

By: Aimee Maurer
Deputy Agency Clerk

STATE OF FLORIDA
BOARD OF MEDICINE

DEPARTMENT OF HEALTH,

Petitioner,

vs.

DOH CASE NO.: 2020-22166

DOAH CASE NO.: 20-4079PL

LICENSE NO.: ME0077602

SAEED AKHTAR KHAN, M.D.,

Respondent.

FINAL ORDER

THIS CAUSE came before the BOARD OF MEDICINE (Board) pursuant to Sections 120.569 and 120.57(1), Florida Statutes, on April 9, 2021, via a duly noticed video conference meeting, for the purpose of considering the Administrative Law Judge's Recommended Order, Petitioner's Motion to Accept Late-Filed Exceptions, Respondent's Response to the Department's Motion to Accept Late-Filed Exceptions, Petitioner's Exceptions to the Recommended Order, and Respondent's Responses to Petitioner's Exceptions to the Recommended Order, (copies of which are attached hereto as Exhibits A, B, C, D, and E) in the above styled cause. Petitioner was represented by Amanda M. Godbey, Assistant General Counsel. Respondent was present and represented by Jon Pellett, Esq., Edward Donald Reagan, Esq. and Robert N. Nicholson, Esq.

DIVISION OF
ADMINISTRATIVE HEARINGS

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FILED

Upon review of the Recommended Order, the argument of the parties, and after a review of the complete record in this case, the Board makes the following findings and conclusions.

RULING ON PETITIONER'S MOTION TO
ACCEPT LATE-FILED EXCEPTIONS

The Recommended Order in this matter was issued by the Division of Administrative Hearings (DOAH) on March 1, 2021. Pursuant to Section 120.57(1)(k), Florida Statutes, the parties were to file any exceptions to the findings in the Recommended Order within fifteen (15) days of the issuance of the Recommended Order. Fifteen days from March 1, 2021, was March 16, 2021. On March 16, 2021, the Petitioner filed a copy of the Recommended Order at DOAH and with Respondent's Counsel but failed to file the original with the Agency Clerk at the Department of Health until March 17, 2021.

Respondent objects to the Petitioner's Motion to Accept Late-Filed Exceptions and asks the Board to deny the motion but fails to disclose how a one day delay in the filing of the exceptions with the Agency Clerk of the Department of Health prejudiced him in any way whatsoever. Hence, given that the exceptions were provided to the Respondent and filed with DOAH on a timely basis and that Respondent has been unable to demonstrate any prejudice arising from the late filing with the

Department, the Board GRANTED Petitioner's Motion to Accept Late-Filed Exceptions.

RULING ON EXCEPTIONS

The Board reviewed and considered the Petitioner's Exceptions to the Recommended Order and ruled as follows:

1. Petitioner's first exception to Paragraphs 48-53 and 55 of the Recommended Order is denied based upon the arguments set forth in the Respondent's Response to Petitioner's Untimely Exceptions to the Recommended Order and based on its finding that Rule 64B8-9.008, Florida Administrative Code, does acknowledge that the distinction between a "current" and a "former" patient is relevant to the determination of whether sexual activity between a physician and a former patient is precluded by Section 456.072(1)(v), Florida Statutes, and Rule 64B8-9.008, Florida Administrative Code. The Board believes that its finding is supported by *Department of Health, Board of Psychology v. Caddy*, 764 So.2d 625 (Fla. 1st DCA 2000).

2. Petitioner's second exception to Paragraphs 5 and 33 of the Recommended Order is denied based upon the arguments set forth in the Respondent's Response to Petitioner's Untimely Exceptions to the Recommended Order and based on its finding that paragraph 5 of the Recommended Order does indeed contain a finding of fact that is based on competent and substantial evidence. The Board also found that paragraph 33 of the

Recommended Order contains a finding of ultimate fact that is also based on competent and substantial evidence.

