Prof’l Reg., Bd. of Med.*, 567 So. 2d 469, 471 (Fla. 1st DCA 1990); *Munch v. Dep’t of Prof’l Reg., Div. of Real Estate*, 592 So. 2d 1136, 1143 (Fla. 1st DCA 1992).

57. A hearing involving disputed issues of material fact under section 120.57(1) is a de novo hearing, and Petitioner's initial action carries no presumption of correctness. § 120.57(1)(k), Fla. Stat.; *Moore v. Dep’t of HRS*, 596 So. 2d 759 (Fla. 1st DCA 1992).

58. The grounds proving Petitioner’s assertion that Respondent’s license should be disciplined must be those specifically alleged in the Complaint. *See, e.g., Trevisani v. Dep’t of Health*, 908 So. 2d 1108 (Fla. 1st DCA 2005); *Kinney v. Dep’t of State*, 501 So. 2d 129 (Fla. 5th DCA 1987); and *Hunter v. Dep’t of Prof’l Reg.*, 458 So. 2d 842 (Fla. 2d DCA 1984).

59. 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 Shore Vill. Prop. Owners’ Ass’n v. Dep’t of Env’tl. Prot.*, 824 So. 2d 208, 210 (Fla. 4th DCA 2002); and *Delk v. Dep’t of Prof’l Reg.*, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

60. Petitioner charged Respondent under section 456.072(1)(v), which provides, in relevant part:

(1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken:

* * *

(v) Engaging or attempting to engage in sexual misconduct as defined and prohibited in s. 456.063(1).

Section 456.063(1) provides, in relevant part:

(1) Sexual misconduct in the practice of a health care profession means violation of the professional relationship through which the health care practitioner uses such relationship to engage or attempt to engage the patient or client, or an immediate family member, guardian, or representative of the patient or client in, or to induce or attempt to induce such person to engage in, verbal or physical sexual activity outside the scope of the professional practice of such health care profession. Sexual misconduct in the practice of a health care profession is prohibited.

61. Petitioner charges that Respondent engaged in sexual misconduct by touching or cupping S.L.'s breasts during a medical examination. In order to prevail, Petitioner must prove by clear and convincing evidence that Respondent engaged in sexual misconduct by touching, or cupping, S.L.'s breasts during abdominal examinations on September 7, 8, and 13, 2019.

62. Based upon the testimony given by Respondent and Ms. Ramirez, the only "non-participant" witness to any of the alleged unlawful contact, the Department has not clearly or convincingly shown that Respondent engaged in sexual misconduct in violation of section 456.072(1)(v).

63. The evidence establishes that Respondent performed abdominal examinations on S.L. consistent with his routine practice of performing

such examinations over the past 40 years of medical practice as a gastroenterologist. The evidence clearly establishes, as confirmed through the testimony of both S.L. and Respondent, that the door to S.L.'s hospital room remained open for the duration of the examinations by Respondent on September 7 and 8, 2019. The evidence also clearly establishes that Ms. Ramirez witnessed the physical examination of S.L. in its entirety during the office visit on September 13, 2019. Ms. Ramirez testified repeatedly that nothing out of the ordinary occurred and that she at no time ever witnessed Respondent touch S.L.'s breasts or act inappropriately. The testimony is also clear and convincing that the examination witnessed by Ms. Ramirez was substantially the same as those conducted on September 7 and 8, 2019, in the hospital.

64. Although Respondent admits that he has no specific recollection of his encounters with S.L. beyond the medical record, he clearly and credibly testified that he would have no need to touch a patient's breast during an abdominal exam. Moreover, Respondent clearly and credibly testified that at no time did he touch the breasts of S.L. Respondent was consistent in his denials, and the testimony of Respondent's witness, Ms. Ramirez, was clear in her detailed recounting of the events of the office visit. Both the testimony of Respondent and Ms. Ramirez directly dispute the testimony of S.L. The burden of proof, however, is not on Respondent, but is on Petitioner.

65. While S.L. was a credible witness, her testimony, standing alone, was not clear and convincing evidence of any sexual misconduct on the part of Dr. Gupta. The undersigned cannot find that S.L.'s testimony was clear and convincing that Respondent touched or cupped her breasts at any time, much less on three separate occasions during three different visits. While this was S.L.'s testimony, given freely and without reservation, Respondent was just as clear and certain in his denials. Respondent was unequivocal that he does not touch a patient's breasts. Moreover, Ms. Ramirez's testimony, as the only direct witness to the office visit, and who was watching the totality of the

physical examination at all times, also was equally clear that Respondent never engaged in any inappropriate behavior. More specifically, Ms. Ramirez credibly testified that Respondent did not at any time touch S.L.'s breasts during the examination on September 13, 2019.

