# STATE OF FLORIDA
# DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
MEDICINE,

PETITIONER,

Case No. 21-1438PL

VS.

AUNALI SALIM KHAKU, M.D.,

RESPONDENT.
______________________________________/

## RECOMMENDED ORDER

Administrative Law Judge Andrew D. Manko of the Division of Administrative Hearings ("DOAH") presided over the final hearing in this matter, pursuant to sections 120.569 and 120.57(1), Florida Statutes (2020), on June 8, 9, 10, and 16, 2021, by Zoom Conference.

## APPEARANCES

For Petitioner: Kristen Summers, Esquire
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## STATEMENT OF THE ISSUE

Whether Respondent committed the violations alleged in the Amended Administrative Complaint; and, if so, the appropriate penalty therefor.

## PRELIMINARY STATEMENT

On April 27, 2021, the Department issued an Amended Administrative Complaint ("Amended Complaint") charging Respondent with sexual misconduct with three female patients—S.R., M.H., and M.V.S.—in violation of sections 456.063(1), 458.331(1)(j), and 458.329, Florida Statutes.[1] Respondent disputed the allegations in the Amended Complaint and requested an expedited administrative hearing. On April 30, 2021, the Department transmitted the case to DOAH for an Administrative Law Judge to conduct an evidentiary hearing under chapter 120.

The final hearing was scheduled to be held by Zoom on June 8 through 10, 2021. The undersigned issued an Agreed Scheduling Order for Expedited Proceedings to address deadlines for discovery, pre-hearing stipulations, and witness and exhibit disclosures. The undersigned also issued a HIPAA Qualified Protective Order to ensure that any medical records produced during discovery or presented at the final hearing would be kept confidential.

The parties engaged in discovery. Respondent served notices of production and subpoenas duces tecum on several nonparties, including the patients, the Orlando area Department of Veterans Affairs ("VA") where Respondent treated S.R. and M.H., Orlando Health where Respondent treated M.V.S., and fire-rescue and EMS entities in the vicinity of M.V.S.'s home. The Department objected to the production of any medical records beyond those concerning Respondent's treatment of the three patients at issue.

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[1] The three patients are referenced herein and in the Transcript by their initials to protect their privacy. An unredacted list of their full names is included in the Transcript.

On May 18 and 20, 2021, the undersigned held teleconferences on the Department's requests for protective orders. Respondent acknowledged that he withdrew his discovery requests on the VA after receiving a letter confirming that it would not release any records without signed releases from the patients. Respondent also agreed to narrow the scope of his requests for documents from Orlando Health to a list of staff present at Respondent's office on the date of the alleged sexual misconduct, M.V.S.'s medical records from three specific providers for limited periods of time before and after the alleged sexual misconduct, and records containing statements M.V.S. made to other providers, including any mental health providers, about her allegations against Respondent. Respondent sought these medical records to discover evidence as to whether M.V.S. suffered from cognitive or other health issues that could have affected her ability to accurately recall the alleged events.

On May 21, 2021, the undersigned issued an Order granting the Department's requests for protective orders, in part. As to Orlando Health, the undersigned found Respondent's narrowed scope of requested records to be reasonably calculated to lead to admissible evidence. As to the mental health records, which are subject to even greater protection, the undersigned permitted Orlando Health to submit such records under seal. On May 25, 2021, Orlando Health filed the mental health records under seal and the undersigned conducted an in-camera review of same. In an Order dated May 26, 2021, the undersigned found only three sentences concerning M.V.S.'s allegations against Respondent appropriate for disclosure, provided the parties with a confidential, redacted version containing only those sentences, and returned the unredacted records to Orlando Health.

On June 3, 2021, Respondent filed a motion to preclude the Department from presenting testimony from his wife and questioning him about his religious beliefs, civic engagement, or his marriage. In an Order dated

June 3, 2021, the undersigned denied the motion based on the Department's confirmation that it would neither present the testimony of Respondent's wife nor question him about his religious or civic engagement. The undersigned reserved as to testimony about Respondent's marriage pending additional testimony and argument concerning same at the final hearing.

On June 4, 2021, Respondent moved to strike witnesses associated with the VA and the allegations concerning S.R. and M.H. based on the Department's delay in transmitting the case to DOAH and the VA's refusal to comply with Respondent's subpoena duces tecum. The undersigned heard argument on the motions at the beginning of the final hearing on June 8, 2021, and, in an Order dated June 9, 2021, denied the motion because, among other things, Respondent withdrew his discovery requests served on the VA and failed to file actions in state or federal court to enforce the subpoenas.

The final hearing occurred on June 8, 9, 10, and 16, 2021. The Department presented the testimony of the following witnesses: (1) M.H.; (2) Ms. Adams, M.H.'s mother; (3) S.R.; (4) M.V.S.; (5) Ms. Tucker, M.V.S.'s daughter; and (6) Rafael R. Torres Castellon, a Lake Mary Police Department ("LMPD") detective who investigated M.V.S.'s allegations.

Respondent testified on his own behalf and presented the testimony of: (1) Anthony Stampp, the Department's investigator; (2) Daniel Kantor, M.D., an expert neurologist; and several practitioners with whom he previously worked, including (3) Erika Oliver, a nurse practitioner; (4) Parimalkamur Chaudhari, M.D., a pulmonologist who shared an office with Respondent; (5) Simon Oh, a nurse practitioner; (6) Jenny Simons, a nurse; (7) Sara Fleming, a senior medical assistant; (8) Amie Britt, a scheduling coordinator; and (9) Sayed K. Ali, M.D., an internist.