3. Petitioner withdrew its third exception to paragraph 53 of the Recommended Order.

4. Petitioner's fourth exception to Paragraphs 45, 46, 48, 50 and 51 of the Recommended Order is denied based upon the arguments set forth in the Respondent's Response to Petitioner's Untimely Exceptions to the Recommended Order. The Board also found that Petitioner's exception to the ALJ's conclusion that the Department failed to charge the Respondent with committing sexual misconduct with T.B. as a "former Patient" involves a procedural due process issue over which it does not have substantive jurisdiction.

5. Petitioner withdrew its fifth exception to paragraph 53 and 55 of the Recommended Order.

6. Petitioner's sixth exception to the recommended penalty is denied based upon the arguments set forth in the Respondent's Response to Petitioner's Untimely Exceptions to the Recommended Order.

FINDINGS OF FACT

1. The findings of fact set forth in the Recommended Order are approved and adopted and incorporated herein by reference.

2. There is competent substantial evidence to support the findings of fact.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter pursuant to Section 120.57(1), Florida Statutes, and Chapter 458, Florida Statutes.

2. The conclusions of law set forth in the Recommended Order are approved and adopted and incorporated herein by reference.

DISPOSITION

Upon a complete review of the record in this case, the Board determines that the disposition recommended by the Administrative Law Judge be **ACCEPTED**. WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED:

The Administrative Complaint filed in this matter is hereby **DISMISSED**.

DONE AND ORDERED this 20th day of April, 2021.

BOARD OF MEDICINE

Paul A. Vazquez

Paul A. Vazquez (Apr 20, 2021 15:48 EDT)

Paul A. Vazquez, J.D., Executive Director
For Zachariah P. Zachariah, M.D., Chair

NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DEPARTMENT OF HEALTH AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN THIRTY (30) DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Final Order has been provided by **Certified Mail** to: Saeed Akhtar Khan, M.D., 2257 Highway 441 N., Suite A, Okeechobee, FL 34972; by mail to: Mary Li Creasy, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; Jon M. Pellett, Esq., 12724 Gran Bay Parkway West, Suite 401, Jacksonville, FL 32258; Robert N. Nicholson, Esq., 707 N.E. 3rd Avenue, Ste. 301, Fort Lauderdale, FL 33304; Edward Donald Reagan, Esq., 658 West Indiantown Road, Suite 209, Jupiter, FL 33458; by email to: Chad Dunn, Assistant General Counsel, Department of Health, at Chad.Dunn@flhealth.gov; Edward A. Tellechea, Chief Assistant Attorney General, at Ed.Tellechea@myfloridalegal.com; on this

23rd day of April, 2021.

Saeed Akhtar Khan, M.D.
2257 Highway 441 N., Suite A
Okeechobee, FL 34972

Aimee Maus
Deputy Agency Clerk

Certified Article Number

7414 7266 7704 2140 1301 07

SENDER'S RECORD

**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

DEPARTMENT OF HEALTH, BOARD OF
MEDICINE,

Petitioner,

vs.

Case No. 20-4079PL

SAEED AKHATAR KHAN, M.D.,

Respondent.

RECOMMENDED ORDER

Pursuant to notice, a final hearing in this case was conducted before Administrative Law Judge Mary Li Creasy by Zoom conference on November 2 through 4, 2020.

APPEARANCES

For Petitioner: Amanda M. Godbey, Esquire
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For Respondent: Robert N. Nicholson, Esquire
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Fort Lauderdale, Florida 33304

Edward Donald Reagan, Esquire
Edward D. Reagan, P.A.
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Jupiter, Florida 33458

STATEMENT OF THE ISSUES

Whether Respondent engaged in sexual misconduct in the practice of a healthcare profession, as defined in section 456.063(1), Florida Statutes (2019), and/or Florida Administrative Code Rule 64B8-9.008 (2019), with T.B. on or about February 25, 2020; and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

On July 31, 2020, the Department of Health (Petitioner or Department), issued an Administrative Complaint (Complaint) against Saeed Akhtar Khan, M.D. (Respondent). The Complaint charged Respondent with violating section 458.331(1)(nn), Florida Statutes (2019), by engaging in sexual misconduct with a patient in violation of section 456.072(1)(v), and/or rule 64B8-9.008. Respondent disputed material facts alleged in the Complaint and requested an administrative hearing.

