

FILED DATE - DEC 29 2021

Department of Health

By: *[Signature]*
Deputy Agency Clerk

**STATE OF FLORIDA
BOARD OF PHYSICAL THERAPY PRACTICE**

DEPARTMENT OF HEALTH,

Petitioner,

CASE NO.: 2018-26938
DOAH CASE NO.: 20-5141PL
LICENSE NO.: PT 16173

BRYAN M. DOWNS, P.T.,

Respondent.

ADMINISTRATIVE HEARINGS

2022 JAN -4 PM 12:07

FILED

FINAL ORDER

THIS CAUSE came before the BOARD OF BOARD OF PHYSICAL THERAPY PRACTICE (Board) pursuant to Sections 120.569 and 120.57(1), Florida Statutes, at a duly noticed public meeting held on December 10, 2021, in Jacksonville, Florida, for the purpose of considering the Administrative Law Judge's Recommended Order, Petitioner's Exception to the Recommended Order, Respondent's Exceptions to the Recommended Order, and Petitioner's Response to Respondent's Exceptions to the Recommended Order (copies of which are attached hereto as Exhibits A, B, C, and D respectively). Petitioner was represented by Christina A. Shideler, Assistant General Counsel. Respondent was present and represented by Howard J. Hochman, Esq.

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

RULING ON RESPONDENT'S EXCEPTIONS

1. Respondent filed exceptions to the Recommended Order numbered I through VIII. Petitioner filed responses to the Respondent's exceptions. The Board

reviewed and considered the Respondent's Exceptions to the Recommended Order and Petitioner's Response to Respondent's Exceptions to the Recommended Order, and ruled as follows:

2. Respondent's Exception I is REJECTED without consideration as not legally sufficient by failure to provide a specific citation to the record, such as exhibits or the hearing transcript, identify a legal basis, and for the reasons stated in Petitioner's Response.

3. Respondent's Exception II is REJECTED as not legally sufficient for the reasons stated in Petitioner's Response.

4. Respondent's Exception III is REJECTED as not legally sufficient for the reasons stated in Petitioner's Response.

5. Respondent's Exception IV is REJECTED as not legally sufficient for failure to identify disputed portions of the Recommended Order and the reasons stated in Petitioner's Response.

6. Respondent's Exception V is REJECTED as not legally sufficient for failure to identify a legal basis for the exception, failure to include an appropriate and specific citation to the record, such as exhibits or the hearing transcript, and for the reasons stated in Petitioner's Response.

7. Respondent's Exception VI is DENIED because the findings set forth in the Recommended Order at page 19, paragraphs 70 through 71, were supported by competent substantial evidence, and for the reasons set forth in the Petitioner's Response to Respondent's Exceptions to the Recommended Order.

8. Respondent's Exception VII is REJECTED as not legally sufficient for

failure to identify a legal basis for the exception and the reasons stated in Petitioner's Response.

9. Respondent's Exception VIII is DENIED because the findings set forth in the Recommended Order at page 7, paragraph 15, is supported by competent substantial evidence.

RULING ON PETITIONER'S EXCEPTION

1. Petitioner's exception to Recommended Order paragraph 73 is GRANTED. For the written reasons stated by Petitioner, adopted and incorporated fully herein, and based upon the Board's discussion during the presentation of the exception, the Board finds that, pursuant to section 120.81(4)(a), Florida Statutes, additional evidence in the form of corroboration is not necessary to meet the clear and convincing burden of proof in a proceeding against a licensed professional which involves allegations of sexual misconduct. Accordingly, as required by section 120.57(1)(l), Florida Statutes, the Board finds this substituted conclusion of law to be as or more reasonable than the ALJ's, grants the Exception, and substitutes the following language for Paragraph 73 of the RO:

The undersigned finds, based on the evidence, that the kiss on the forehead was not clearly and convincingly shown to constitute sexual misconduct. Mr. Downs adamantly denied that there was any sexual intent in the kiss, though his denial is undercut by the fact that in his initial written statement to the Department, Mr. Downs denied that the kiss occurred. It was not unreasonable for Patient A.D. to interpret the kiss as at least an effort by Mr. Downs to assess what he could get away with in terms of sexual advances. However, given the relatively high standard of proof and the necessarily subjective question of whether Mr. Downs intended to "attempt to induce" Patient A.D. to engage in sexual activity, the undersigned finds that the Department has not met its burden of proving sexual misconduct. Mr. Downs's behavior was odd, overly intimate, and professionally inappropriate, but not clearly intended as sexual. As noted above, the Department did prove by clear and convincing evidence that the kiss was outside the scope

of practice and fell below the standard of practice for a physical therapist.

FINDINGS OF FACT

1. There is competent substantial evidence to support the Findings of Fact.
2. The Findings of Fact set forth in the Recommended Order are approved and adopted and incorporated herein by reference.

CONCLUSIONS OF LAW

1. The Board has jurisdiction of this matter pursuant to Section 120.57(1), Florida Statutes, and Chapter 486, Florida Statutes.
2. The Conclusions of Law set forth in the Recommended Order are approved as modified by this Final Order and adopted and incorporated herein by reference. There is competent, substantial evidence to support the conclusions of law.

DISPOSITION

Upon a complete review of the record in this case, the Board approves and adopts the penalty set forth in the Recommended Order, and in accordance therewith, imposes the following discipline:

1. Payment of an \$8,000.00 fine.
2. Respondent's License Number PT 16173 is placed on probation for a period of two years.
3. Payment of the costs of the Department's investigation and prosecution.

RULING ON MOTION TO TAX COSTS

Petitioner filed written Motions to Assess Costs in accordance with section 456.072(4), Florida Statutes. Respondent filed a Corrected Objection to Motion to Assess

Costs. Because the competing Motions establish a disputed issue of fact, the proceeding to assess costs is BIFURCATED pending resolution of the final amount(s) due.

This Final Order shall take effect upon being filed with the Clerk of the Department of Health.

DONE AND ORDERED this 28 day of December, 2021.

BOARD OF PHYSICAL THERAPY PRACTICE



By Allen Hall, Executive Director
for Dr. Patrick Pabian, P.T., Chair

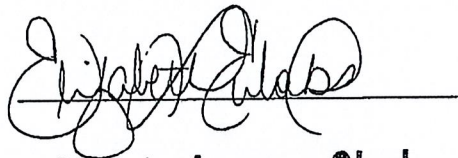
NOTICE OF RIGHT TO JUDICIAL REVIEW

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 BUSINESS AND PROFESSIONAL REGULATION 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 FLORIDA 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 U.S. Mail and electronic mail to: **Bryan M. Downs, P.T. c/o Howard J. Hochman, Esq.**, 7695 S.W. 104 Street, Suite 210, Miami, FL 33156, hoch3333@aol.com.; by U.S. Mail to: **Lawrence P. Stevenson, Administrative Law Judge**, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; and by electronic mail

to: **Christina Arzillo Shideler, Assistant General Counsel,**
Christina.Shedeler@flhealth.gov; and **John B. Fricke, Jr., Assistant Attorney General,**
John.Fricke@myfloridalegal.com this 29 day of December, 2021.

A handwritten signature in cursive script, appearing to read "Elizabeth Adams", written over a horizontal line.

Deputy Agency Clerk