Joint Exhibits 1 through 5 were admitted in evidence. Petitioner's Exhibits 1 through 10 were admitted in evidence, except that the portions of Petitioner's Exhibits 2, 5, and 6 concerning a 2010 law enforcement investigation of Respondent were excluded pursuant to section 120.57(1)(d). Respondent's Exhibits 1 through 21, 23 through 25, and 27 were admitted in evidence. Respondent's proposed exhibit 22 was not admitted, as the undersigned reserved ruling on its admission pending witness testimony and Respondent never renewed his request for admission.

An eight-volume Transcript of the final hearing was filed on August 2, 2021. The Department requested an extension on proposed recommended orders ("PROs") and Respondent moved to enlarge the page limitations on his PRO. The undersigned granted both requests. The Department, the Board of Medicine ("Board"), and Respondent timely filed PROs on August 23, 2021, which were duly considered in preparing this Recommended Order.

All references to the Florida Statutes and the Florida Administrative Code are to the 2020 versions. In making the findings below, the undersigned only considered hearsay evidence that supplemented or explained other evidence or would be admissible over objection in civil actions. § 120.57(1)(c), Fla. Stat.

## FINDINGS OF FACT

Parties and Investigation Leading to Issuance of the Amended Complaint

1. The Department is the state agency responsible for regulating the practice of medicine pursuant to section 20.43, Florida Statutes, and chapters 456 and 458, Florida Statutes.

2. Respondent, Aunali Salim Khaku, M.D., is a neurologist and sleep medicine specialist licensed (ME 114611) in Florida. Respondent completed a neurology residency in 2013 and a sleep medicine fellowship in 2014. He practiced at the VA from 2014 until 2020, initially at the Lake Baldwin

facility and then at the Lake Nona facility. From 2020 until early 2021, Respondent practiced at Orlando Health. Other than the allegations herein, the Department has never sought to discipline Respondent.

3. The Department seeks to revoke Respondent's license based on allegations that he engaged in sexual misconduct during office visits with three female patients—S.R., M.H., and M.V.S. The parties stipulated that the factual allegations, if proven by clear and convincing evidence, constitute sexual misconduct under Florida law.

4. On or around December 6, 2020, M.V.S. reported to both the LMPD and the Department that Respondent acted inappropriately during an office visit on November 30, 2020. The Department investigated further, interviewed M.V.S. and Respondent, and obtained medical records from Orlando Health.

5. On February 17, 2021, the Department issued an Order of Emergency Restriction of License ("ERO") that restricted Respondent from practicing on female patients based on findings of sexual misconduct with M.V.S.

6. On February 22, 2021, Respondent requested an expedited hearing under sections 120.569 and 120.57. The Department properly did not transmit the case to DOAH at that time, as judicial review of the ERO is via petition in the appellate court. §§ 120.60(6)(c) and 120.68, Fla. Stat. Respondent filed such a petition, but the First District Court of Appeal ultimately denied it on the merits.

7. On March 9, 2021, the Department presented its disciplinary case to a probable cause panel of the Board. After hearing argument from both parties, the panel unanimously found probable cause to issue a three-count Administrative Complaint ("Complaint") seeking to discipline Respondent for engaging in sexual misconduct with M.V.S.

8. On March 10, 2021, the Department issued the Complaint. On March 16, 2021, Respondent requested an expedited formal hearing under chapter 120. However, the Department did not immediately transmit the Complaint to DOAH because it had just received notification that the VA

investigated complaints of sexual misconduct against Respondent by two veterans, S.R. and M.H., who each saw Respondent multiple times between 2014 and 2016.

9. The Department obtained records from the VA. As to S.R., the VA closed the matter as unsubstantiated based on S.R.'s decision not to pursue criminal charges and the VA's finding of insufficient evidence to support the allegations. As to M.H., the VA found no conclusive evidence of misconduct based on Respondent's testimony, which was corroborated by the testimony of his nurse and a medical student.

10. After receipt of the VA records, the Department interviewed S.R. and M.H. Based on this additional information, the Department presented its case to another probable cause panel to amend the Complaint to include allegations relating to S.R. and M.H. After hearing from both parties, the panel voted unanimously on April 23, 2021, to find probable cause of sexual misconduct with S.R. and M.H.

11. On April 27, 2021, the Department issued the three-count Amended Complaint seeking to discipline Respondent's license for sexual misconduct with S.R., M.H., and M.V.S. On April 29, 2021, Respondent filed a third request for a hearing, which sought transmission of the case to DOAH for an expedited evidentiary hearing to be held within 30 days.

12. On April 30, 2021, 45 days after Respondent's request for a hearing on the initial Complaint, the Department transmitted the Amended Complaint to DOAH to conduct an evidentiary hearing under chapter 120.[2]

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[2] In filings prior to transmittal of the Amended Complaint to DOAH, in pleadings prior to the final hearing, and orally at the final hearing, Respondent argued that the Department improperly delayed transmitting the case to DOAH and violated his due process rights throughout the investigatory process.

Even had Respondent preserved those arguments by including them in his PRO, the undersigned would have found that the Department's investigation, the probable cause panel proceedings, and the timing of the transmittal of the case to DOAH did not render the proceedings unfair or impair the correctness of the Department's action based on the weight of the credible evidence. For one, the Department presented its case to the probable cause panel 20 days after issuing the ERO and issued the initial Complaint the next day. It presented the new allegations to a probable cause panel 65 days after the ERO (and 44 days after filing the initial Complaint) and issued the Amended Complaint the next day. The Department then transmitted the Amended Complaint to DOAH on April 30, 2021, one day after Respondent requested a hearing on it and 45 days after requesting a hearing on the initial Complaint. Based on this timeline, the Department met its obligation to promptly institute chapter 120 proceedings. *See* § 120.60(6)(c), Fla. Stat. ("Summary suspension, restriction, or limitation may be ordered, but a suspension or revocation proceeding pursuant to ss. 120.569 and 120.57 shall also be promptly instituted and acted upon."); *see also* § 456.073(5), Fla. Stat. ("Notwithstanding s. 120.569(2), the department shall notify the division within 45 days after receipt of a petition or request for a formal hearing."); Fla. Admin. Code. R. 28-106.501(3) ("In the case of the emergency suspension, limitation, or restriction of a license, unless otherwise provided by law, within 20 days after emergency action taken pursuant to subsection (1) of this rule, the agency shall initiate administrative proceedings in compliance with Sections 120.569, 120.57 and 120.60, F.S., and Rule 28-106.2015, F.A.C.").