The case was forwarded to the Division of Administrative Hearings (DOAH) and a final hearing was held as scheduled on November 2 through 4, 2020. 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 T.B., the accuser in this case. Petitioner also presented the testimony of Okeechobee County Sheriff's Office Detective J. Gonzalez; former patient M.T.;¹ and Gateway

¹ Respondent objected to the admission of the testimony of former patient M.T. as immaterial and not permitted by sections 90.404 and 90.403, Florida Rules of Evidence. Respondent's objections were overruled, and the testimony was received. However, M.T.'s testimony was

Medical Group (Gateway Medical) employees Amanda Curtis and Shannon Lawrence. Petitioner's Exhibits 1 through 8 were admitted into evidence.

Respondent presented the testimony of Gateway Medical employees Amanda Curtis, Shannon Lawrence, Miranda Chandler, Kristina Chapman, and Kora Chapman. Respondent also presented the testimony of Department of Health Investigator Kathleen Healy-Baez and Dr. Leland Heller. Respondent did not testify. Respondent's Exhibits 1, 2, 4 through 8, 9 (excluding pages 1 and 2), 10, 12 through 14, 16 through 20, 23, 24, and 30 were admitted into evidence.

The five-volume final hearing Transcript was filed on December 14, 2020. Respondent requested, and was granted, an extension of time for the parties to file proposed recommended orders. Both parties timely filed proposed recommended orders, which were considered in the drafting of this Recommended Order. Unless otherwise indicated, citations to the Florida Statutes refer to the version in effect during the time that the violation was allegedly committed.

FINDINGS OF FACT

The Parties

1. Petitioner is the state agency charged with regulating the practice of medicine 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 ME77602. Respondent's address of record with the Department is 2257 Highway 441 North, Suite A, Okeechobee, Florida 34972.

not ultimately deemed relevant or material to the resolution of the facts in dispute in this matter.

3. At all times material to this Order, Respondent owned and operated Saeed Khan, P.A., a medical practice within the Gateway Medical. Gateway Medical is comprised of ten professional associations which include a professional association owned by Tahir Naeem, M.D. (Dr. Naeem).

The Relationship Between Respondent and T.B

4. On February 25, 2020, T.B., a long-time patient of Respondent's medical practice, presented to Respondent at his office, where Respondent engaged T.B. in sexual activity.

5. T.B. had been Respondent's patient since first seeing him as her primary care physician in 2005, and T.B. remained Respondent's patient for "approximately 13 or 14 years." T.B. ceased her patient-physician relationship with Respondent in April 2019.

6. T.B. is a medically complex patient and over the course of their 14-year relationship, Respondent treated her for numerous medical issues including, but not limited to the following: Chiari 1 malformation, Graves' disease, hyperthyroidism, fibromyalgia, post-traumatic stress disorder, attention-deficit/hyperactive disorder, breast calcifications, depression, anxiety, and failed neck surgery fusion.

7. However, although their relationship was friendly, T.B. and Respondent's "friendship" remained within the confines of the physician-patient relationship. In the 14 years that Respondent treated T.B., the two never socialized outside of Respondent's medical office and the majority of their conversations revolved around T.B. seeking advice about her various medical issues. T.B. occasionally texted Respondent to seek medical advice for her health concerns, to request referrals to specialists, and to schedule medical appointments with Respondent.

8. Over the course of their professional relationship, T.B. often discussed sensitive and personal subjects with Respondent, including her marital strife. Conversations of this personal nature were important and pertinent

components of T.B.'s medical care, especially since she was being treated for depression and anxiety.

9. T.B. sent text messages to a friend in March 2019 that she personally disliked Respondent and no longer wanted him as her physician. T.B. texted her friend on March 29, 2019, that she doesn't "like Khan anymore," that Respondent "makes her feel stupid," and that "he sucks." T.B. later texted the same friend that "I hate my primary" (referring to Respondent), and "I freakin' hate Khan and will dump his ass as soon as I get through all this."

