Final Order No. DOH-01-1502-FOF-MQA
FILED DATE - 9/5/01
Department of Health
By: [signature]
Deputy Agency Clerk

STATE OF FLORIDA
BOARD OF MEDICINE

DEPARTMENT OF HEALTH,

Petitioner,

vs.

DOH CASE NO.: 1997-15802
DOAH CASE NO.: 00-0023
LICENSE NO.: ME0056777

DAVID IRA MINKOFF, 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 August 3, 2001, in Tallahassee, Florida, for the purpose of considering the Administrative Law Judge's Recommended Order, Exceptions to the Recommended Order, and Response to Exceptions (copies of which are attached hereto as Exhibits A, B, and C, respectively) in the above-styled cause. Petitioner was represented by Larry G. McPherson, Jr., Chief Attorney. Respondent was present and represented by Bruce D. Lamb, Esquire.

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.

RULINGS ON EXCEPTIONS

The Board reviewed and considered the exceptions filed by the Respondent and rejected the exceptions for the reasons set forth in the Petitioner's response.

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.

3. There is competent substantial evidence to support the conclusions of law.

PENALTY

Upon a complete review of the record in this case, the Board determines that the penalty recommended by the Administrative Law Judge be ACCEPTED. WHEREFORE,

IT IS HEREBY ORDERED AND ADJUDGED that

1. Respondent shall pay an administrative fine in the amount of $10,000 to the Board.

2. Respondent's license to practice medicine in the State of Florida is hereby suspended for a period of one year.

3. Following the one year suspension set forth above, Respondent shall be placed on probation for a period of two (2) years subject to the following terms and conditions:

a. Respondent shall comply with all state and federal statutes, rules and regulations pertaining to the practice of medicine, including Chapters 456, 458, 893, Florida Statutes, and Rule 64B8, Florida Administrative Code.

b. Respondent shall appear before the Probationer's Committee at the first meeting after said probation commences, at the last meeting of the Probationer's Committee preceding termination of probation, quarterly, and at such other times requested by the committee. Respondent shall be noticed by Board staff of the date, time and place of the Board's Probationer's Committee whereat Respondent's appearance is required. Failure of the Respondent to appear as requested or directed shall be considered a violation of the terms of probation, and shall subject the Respondent to disciplinary action.

c. In the event the Respondent leaves the State of Florida for a period of thirty days or more or otherwise does not engage in the active practice of medicine in the State of Florida, then certain provisions of Respondent's probation (and only those provisions of said probation) shall be tolled as enumerated below and shall remain in a tolled status until Respondent returns to active practice in the

State of Florida. Respondent must keep current residence and business addresses on file with the Board. Respondent shall notify the Board within ten (10) days of any changes of said addresses. Furthermore, Respondent shall notify the Board within ten (10) days in the event that Respondent leaves the active practice of medicine in Florida.

d. In the event that Respondent leaves the active practice of medicine in this state for a period of thirty days or more, the following provisions of probation shall be tolled:

(1) The time period of probation shall be tolled.

(2) The provisions regarding supervision, whether direct or indirect by another physician.

(3) The provisions preparation of investigative reports detailing compliance with this Stipulation.

(4) The community service requirements detailed below.

e. In the event that Respondent leaves the active practice of medicine for a period of one year or more, the Probationer's Committee may require Respondent to appear before the Probationer's Committee and demonstrate the ability to practice medicine with skill and safety to patients prior to resuming the practice of medicine in this State.

f. Respondent shall not practice except under the direct supervision of a physician fully licensed under Chapter 458 who has been approved by the Probationer's Committee. The supervisory physician shall share offices with Respondent. Absent provision for

and compliance with the terms regarding temporary approval of a supervising physician set forth below, Respondent shall cease practice and not practice until the Probationer's Committee approves a supervising physician. Respondent shall have the supervising physician appear at the first probation appearance before the Probationer's Committee. Prior to approval of the supervising physician by the committee, the Respondent shall provide to the supervising physician a copy of the Administrative Complaint and Final Order filed in this case. A failure of the Respondent or the supervising physician to appear at the scheduled probation meeting shall constitute a violation of the Board's Final Order. Prior to the approval of the supervising physician by the committee, Respondent shall submit to the committee a current curriculum vitae and description of the current practice of the proposed supervising physician. Said materials shall be received in the Board office no later than fourteen days before the Respondent's first scheduled probation appearance. The attached definition of a supervising physician is incorporated herein. The responsibilities of a supervising physician shall include:

(A) Submit quarterly reports, in affidavit form, which shall include:

(1) Brief statement of why physician is on probation.

(2) Description of probationer's practice.

(3) Brief statement of probationer's compliance with terms of probation.

(4) Brief description of probationer's relationship with supervising physician.

(5) Detail any problems which may have arisen with probationer.

(B) Review 50 percent of Respondent's patient records selected on a random basis at least once every month.

(C) Receive and review copies of all Schedule controlled substances in order to determine the appropriateness of Respondent's prescribing of controlled substances.