The weight of the credible evidence also failed to establish any resulting prejudice to Respondent. He presented no evidence as to how the Department's decision to investigate the new allegations and issue the Amended Complaint before transmitting the case to DOAH prejudiced his ability to defend against the allegations. The Department notified Respondent of M.V.S.'s complaint and allowed him to provide statements during the investigation, make arguments before both probable cause panels, conduct discovery, and adequately prepare for and defend against the allegations at a final hearing. The fact that the VA did not comply with Respondent's discovery requests or make witnesses available is neither attributable to the Department nor a reasonable basis to argue prejudice, particularly where Respondent failed to enforce subpoenas or challenge the VA's discovery objections in state or federal court. The undersigned simply cannot find that the Department violated Respondent's due process rights by waiting 45 days to transmit the case to DOAH while the Department investigated new allegations involving two other female patients. At best, Respondent's alleged prejudice is that the Department was able to prosecute him for sexual misconduct with two additional patients, which it had authority to do independently by separate complaint or by moving to amend the Complaint once it transmitted the case to DOAH. The latter option could have resulted in even more delay, as DOAH may have had to relinquish jurisdiction to allow for the new allegations to be approved by a probable cause panel if the Department had not already completed that necessary step.

S.R.'s Two Appointments with Respondent in 2014 and 2015

13. In 2014, S.R., a 58-year-old veteran who just moved to Orlando, requested a neurology referral because she suffers from multiple sclerosis ("MS"). The VA referred her to Respondent with whom she had two office visits.

14. On December 29, 2014, S.R. had her first appointment with Respondent at the VA Lake Baldwin facility. Respondent's assistant took S.R.'s vitals but did not remain in the room during the examination.[3] S.R. never asked for a chaperone to be present and one was not offered to her.

15. Respondent entered the room and made introductions with S.R. They discussed the new VA facility in Lake Nona, where Respondent lived, and restaurants in that area. According to S.R., Respondent said that he hoped to see her, though she did not understand what that meant.

16. S.R. explained that she suffered her first MS attack over 30 years earlier but only recently was diagnosed with the disease after a neurologist ordered an MRI. She discussed her current symptoms, including back pain, muscle spasms, and fatigue. Respondent told her that back problems were common for women with large breasts, which she thought was odd. But, she expressed hope that Respondent could continue to help with her symptoms much like her prior neurologists in South Carolina and South Florida.

17. Respondent examined S.R. and tested her reflexes, vision, coordination, and physical limitations. Respondent said he wanted to listen to S.R.'s heart. Without even trying to listen over her clothes, he asked S.R. to lift her t-shirt. He began rubbing his stethoscope across both her breasts and under her bra. He then cupped the bottom of her left breast with the palm of

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[3] The VA advocate's report indicated that S.R. said that Respondent instructed his assistant to leave the room prior to his examination. However, S.R. testified credibly that she never made that allegation and her handwritten statement to the VA advocate also contained no such allegation. That the VA advocate's hearsay report says otherwise neither calls S.R.'s credibility into doubt nor undermines the clear and consistent nature of her testimony.

his hand while holding the stethoscope between his fingers and touching her nipple. This portion of the examination lasted about ten seconds.

18. At the end of the initial visit, Respondent discussed treatment plans, medication, and physical therapy with S.R. They scheduled a follow-up appointment for several months later. Respondent documented S.R.'s records based on his examination. Although S.R. testified credibly that she had a heart murmur, Respondent noted a regular heart rate and rhythm with no murmurs. He also continued S.R.'s prescription for Diazepam, though several months later he placed an addendum for that initial visit record to indicate the prescription was improperly entered under his name and that he would defer to S.R.'s primary care physician for that medication.

19. S.R. thought Respondent's conduct was weird because no doctor had ever listened to her heart under her clothes or touched her breasts in that manner. She felt confused and uncomfortable, but she did not report the incident then because she trusted Respondent as her doctor and thought it could have been a mistake. She also thought Respondent might be the only neurologist at the VA. She discussed the incident with her husband and decided that she would be more aware at subsequent appointments.

20. On March 30, 2015, S.R. had her second visit with Respondent at the Lake Nona facility. She arrived early, but the office staff delayed bringing her back and then had trouble taking her vitals. S.R. did not request a chaperone for this visit because everyone seemed very busy.

21. Respondent entered the room and they were again alone. Respondent seemed irritated because he thought S.R. arrived late, which made her defensive. She complained of left hip pain and told Respondent that she had not gone for physical therapy. He examined her hip by lifting her leg, which hurt. She then sat up and he said he needed to listen to her heart. Again, without attempting to listen over her t-shirt and bra, he told her to lift her t-shirt. Because of what occurred during the last visit, S.R. kept her arms tightly by her sides to limit Respondent's ability to touch her breasts. He kept

using his elbow to try to relax her arms while moving the stethoscope higher over her breasts, eventually cupping her breast under her bra. He grabbed at her breasts but got frustrated by her refusal to relax her arms.