10. In April 2019, Respondent and T.B. had a disagreement over T.B.'s medical care. On April 12, 2019, T.B. reported to Respondent that she was concerned about her thyroid. Respondent's office mistakenly ordered a gallbladder test instead of a thyroid diagnostic test for T.B.

11. T.B. was irate with Respondent for not realizing what she perceived to be a grievous error. T.B. vented about her frustration with Respondent with Brenda Adams (Ms. Adams), a family friend and Gateway Medical employee. T.B. informed members of Respondent's staff that she was leaving the practice and would be seeking care with another physician.

12. T.B. thereafter transferred her medical care from Respondent to another primary care physician with Gateway Medical, Dr. Naeem, in April 2019. T.B. treated with Dr. Naeem on two occasions between April and June 2019.

13. T.B. subsequently transferred her care from Dr. Naeem to another primary care physician, Dr. Leland Heller, beginning in June 2019.

14. At the time of T.B. terminating her care with Respondent, Respondent's office did not send a letter notifying T.B. that she was no longer a patient nor was this documented in T.B.'s medical records. However, the evidence is clear and convincing that neither T.B. nor Respondent considered her a patient of his practice after April 2019.

15. It is Respondent's standard policy and practice not to readmit a patient once they have left the practice. To be readmitted to the practice,

Respondent has to personally approve the readmission. T.B. was never readmitted to Respondent's practice.

16. T.B. had no contact with Respondent between April 16, 2019, and September 2019. During that time, T.B. had medical appointments with Dr. Naeem and four with Dr. Heller. By September 2019, T.B. was overwhelmed and frustrated with the medical care she received from the other physicians. She had also come to the realization that the error that Respondent's office had made in April 2019 was less egregious than she initially believed.

17. On September 12, 2019, T.B. contacted Respondent by Facebook instant message and requested a meeting with him "to clear the air" regarding the circumstances of her departure from the practice, and to "see if I'm still your patient." Respondent did not respond to T.B.'s Facebook message.

18. T.B. contacted Respondent again on September 23, 2019, this time by text message to his personal cell phone, stating that she felt "they have left off on the wrong foot in our last conversation," and asking whether Respondent would be willing to "meet" with her. T.B. acknowledged in her text message that she was not supposed to be contacting Respondent on his personal cell phone. Respondent agreed to meet T.B. at his office the next day.

19. On September 24, 2019, T.B. met with Respondent in Respondent's personal office and discussed her thyroid issues, the treatment recommended by her endocrinologist, and her pending separation from her husband.

20. At the meeting, T.B. requested to return to the practice as a patient, and Respondent replied that "I think it might be better if we remain friends."

21. Respondent's refusal to take T.B. back as a patient was documented by T.B. in text messages with a friend. T.B. texted with a friend on September 24, 2019, regarding her meeting with Respondent, stating in the text message, "Just finished. Everything went well. He won't take me back as

a patient, which is probably best.” When asked by her friend why not, T.B. replied, “He just says I’d always have a doubt about the care bc I felt he missed the thyroid thing.”

22. T.B. was not reestablished as a patient in the medical records system of Respondent’s practice on September 24, 2019, and an appointment that had been placed in the calendar of the practice was listed as “cancelled.” T.B. did not seek further medical care from Respondent.

The Events Giving Rise to This Disciplinary Action

23. T.B. and Respondent had no contact with each other between September 24, 2019, and February 2020.

24. T.B. suffered with a pinched nerve in her spinal cord that caused pain and numbness down her right arm and shoulder. T.B. attempted to alleviate this issue with an anterior cervical decompression fusion (ACDF) surgery in 2018; however, the surgery was unsuccessful and T.B. was suffering from the same symptoms. T.B. scheduled a second ACDF surgery to occur on March 12, 2020. The scheduled surgery was different from her first, and T.B. was anxious about the decision of whether to go through with the surgery.