66. Further supporting the conclusion that Petitioner failed to prove any improper touching by clear and convincing evidence is an examination of Petitioner's behavior after each alleged incident. Following her examination by Respondent on September 7, 2019, S.L. made no mention to any party of any alleged inappropriate behavior by Respondent. Instead, she agreed to again receive care by Respondent on the following day, September 8, 2019. Then, after allegedly being inappropriately touched by Respondent for the second time on September 8, 2019, S.L. again failed to report any such issue to a nurse, staff member, or any other individual. Instead, S.L. elected to visit Respondent on a third occasion, on September 13, 2019, for outpatient care following her discharge from the hospital.

67. Additionally, on September 12, 2019, S.L.'s primary care physician provided her with the names of three other GIs for outpatient care. S.L. testified that her primary care physician seemed "almost confrontational," as he wanted her to see one of the three physicians he had recommended. However, despite the insistence of her primary care physician, and despite the alleged two incidences of inappropriate conduct, S.L. neither contacted any of the three GI physicians for an appointment ("I do not recall" whether I [S.L.] tried to get an appointment with one of the three) nor said anything about such events to her physician and, instead, chose to present to Respondent for outpatient care at a third visit.

68. Based upon the totality of the testimony and other evidence produced at hearing, S.L.'s testimony that she was the victim of sexual misconduct by Respondent is outweighed by the evidence to the contrary. Her testimony, standing alone, does not constitute clear and convincing evidence of sexual misconduct by Respondent.

69. S.L.'s decision to continue to receive care in the hospital and even seek his continued care after discharge, along with the consistency of the testimony of Respondent and Respondent's witness, Ms. Ramirez, results in the undersigned being unable to conclude Respondent engaged in any sexual misconduct, as alleged. It is impossible to say that the events as alleged in the Complaint were presented or proven with the precision and clarity necessary to meet the requisite clear and convincing standard of proof. *See Dep't of Health, Bd. of Med. v. Orly Pena-Sanchez, M.D.*, Case No. 18-4558PL (Fla. DOAH Apr. 18, 2018; Fla. DOH July 15, 2019).

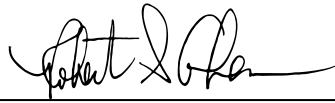
70. Although there are instances when clear and convincing evidence can be shown without a corroborating witness, this was not such an instance. *See Dep't of Health, Bd. of Chiropractic Med. v. Hamed Kian D.C.*, Case No. 18-0263PL (Fla. DOAH July 27, 2018; Fla. DOH Oct. 2, 2018). In this instance, Respondent had in Ms. Ramirez, a credible, corroborating witness and her testimony is highly credited. The testimony of Dr. Burke, who was not a witness to any of the alleged acts of Respondent complained of by S.L., was not relevant to the issue in this case and, therefore, played no direct role in the determination of the outcome in this matter.

71. Given the direct conflicts of testimony, together with the deficiencies in the testimony, the lack of a corroborating witness, or other sufficiently corroborating evidence offered by Petitioner, the undersigned finds that Petitioner failed to prove, by clear and convincing evidence, that Respondent violated section 456.072(1)(v), by engaging in or attempting to engage in sexual misconduct.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Health, Board of Medicine, enter a final order dismissing the Complaint.

DONE AND ENTERED this 18th day of December, 2020, in Tallahassee,
Leon County, Florida.



ROBERT S. COHEN
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 18th day of December, 2020.

COPIES FURNISHED:

Amanda M. Godbey, Esquire
Major Ryan Thompson, Esquire
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399
(eServed)

Gregory A. Chaires, Esquire
Richard Jay Brooderson, Esquire
Chaires Brooderson & Guerrero, P.L.
283 Cranes Roost Boulevard, Suite 165
Altamonte Springs, Florida 32701
(eServed)

Louise St. Laurent, General Counsel
Department of Health
4052 Bald Cypress Way, Bin C-65
Tallahassee, Florida 32399-3565
(eServed)

Claudia Kemp, J.D., Executive Director
Board of Medicine
Department of Health
4052 Bald Cypress Way, Bin C-03
Tallahassee, Florida 32399-3253
(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.