22. At that point, Respondent threw the stethoscope into the sink and became angry, which startled S.R. and made her uncomfortable. She requested that he continue her Diazepam prescription to help her sleep at night, which she said her prior neurologist prescribed for muscle spasms. Respondent told her that the drug was for anxiety, not muscle spasms, though he documented in her record that she should continue to take the medication. Respondent also documented again that S.R. had a regular heart rate and rhythm.

23. S.R. felt uncomfortable during the entire visit. She had never had a neurologist get angry or confrontational with her, but she decided not to report the incidents at that time because she was in pain and just wanted to go home. About a month later, she awoke in the middle of the night and realized the inappropriateness of Respondent's conduct.

24. In August 2015, S.R. returned to the Lake Nona facility to schedule an appointment with a different neurologist. When she saw Respondent's name on the signage, she immediately went to the patient advocate to report his misconduct in the hope of preventing him from engaging in the same behavior with other patients. She met with the patient advocate and the VA police, and she completed a written statement. Although she was supposed to testify before the VA investigative board, she had trouble finding the room that day and left without speaking to anyone. Based on S.R.'s decision not to pursue criminal charges and the VA's finding of insufficient evidence to support the allegations, the VA closed the matter as unsubstantiated. However, the matter was referred for clinical and/or administrative follow-up, which resulted in the VA updating its chaperone policy to require signs to be posted in the offices to put patients on notice of their right to ask for a chaperone.

25. S.R. did not report the incidents to the Department at the time because she did not realize she could do so. But, when the Department contacted her in 2021 about this case, she agreed to participate and testify.

26. The undersigned found S.R. to be a highly credible witness who unequivocally testified about Respondent's inappropriate sexual behavior. S.R.'s testimony was compelling, specific, clear, and materially consistent with the statements she made when the incidents first occurred.

27. Respondent testified about his treatment of S.R., but he conceded he had no independent recollection of the visits. Instead, he based his testimony on what he documented in her medical records and his standard practice.

28. Respondent testified that he conducted a thorough examination in the same manner that he evaluates all of his new patients. He performed a cardiac examination over S.R.'s clothing by placing a stethoscope on her chest in several areas to listen to her heart. He confirmed that he never places the stethoscope on, or allows his hand to come into contact with, a patient's breasts and that it was impossible that such contact happened with S.R. even inadvertently. He also said that he always has a chaperone present if he needs to listen to a female patient's heart under her clothing and that is exactly what he would have done had he needed to do so with S.R.

29. Respondent denied engaging in any inappropriate behavior with S.R. and suggested instead that she misperceived what happened. However, he offered no credible explanation for S.R. having such a misperception, except to accuse her of being upset for his refusal to prescribe her Diazepam. S.R.'s medical records fail to document any cognitive impairment and Respondent confirmed that she did not suffer from hallucinations or ailments that would cause her to imagine things that did not happen. Although S.R. admitted that it took her a few months to fully realize what Respondent had done and to report it to the VA, the undersigned has no hesitation in finding her testimony to be a fair and accurate account of Respondent's actual conduct.

30. The records themselves also call the veracity of Respondent's testimony into question. Although S.R. credibly testified that she had a heart murmur, Respondent documented the lack of such a murmur even after conducting two cardiovascular examinations of her. Had Respondent conducted a proper cardiac examination, he should have identified and documented her murmur. Further, it cannot be ignored that the treatment plan for both visits continued her prescription for Diazepam, even though Respondent—after the first visit but before the second visit—placed an addendum in the record to indicate that S.R. needed to obtain the prescription from her primary care physician. Respondent's notes for the March 2015 visit also document that Diazepam continued to be an active prescription for S.R., undermining the suggestion that she would fabricate an allegation of sexual misconduct against Respondent on that basis. Moreover, Respondent's expert neurologist had never heard of a patient fabricating sexual misconduct allegations against a doctor for failing to prescribe medication.

31. Based on the weight of the credible evidence, the undersigned finds that the Department proved by clear and convincing evidence that Respondent engaged in sexual misconduct with S.R. During the first visit, Respondent directed S.R. to lift her shirt and inappropriately rubbed his stethoscope across her breasts and under her bra, cupped her left breast with the palm of his hand while holding the stethoscope between his fingers, and touched her nipple. During the second appointment, Respondent directed S.R. to lift her shirt again. Although S.R. kept her arms tightly against her sides to try to limit Respondent's ability to touch her inappropriately, he inappropriately rubbed the stethoscope across her breasts, cupped her breast under her bra, and grabbed at her breasts. Respondent did so on both occasions without first attempting to listen to S.R.'s heart over her clothing, which itself was contrary to the standard of care.

M.H.'s Four Appointments with Respondent in 2015 and 2016

32. In late 2015, the VA referred M.H., a 39-year-old veteran, to Respondent for a neurological evaluation after she had an abnormal MRI showing white matter changes in her brain following an illegal drug overdose. M.H. had four office visits with Respondent at the Lake Nona facility on August 12, 2015, November 6, 2015, June 23, 2016, and August 1, 2016.

33. During the first three visits, Respondent discussed M.H.'s medical history, prior drug use, and symptoms, including migraines, pain, possible nerve damage, and cognitive and motor issues; he also conducted physical and neurological examinations. During the fourth visit, Respondent performed a nerve block procedure to address M.H.'s migraines.

34. M.H. testified about the visits and her uncomfortable interactions with Respondent. During several visits, he discussed the lack of sex with his wife and that she allowed him to step outside the marriage. He either asked M.H. out on a date or to meet at a hotel, which she interpreted as an offer of sex, and he also asked if he could call her. He asked her questions about her sex life several times, including how often she had sex with her boyfriend, what positions they liked, the size of her bra, and whether sex was painful.