25. On February 19, 2020, T.B. posted on Facebook that she was going to have a 75-minute MRI done at the University of Miami Health System. On the same day, Respondent commented under that post, “Good Luck,” and sent T.B. a private Facebook message that stated, “Good Luck Thinking of you. I am always available as a sounding board.” T.B. responded to Respondent’s message stating, “Thank you! I’d love to come in and run it all by you. Just let me know when. Failed fusion and scar tissue hitting a nerve the doctor believes....” T.B. was aware that Respondent had previously undergone the same surgery.

26. On February 24, 2020, T.B. was served with divorce papers. Following receipt of her divorce papers, T.B. initiated contact with Respondent on February 25, 2020, and asked to meet with him that day. Respondent replied asking if she was OK, and T.B. responded, “Not really. Having the surgery

redone. And was served with divorce papers yesterday and lost my job because of disability. Wanted your 'older and wiser advice.'”

27. They agreed to meet that same day. T.B. went to Respondent's office and met with Respondent at approximately 4:00 p.m. Respondent's staff directed T.B. to meet Respondent in his private medical office. When she arrived, the receptionist told her that she did not need to sign in, and T.B. did not sign in as a patient. When asked by the receptionist why she was coming to the office that day, T.B. responded that she was not there as a patient, but to meet with Dr. Khan.

28. Respondent did not medically examine T.B. on February 25, 2020. Significantly, T.B. did not have her vital signs taken by a nurse or medical assistant. T.B. did not complete any new or existing patient paperwork. Respondent did not render a diagnosis on February 25, 2020, nor did Respondent render any treatment or prescribe T.B. any medication, nor did he make any referrals for medical care. T.B. did not bring any medical records with her to the February 25, 2020, meeting, and Respondent did not review any medical records during the meeting.

29. T.B. met with Respondent in his personal office space at the practice rather than an examination room. Upon T.B.'s arrival, Respondent dismissed his staff and closed the door to the office, leaving him alone with T.B.

30. After discussing T.B.'s impending divorce, Respondent approached T.B. and asked her to scratch his back, to which T.B. complied. Respondent then placed his hands on T.B.'s and then began to massage her shoulders. T.B. attempted to leave the office by feigning an excuse to leave, however, Respondent blocked her exit, pulled down her blouse, placed his mouth on her breast, and sucked on her nipple. Respondent then pulled down the other side of T.B.'s blouse, placed his mouth on her other breast, and sucked on her nipple. As T.B. broke away and exited the practice, Respondent told her that they would be sleeping together in the future.

Subsequent Law Enforcement Investigation

31. T.B. did not initiate a complaint against Respondent with law enforcement immediately after the incident because she underwent neck surgery on March 12, 2020. The recovery for that surgery involved 12 weeks in a neck brace and a difficult and painful recovery. As soon as T.B. recovered, she immediately reported Respondent's conduct to law enforcement, initiating an investigation, which resulted in Respondent's arrest. T.B. also hired a civil attorney to initiate a civil claim against Respondent.

32. Respondent did not testify at hearing and asserted his Fifth Amendment privilege against self-incrimination in his deposition. Accordingly, T.B.'s testimony regarding the heinous sexual assault of February 25, 2020, is credited.

33. However, Respondent's actions of February 25, 2020, as described by T.B., did not re-establish the physician-patient relationship. The meeting between T.B. and Respondent on February 25, 2020, was that of two acquaintances. It was not intended by either of them as a physician-patient encounter.

34. During her final hearing testimony, T.B. claimed that during the February 25, 2020, meeting, she and Respondent discussed her upcoming surgery. However, this testimony is inconsistent with T.B.'s prior sworn testimony and prior sworn statements in this matter. It is also inconsistent with T.B.'s narrative description of the meeting with Respondent in this matter. Her testimony in this regard is, therefore, deemed not credible.