35. M.H. testified that Respondent also acted inappropriately. During one visit, he either lifted her shirt or asked her to lift her shirt to look at her breasts and listen to her heart. He once blocked the door to prevent her from leaving the room and attempted to put his arms around her to hug her. He once put his hands on the bottom of her buttocks, like a lover's caress. During the fourth visit when the nurse left the room after the procedure, he had an erection and rubbed it through his pants against her leg while trying to give her a hug. She said that she told her mother in the waiting room after that visit that Respondent had rubbed his erection on her. She also said that he told her not to say anything about their interactions at each visit.

36. In August 2016, M.H. reported Respondent's conduct to the VA; she did not report the conduct to the Department because she did not know she could. The VA investigative board conducted sworn interviews of M.H., Respondent, his nurse, and a medical student, and it considered numerous letters of recommendation from Respondent's patients and colleagues. It found no conclusive evidence of sexual misconduct based on Respondent's testimony, as corroborated by testimony from a nurse and a medical student.

37. M.H. testified passionately about Respondent's conduct and how it made her feel. However, her recollection of the details—as to what occurred, when, and who was present—was fuzzy and inconsistent in material ways with the testimony she gave to the VA board in 2016, her deposition testimony in this case, and the testimony of her mother. M.H. stated that her recollection in 2016 was better than now, but the inconsistencies outlined below affect the weight to be given to M.H.'s testimony.

38. M.H. testified initially that she and Respondent were alone in the examination room at some point during each visit. M.H. testified that she asked to have her daughter present during either the third or fourth visit, but Respondent refused. M.H. also testified on cross examination that she could not recall if her mother was in the room with her during the first two visits, only to later confirm that her mother must have been present during those two visits based on the testimony she gave before the VA board in 2016.

39. M.H.'s mother testified that she accompanied M.H. to two of the visits, though she could not recall the dates. Contrary to M.H.'s testimony, her mother said she neither came back to the examination room nor met Respondent at any visit and based her testimony solely on what M.H. said. M.H.'s mother testified that M.H. said that Respondent asked her out after one visit and rubbed his erection against her back after another visit, which contravened M.H.'s testimony that Respondent rubbed his erection against her leg while hugging her from the front.

40. Before the VA board in 2016, and contrary to her testimony at the final hearing, M.H. said that Respondent acted professionally during the first two visits and that her mother was present in the examination room both times. M.H. testified that Respondent became unprofessional while they were alone in the room during the final two visits, at which he asked inappropriate questions about her sex life. M.H. explained that she was offered a chaperone before the third visit, but she refused because nothing unprofessional had occurred before, and that Respondent refused to allow her daughter to be in the room during the procedure on the fourth visit. M.H. said Respondent grabbed her buttocks during the third visit and, during the fourth visit, he blocked the door after the procedure, grabbed her buttocks, lifted her shirt to comment on how much he liked her breasts, and rubbed his erection through his pants on her leg. When cross-examined about the inconsistencies, M.H. testified at the final hearing that she may have been protecting Respondent by saying in 2016 that he acted professionally during the first two visits, though she now recalls him acting unprofessionally during all four visits.

41. During her pre-hearing deposition in this case, M.H. testified that Respondent asked questions about her sex life and bra size, discussed his open marriage, and asked her out during the first visit, but he did not touch her inappropriately. M.H. testified that Respondent refused to allow her daughter to stay in the room with her during the second visit and, after the examination, he blocked the door, grabbed her and tried to hug her, rubbed his erection on her stomach and leg, and again reiterated that he was allowed to have sex outside his marriage. She testified that Respondent discussed his open marriage and asked her to date him during the third visit; M.H. said that the office refused to allow her mother to accompany her in the room. M.H. testified that the only uncomfortable thing that Respondent did during the fourth visit was ask her out repeatedly. M.H. testified that Respondent never asked if she wanted a chaperone at any of the visits, though she later acknowledged that a chaperone was present at the fourth visit.

42. Respondent testified about his treatment of M.H. based only on what he documented in her chart, as he had no independent recollection beyond his review of her medical records. Respondent denied any inappropriate behavior with M.H. He claimed that he never allowed himself to be alone in a room with her because she was engaging in manipulative, drug-seeking behavior. He basically accused M.H. of fabricating the allegations against him because he refused to prescribe her pain medication.

43. However, Respondent's accusations against M.H. are questionable for several reasons. Respondent never documented in her record his concern about M.H.'s alleged drug-seeking behavior, that a chaperone needed to be present at all visits, or that she had requested pain medication. Although he documented the presence of his nurse and a medical student at the fourth visit, he failed to do the same for the first three visits. One would expect a physician—surely one as concerned about a patient's drug-seeking history and behavior as Respondent now claims to be—to document those concerns and the presence of chaperones in the medical record to prevent any future false accusation. This is particularly so given that Respondent, at the time, had recently been accused of misconduct by S.R., which he believed was both false and based on her drug-seeking behavior.

44. The medical records also confirm that M.H. informed Respondent at the June 2016 visit that she had been prescribed Lyrica for pain while in jail and that it was working. Respondent noted, "Renewed lyrica," in the plan/recs section of the record for that visit. Respondent also noted Pregabalin, the generic name for Lyrica,[4] in both the active and pending medication lists for both the June and August 2016 visits.

45. The weight of the credible evidence does not support Respondent's claim that M.H. fabricated her allegations because he refused to prescribe her pain medication, particularly given her credible testimony that she did not

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[4] According to WebMD, the generic name for Lyrica is Pregabalin. Available at https://www.webmd.com/drugs/2/drug-93965/lyrica-oral/details.

need pain medication because Respondent continued her Lyrica prescription. It also bears repeating that Respondent's own expert had never heard of a patient falsely accusing a doctor of sexual misconduct for refusing to prescribe medication.

46. After evaluating the evidence, the undersigned finds M.H. generally to be a more credible witness overall than Respondent. She testified passionately and credibly about Respondent's requests to meet her outside the office because he had an open marriage and his wife allowed such conduct. She also credibly explained how Respondent commented on the size of her breasts, grabbed her buttocks, and rubbed his erection on her.

47. Importantly, however, the undersigned cannot ignore that the clear and convincing evidence standard applies in this case. M.H.'s recollection was too fuzzy and inconsistent to definitively find without hesitation that Respondent engaged in the exact sexual misconduct alleged by M.H. and set forth in the Amended Complaint. If the Department's burden in this case was a mere preponderance of the evidence, the undersigned would likely find that it proved Respondent engaged in sexual misconduct with M.H. But, the clear and convincing evidence standard applies herein. And, because M.H. could not provide the type of definitive and clear testimony required in this disciplinary action, the Department failed to prove that Respondent engaged in sexual misconduct with M.H.

<u>M.V.S.'s One Appointment with Respondent in 2020</u>

48. On November 30, 2020, M.V.S., a 68-year-old woman, had an initial neurology consult with Respondent at Orlando Health. M.V.S. sought a neurologist based on an abnormal MRI showing a cyst near her pituitary gland and complaints of neck pain radiating to her shoulder and arm.

49. After filling out paperwork in the reception area, a medical assistant or nurse brought M.V.S. to an examination room. The room had an examination table, which could be lowered, a counter, and a chair. M.V.S. sat in the chair while the assistant took her vitals. Although M.V.S. has a history

of blood pressure spikes, for which she has called 911 and even gone to the hospital several times, her blood pressure was within normal limits that morning. The assistant waited for M.V.S. to complete the paperwork and then left the room.

50. Respondent entered the room a few minutes later and closed the door behind him. He wore green scrubs and a white lab coat; she wore a skirt, blouse, bra, and underwear. He and M.V.S. were alone for the remainder of the appointment.

51. They initially discussed M.V.S.'s medical history and complaints. M.V.S. talked about her aunt, who had symptoms of Alzheimer's disease and did not recognize her on a recent visit. She was concerned about the disease because she recently had forgotten some small details, like the name of an actor in a movie. M.V.S. did not believe she had significant memory issues, but she wanted research on the disease because it ran in her family.

52. Respondent asked M.V.S. if she lived with anyone, which she interpreted as a question relating to her safety. She informed him that she lived alone within close proximity to a fire station. She also mentioned that her daughter lived in Orlando and her fiancé lived in Longwood. Respondent asked if she had sexual relations with her fiancé; she explained that they did not because her fiancé had prostate cancer. M.V.S. thought the question was odd given the reason for the appointment and because no other physician had ever asked that type of question before.

53. Respondent moved on to M.V.S.'s complaints of neck pain. She explained that she experienced pain on the left side of her neck that radiated to her left shoulder and left arm. At that point, Respondent directed M.V.S. to sit on the table so he could examine her.

54. While standing to M.V.S.'s left, Respondent rubbed and squeezed her neck and shoulders with his thumbs and fingers for a couple of minutes. No other doctor had examined her in that fashion before. He said she felt tense, but never asked if she experienced pain during the examination. She

confirmed that it definitely felt like a neck and shoulder massage, which she had received many times. She noted that her cardiologist had recently palpated her neck for pain by using two fingers to poke and feel around, which was different than Respondent's examination. Indeed, when a doctor palpates for pain, they typically use two fingertips to lightly press and prod in the trouble areas and obtain feedback from the patient about the level of pain.

55. Respondent then examined M.V.S.'s spine while she stood in front of him. He thereafter examined her reflexes, eyes, and extremity strength while she sat on the table. He also conducted a memory test, which she passed. M.V.S. did not recall Respondent listening to her heart during the visit.

56. At that point, Respondent directed M.V.S. to lie face-down on the table, which already was lowered. He asked if he could raise her skirt and she said, yes, because she believed it related to a muscular or skeletal examination. He raised her skirt and, over her underwear, rubbed her lower back and eventually moved down to her buttocks using both of his hands. He rubbed and squeezed both of her buttocks. She confirmed it felt like a deliberate, prolonged massage, which had never happened to her at a doctor's office. Her mind raced, she felt frozen, and she could not believe what was happening.

57. After one to two minutes, Respondent told her to sit up because he heard a voice. She sat on the end of the table and he began massaging and squeezing her right breast while standing on her right. He told her that he had never done this before and that she was beautiful. She thanked him in a low voice, but she was afraid and felt trapped because they were alone, there were no witnesses, and she was unsure of what he would do.

58. Respondent asked if M.V.S. was comfortable with him massaging her breast and he stopped when she said no. He moved to her left side and explained that his wife would not have sex with him, so she permitted him to have sex outside the marriage. He asked if M.V.S. would meet him for sex

and she declined. Respondent asked if that was because her fiancé would object, and she confirmed they had a commitment.

59. At that point, Respondent pulled his lab coat back and said, "Look at this. Look what you did to me." Respondent revealed his erect penis, which M.V.S. confirmed was clearly visible through his scrubs. Respondent told her to keep this between us, said his assistant would be in shortly with paperwork, and left the room. M.V.S. waited for about seven minutes and, when no one came, she left the room, tried to hold her composure, and checked out. She said nothing before leaving because she felt unsafe and was unsure if anyone would believe her anyway.

60. M.V.S. turned on her car's air conditioning and drank water to calm down. Her heart was pounding, and she feared having a blood pressure spike. As soon as she arrived home, M.V.S. called her daughter to tell her what happened. M.V.S.'s daughter, who is a nurse, told her to call the police.