35. During T.B.'s discovery deposition in this case, T.B. specifically denied that she discussed her impending surgery with Respondent during the February 25, 2020, meeting. Additionally, in T.B.'s prior sworn written statement to Deputy Reno of the Okeechobee County Sheriff's Office, she made no mention of discussing her upcoming surgery with Respondent prior to the physical contact between Respondent and her. Instead, her narrative of

the event was that she and Respondent only discussed her impending divorce and marital assets prior to Respondent asking her to scratch his back.

36. This version is consistent with the fact that T.B. brought her divorce papers with her to the meeting with Respondent and did not bring any medical records. It is also consistent with the fact that T.B. and Respondent had discussed her impending divorce at the September 24, 2019, meeting. T.B. also referred to Respondent as her “previous primary doctor” in her statement to Deputy Reno.

37. Further, T.B. told Detective Gonzalez that when she walked into Respondent’s office she was in tears because of the divorce, and that the first thing she told Respondent was that she had been served with the divorce papers. During her May 6, 2020, interview with Detective Gonzalez., T.B. stated she was not a patient of Respondent’s on February 25, 2020. T.B. told Detective Gonzalez that she had severed the physician-patient relationship with Respondent based upon a prior misdiagnosis by Respondent’s practice, and that she was seeing Respondent as a “friend” on February 25, 2020.

38. Even if T.B.’s testimony that she discussed her already planned surgery with Respondent was credited, her testimony was that Respondent told her nothing more than that the surgery was “worth a try” and “why not” have it. Such advice does not rise to the level of or constitute a medical diagnosis, treatment, operation, or prescription. *See* § 458.305(3), Fla. Stat. (2020). At most, T.B.’s testimony established that T.B. asked Respondent as a “friend” and a person who had previously had a similar surgery whether he thought she should proceed with the surgery. The fact Respondent was a physician, without more, does not convert this conversation between “friends” into the practice of medicine or create a physician-patient encounter.

CONCLUSIONS OF LAW

39. DOAH has jurisdiction over the subject matter of this proceeding and the parties thereto. §§ 120.569 and 120.57(1), Fla. Stat. (2020).

40. 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, 497 (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)); *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987).

41. 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., Inc.*, 590 So. 2d 986, 988 (Fla. 1st DCA 1991).

42. Penal statutes must be construed in terms of their literal meaning and words used by the Legislature may not be expanded to broaden the application of such statutes. *Elmariah v. Dep't of Bus. & Prof'l Reg., Bd. of Med.*, 574 So. 2d 164, 165 (Fla. 1st DCA 1990); *Griffis v. Fish & Wildlife Conserv. Comm'n*, 57 So. 3d 929, 931 (Fla. 1st DCA 2011); *Beckett v. Dep't of Fin. Servs.*, 982 So. 2d 94, 100 (Fla. 1st DCA 2008). "No conduct is to be regarded as included within a penal statute that is not reasonably proscribed by it; if there are any ambiguities included, they must be construed in favor

of the licensee." *McClung v. Crim. Just. Stds. & Training Comm'n*, 458 So. 2d 887, 888 (Fla. 5th DCA 1984)

43. The allegations of fact set forth in the Complaint are the grounds upon which this proceeding is predicated. *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); *see also Cottrill v. Dep't of Ins.*, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996). 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).

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

(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.

45. Petitioner specifically charged that Respondent engaged in sexual misconduct by engaging in physical sexual activity with "patient T.B.," who was alleged to be a *then* patient of Respondent.

46. After close of discovery and two business days before the start of the formal hearing, when preparing the Joint Pre-Hearing Stipulation, Petitioner for the first time sought to insert a new theory of prosecution into this proceeding that was not previously charged or presented to the probable cause panel of the Board of Medicine.

47. Specifically, Petitioner contends in its position included in the Joint Pre-hearing Stipulation that, “Respondent engaged in sexual misconduct with T.B. on or about February 25, 2020, within a patient-physician relationship.” Petitioner further added, “in the alternative, if the physician-patient relationship is found to be terminated, Respondent engaged in sexual misconduct as a result of the exploitation of trust, knowledge, influence or emotions, derived from the professional relationship.”