61. M.V.S. called the LMPD that afternoon. The officer with whom she spoke suggested that she file a complaint with the Department, which she did on December 6, 2020. Both the Department and the LMPD investigated the allegations, which included interviews of M.V.S. and Respondent.[5] M.V.S. also reported the incident to Orlando Health risk management.

62. The undersigned found M.V.S. to be a highly credible witness who testified passionately and definitively about Respondent's inappropriate sexual behavior during the office visit. She immediately reported it to the LMPD and, within a week, filed complaints with both the Department and Respondent's employer. M.V.S.'s testimony was clear, specific, detailed, compelling, and materially consistent with the interviews and statements she gave immediately following the visit.

63. Respondent testified about his treatment of M.V.S., but—as he did with the S.R. and M.H.—he conceded he had little to no independent

[5] Based on the information obtained from M.V.S. and Respondent, the LMPD placed the case into inactive status pending further evidence.

recollection of her or the visit. Instead, he reviewed her medical records, which refreshed his recollection of what occurred during the visit.

64. Respondent denied engaging in any inappropriate behavior with M.V.S. that could have been interpreted as sexual or outside the scope of a proper examination. He testified that he conducted a neurological examination, palpated her neck for pain, checked her reflexes, and conducted a memory test. He said he never massaged her neck and shoulders, touched or massaged her breasts or buttocks, discussed his marriage, solicited her to have sex, said she was beautiful, or revealed an erection through his scrubs. He also said she could not have laid face-down on the table because he never lowered the back or extended the footrest; he confirmed that he would have brought in a chaperone if he needed her to lie on the table.

65. Respondent testified that M.V.S.'s accusations against him were the product of memory loss and cognitive impairment. Although M.V.S. reported a family history of Alzheimer's and a fear of mild memory loss, Respondent documented that she performed well on her memory and cognitive examinations. M.V.S. and her daughter testified credibly that she did not experience significant memory loss beyond forgetting the name of an actor in a movie. Respondent himself confirmed that M.V.S. did not suffer from hallucinations or ailments that would cause her to perceive things that were not there—a point with which his expert neurologist agreed given the way Respondent documented the medical record. And, more importantly, M.V.S.'s ability to recall the specific details of the visit and do so consistently with the statements she made previously undermine Respondent's belief that cognitive impairment caused her to fabricate her allegations. The weight of the credible evidence simply does not support the suggestion that M.V.S. misperceived, confabulated, or fabricated her allegations based on memory loss or cognitive impairment.

66. Additionally, Respondent attempted to discredit M.V.S. by suggesting that she may have come onto him. Indeed, he testified that she was verbose

and told him during their initial discussion about her history that her fiancé was older, that she was a 60s baby, and that she had not been touched in a while. Aside from M.V.S.'s credible testimony that she said no such things, it cannot be ignored that Respondent conceded that his memory of the visit was based on his review of the medical record, which contained no reference to these comments even though Respondent says they were odd.

67. Respondent also presented evidence that M.V.S. had previously called 911 on multiple occasions relating to blood pressure spikes to undermine the veracity of her testimony. However, the recordings of the 911 calls reveal an individual who, despite being concerned about her blood pressure, is alert, aware of her surroundings, clear-headed, and in no way suffering from an illness that would raise doubts about the veracity of her testimony or her credibility overall.

68. Based on the weight of the credible evidence, the undersigned finds that the Department proved by clear and convincing evidence that Respondent engaged in sexual misconduct with M.V.S. He inappropriately massaged her neck and shoulders, buttocks, and breast. He disclosed that he had an open marriage and solicited M.V.S. to meet him for sex outside the office. He also told her that she was beautiful and revealed his erection through his scrubs.

## CONCLUSIONS OF LAW

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

70. The Department seeks to revoke Respondent's license to practice medicine based on sexual misconduct with three patients. Proceedings to discipline a license, including revocation, are penal in nature. *State ex rel. Vining v. Fla. Real Estate Comm'n*, 281 So. 2d 487, 491 (Fla. 1973). Thus, the Department bears the burden of proving the charges against Respondent by clear and convincing evidence. § 458.331(3), Fla. Stat.; *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)).

71. 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)). "[E]ven when the evidence is in conflict, the proof may be more than sufficient to meet the standard of clear and convincing evidence." *In re Henson*, 913 So. 2d at 592 (quoting *In re Bryan*, 550 So. 2d 447, 448 n.* (Fla. 1989)).

72. Penal statutes must be construed strictly according to their plain meaning and the actual text used by the Legislature may not be expanded upon to broaden the application of such statutes. *Elmariah v. Dep't of Bus. & Prof'l Reg.*, 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).

73. This proceeding is predicated on the factual allegations set forth in the Amended Complaint. *Trevisani v. Dep't of Health*, 908 So. 2d 1108 (Fla. 1st DCA 2005); *Cottrill v. Dep't of Ins.*, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996). 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. *Delk v. Dep't of Prof'l Reg.*, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

74. The three-count Amended Complaint alleged that Respondent engaged in sexual misconduct with three patients. Each count charged Respondent with violating distinct statutes or rules based on the alleged sexual misconduct with all three patients.

75. Count I charged Respondent with violating section 456.072(1)(v), which provides as follows:

> (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).

76. Section 456.063(1) defines "sexual misconduct" as follows:

> 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.

77. Count II charged Respondent with violating section 458.331(1)(j), which provides as follows:

> (1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):
>
> *  *  *
>
> (j) Exercising influence within a patient-physician relationship for purposes of engaging a patient in sexual activity. A patient shall be presumed to be incapable of giving free, full, and informed consent to sexual activity with his or her physician.

78. Count III charged Respondent with violating sections 458.331(1)(nn) and 458.329. Section 458.331(1)(nn) provides as follows:

> (1) The following acts constitute grounds for denial of a license or disciplinary action, as specified in s. 456.072(2):
>
> *  *  *
>
> (nn) Violating any provision of this chapter or chapter 456, or any rules adopted pursuant thereto.

79. Section 458.329 provides as follows:

> The physician-patient relationship is founded on mutual trust. Sexual misconduct in the practice of medicine means violation of the physician-patient relationship through which the 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 the practice or the scope of generally accepted examination or treatment of the patient. Sexual misconduct in the practice of medicine is prohibited.

80. The parties stipulated that the factual allegations, if proven by clear and convincing evidence, constitute sexual misconduct under Florida law.[6]

81. Based on the Findings of Fact above, the Department proved by clear and convincing evidence that Respondent engaged in sexual misconduct with S.R. in violation of sections 458.331(1)(j), 458.329, and 456.063(1).

82. Based on the Findings of Fact above, the Department failed to prove by clear and convincing evidence that Respondent engaged in sexual misconduct with M.H., as charged.

83. Based on the Findings of Fact above, the Department proved by clear and convincing evidence that Respondent engaged in sexual misconduct with M.V.S. in violation of sections 458.331(1)(j), 458.329, and 456.063(1).

84. Florida Administrative Code Rule 64B8-8.001 sets forth disciplinary guidelines for violations of chapters 456 and 458. For violations of sections 458.331(1)(j), 458.329, and 456.072(1)(v), the rule provides a range of penalties. Fla. Admin. Code R. 64B8-8.001(2)(j). For a first offense, the guidelines impose a minimum of a "one (1) year suspension to be followed by a period of probation and a reprimand, and an administrative fine of $5,000.00 to revocation or denial and an administrative fine of $10,000.00." *Id.* For a second offense, the guidelines require revocation. *Id.* The rule provides that "multiple counts of the violated provisions or a combination of the violations may result in a higher penalty than that for a single, isolated violation." Fla. Admin. Code R. 64B8-8.001(1). The Board also may deviate from the guidelines based on "consideration of aggravating and mitigating factors present in an individual case." Fla. Admin. Code R. 64B8-8.001(3).

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[6] In addition to the statutory violations in Counts II and III, the Department also alleged that Respondent violated Florida Administrative Code Rule 64B8-9.008, which also defines "sexual misconduct." Respondent argued before and during the hearing and in his PRO that he cannot be disciplined for a violation of the rule because it is an invalid exercise of delegated legislative authority. However, based on the parties' stipulation and as a matter of judicial restraint, the undersigned need not resolve Respondent's argument concerning the invalidity of the rule. That is because Counts II and III allege independent statutory violations—distinct from and not based on the rule—that the Department proved by clear and convincing evidence and for which the Department may discipline Respondent.

85. Construing the rule in the light most favorable to Respondent, the undersigned concludes that this is a multiple count, "first offense" case. Because Respondent has never been disciplined before, this is not a case in which the Board permitted Respondent to practice medicine after being penalized once and he thereafter committed a second offense. That said, Respondent has committed two counts of sexual misconduct in this case, which gives the Board discretion to impose a penalty at the higher end of the range for first offenses, including revocation.

86. Although revocation is permissible under the rule, the undersigned notes that mitigating factors exist in this case that may justify a penalty short of revocation. The record contains numerous letters of support from patients and colleagues as to Respondent's stellar reputation within the community and the substantial time he spends giving back to the profession by mentoring medical students and other healthcare professionals. Several colleagues offered similar testimony at the hearing. Respondent is also young and at the sunrise of his career, such that there is likely time and opportunity for rehabilitation, reflection, and a second chance.

87. That is not to say that Respondent should be slapped on the wrist. There is no question that his significant violations discussed above are serious, completely inexcusable, and harmed the female patients involved. However, serious discipline could be imposed short of revocation that will both prevent him from engaging in similar misconduct in the future and allow him to continue to earn a living, practice medicine, and contribute as he has to mentoring medical students and others. As such, the undersigned recommends a two-year suspension followed by a permanent restriction that either precludes Respondent from treating female patients or, at a minimum, doing so without a chaperone. This would subject Respondent to severe penalties and prevent him from harming female patients, while also allowing him to meaningfully contribute to the profession as he has done so far in his young career and to continue to earn a living using his medical degree.

## RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Health, Board of Medicine, issue a final order finding Respondent committed sexual misconduct prohibited by sections 458.331(1)(j), 458.329, and 456.063(1), suspending Respondent's license for two years, and thereafter permanently restricting his license to either prohibit him from seeing female patients or, at a minimum, doing so without a chaperone present.[7]

DONE AND ENTERED this 28th day of October, 2021, in Tallahassee, Leon County, Florida.

ANDREW D. MANKO
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of October, 2021.

[7] Section 456.072(4), Florida Statutes, provides that the Board, in addition to any other discipline imposed through final order, "shall assess costs related to the investigation and prosecution of the case." Prior to the final hearing, the parties agreed to bifurcate the investigative costs issue (including Respondent's argument that such costs should not be assessed because they are based on unpromulgated rules) pending resolution of the merits of the Amended Complaint. Upon further reflection, the undersigned concludes that resolving such an issue—even in a bifurcated proceeding—is premature because the Board has not yet issued a final order disciplining Respondent or followed the procedure in section 456.072(4), which requires it to consider an affidavit of itemized costs and any written objections thereto. It is in those written objections where Respondent may challenge the costs as being based on an unpromulgated rule. And, if Respondent's written objections create a disputed issue of fact, the Department can transmit the investigative costs issue to DOAH to resolve that dispute, just as it did in Case No. 20-5385F.

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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.