48. Allegations that T.B. was a *former* patient of Respondent on February 25, 2020, were not charged in the Complaint filed on July 31, 2020, nor alleged in the Order of Emergency Restriction entered on July 15, 2020. The Board of Medicine’s Probable Cause Panel did not find probable cause that Respondent engaged in sexual misconduct with a former patient through exploitation of trust, knowledge, influence, or emotions, derived from the professional relationship. Respondent cannot be subject to discipline for such uncharged conduct.²

49. The Complaint Paragraph 17 also references rule 64B8-9.008 which “prohibits sexual misconduct with a patient, including verbal or physical behavior, which may reasonably be interpreted as intended for the sexual arousal or gratification of the physician, the patient or any third party or may reasonably be interpreted by the patient as being sexual.” *See Fla. Admin Code R. 64B8-9.008(2)(a)*.

² On October 30, 2020, Respondent filed a motion in limine to preclude Petitioner from arguing its alternative theory of prosecution and limit the hearing evidence, testimony, and argument solely to the conduct actually charged in the Complaint. The motion was considered after oral argument from both parties on November 2, 2020, and granted. Because the matter was set for final hearing in less than two days, Petitioner’s oral motion to amend the Complaint to add its new theory of the case was denied by the undersigned.

50. Notably absent from the reference in the Complaint to rule 64B8-9.008 was any description of T.B. as a “former patient” or recitation to the remaining language of that rule which specifically addresses “sexual behavior or involvement with a patient not actively receiving treatment from the physician.”

51. In fact, rule 64B8-9.008(4) specifies that the determination of when a person is a patient for purposes of this rule is “made on a case by case basis” with consideration given to the nature, extent, and context of the professional relationship between the individual and the physician. Subsection (5) provides a variety of factors to be considered. The Complaint makes no reference to subsections (4) or (5) and provides no facts which would put Respondent on notice that he was being charged with a violation of any portion of the rule other than subsection 2(a), which is confined to an existing patient. The Complaint fails to allege that “the sexual contact is a result of the exploitation of trust, knowledge, influence or emotions, derived from the professional relationship.” *See Fla. Admin Code R. 64B8-9.008(6)*.

52. Both parties acknowledge in their proposed recommended orders that the sole issue of material fact that remained for final hearing was whether T.B. was an existing patient of Respondent on the date of the sexual battery.

53. For reasons stated in the Findings of Fact above, it was not clearly or convincingly shown that Respondent was T.B.’s physician on February 25, 2020, or that Respondent sought to use a physician-patient relationship to engage in sexual misconduct with a patient in violation of section 456.072(1)(v), as alleged in the Complaint.

54. T.B. was a former patient who had voluntarily left Respondent’s practice in April 2019, when she transferred her care to other physicians. There was no contact between them after April 2019, and none occurred until T.B. initiated contact with Respondent in September 2019. As shown by the documentation and testimony, T.B. sought to return to the practice in September 2019, but Respondent rejected her request to return to the

practice as a patient. After September 2019, T.B. and Respondent had no contact with each other until February 2020, when Respondent placed a public comment to T.B.'s Facebook post wishing her good luck with a medical procedure. T.B. tried to initiate contact with Respondent following his public comment, but Respondent did not respond to this attempt at contact. When T.B. sought out Respondent following her receipt of divorce papers, Respondent agreed to meet with her and as T.B. said in her own words, they met as "friends."

55. The evidence is clear that T.B. did not then consider Respondent to be her physician and she was not seeking his advice as a physician. The evidence is equally clear that nothing occurred prior to or during the February 25, 2020, meeting between T.B. and Respondent to reestablish a physician-patient relationship. Although the conduct engaged in by Respondent was unquestionably deplorable, Respondent's license as a physician was not relevant to their meeting. He did not seek to use a physician-patient relationship to engage or attempt to engage T.B. in sexual activity.

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 Administrative Complaint.

DONE AND ENTERED this 1st day of March, 2021, in Tallahassee, Leon County, Florida.

Mary Li Creasy

MARY LI CREASY
Administrative Law Judge
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Division of Administrative Hearings
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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.