(D) Report to the Board any violation by the probationer of Chapter 456 and 458, Florida Statutes, and the rules promulgated pursuant thereto.

g. The Board shall confer authority on the Chairperson of the Board's Probationer's Committee to temporarily approve Respondent's supervisory/monitoring physician. In order to obtain this temporary approval, Respondent shall submit to the Chairperson of the Probationer's Committee the name and curriculum vitae of the proposed supervising/monitoring physician. This information shall be furnished to the Chairperson of the Probationer's Committee by way of the Board of Medicine's Executive Director, within 48 hours after Respondent receives the Final Order in this matter. This information may be faxed to the Board of Medicine at (850) 488-9325, or may be sent by overnight mail to the Board of Medicine, 4052 Bald Cypress Way, Bin #C03, Tallahassee, Florida 32399-3253. In order to provide time for Respondent's proposed supervisory/monitoring physician to be

approved or disapproved by the Chairperson of the Probationer's Committee, Respondent shall be allowed to practice medicine while approval is being sought, but only for a period of five working days after Respondent receives the Final Order. If Respondent's supervising/monitoring physician has not been approved during that time frame, then Respondent shall cease practicing until such time as the supervising/monitoring physician is temporarily approved. In the event that the proposed monitoring/supervising physician is not approved, then Respondent shall cease practicing immediately. Should Respondent's monitoring/supervising physician be approved, said approval shall only remain in effect until the next meeting of the Probationer's Committee. Absent said approval, Respondent shall not practice medicine until a monitoring/supervising physician is approved.

h. In view of the need for ongoing and continuous monitoring or supervision, Respondent shall also submit the curriculum vitae and name of an alternate supervising/monitoring physician who shall be approved by Probationer's Committee. Such physician shall be licensed pursuant to Chapter 458, Florida Statutes, and shall have the same duties and responsibilities as specified for Respondent's monitoring/supervising physician during those periods of time which Respondent's monitoring/supervising physician is temporarily unable to provide supervision. Prior to practicing under the indirect supervision of the alternate monitoring physician or the direct supervision of the alternate supervising physician, Respondent shall

so advise the Board in writing. Respondent shall further advise the Board in writing of the period of time during which Respondent shall practice under the supervision of the alternate monitoring/supervising physician. Respondent shall not practice unless Respondent is under the supervision of either the approved supervising/monitoring physician or the approved alternate.

i. Respondent shall submit quarterly reports in affidavit form, the contents of which shall be specified by the Board. The reports shall include:

(1) Brief statement of why physician is on probation.

(2) Practice location.

(3) Describe current practice (type and composition).

(4) Brief statement of compliance with probationary terms.

(5) Describe relationship with monitoring/supervising physician.

(6) Advise Board of any problems.

j. During the period of suspension, Respondent shall attend the USF drug course, the FMA medical records course and document the completion of five (5) hours of risk management Category I Continuing Medical Education. Respondent shall submit a written plan to the Chairperson of the Probationer's Committee for approval prior to the completion of said courses. The Board confers authority on the Chairperson of the Probationer's Committee to approve or disapprove said continuing education courses. In addition, Respondent shall submit documentation of completion of these continuing medical

education courses in each report. These hours shall be in addition to those hours required for biennial renewal of licensure. Unless otherwise approved by the Board or the Chairperson of the Probationer's Committee, said continuing education courses shall consist of a formal live lecture format.

k. During the probationary period Respondent shall perform 50 hours of community service at a rate of 25 hours per year. Community service shall consist of the delivery of medical services directly to patients, without fee or cost to the patient, for the good of the people of the State of Florida. Such community service shall be performed outside the physician's regular practice setting. Respondent shall submit a written plan for performance and completion of the community service to the Probationer's Committee for approval prior to performance of said community service. Affidavits detailing the completion of community service requirements shall be filed with the Board quarterly.

l. Respondent understands that during this period of probation, semi-annual investigative reports will be compiled with the Department of Health concerning compliance with the terms and conditions of probation and the rules and statutes regulating the practice of medicine.

m. Respondent shall comply with the terms and conditions of any criminal probation.

n. Respondent shall pay all costs necessary to comply with the terms of the Final Order issued based on this proceeding. Such costs

include, but are not limited to, the costs of preparation of the investigative reports detailing compliance with the terms of this proceeding, the cost of analysis of any blood or urine specimens submitted pursuant to the Final Order entered as a result of this proceeding, and administrative costs directly associated with Respondent's probation. See Section 458.331(2), Florida Statutes.

RULING ON MOTION TO STAY SUSPENSION

The Board considered the Respondent's oral Motion to Stay the suspension required by this Final Order and determined that a stay of the suspension is GRANTED provided Respondent complies with the terms of probation set forth in Paragraph 3 above.

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

DONE AND ORDERED this 29th day of August, 2001.

BOARD OF MEDICINE

Tanya Williams

TANYA WILLIAMS, BOARD DIRECTOR
For
GASTON ACOSTA-RUA, M.D.
CHAIRMAN

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 U.S. Mail to David Ira Minkoff, M.D., 129 Garden Avenue North, Clearwater, Florida 33755; to Bruce Lamb, Esquire, Ruden, McClosky, et al., 401 East Jackson Street, 27th Floor, Tampa, Florida 33602; to William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings, The DeSoto Building, 1230 Apalachee Parkway, Tallahassee, Florida 32399-3060; and by interoffice delivery to Nancy M. Snurkowski, Chief Medical Attorney, and Simone Marstiller, Senior Attorney - Appeals, Agency for Health Care Administration, 2727 Mahan Drive, Tallahassee, Florida 32308-5403, on or before 5:00 p.m., this 5th day of September, 2001.

STATE OF FLORIDA
DEPARTMENT OF HEALTH

DEPARTMENT OF HEALTH,

Petitioner,

Vs. AHCA Case No. 1998-15802

DAVID I. MINKOFF, M.D., DOAH Case No. 00-0023

Respondent.
_____/

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OFFICE OF THE CLERK

FILED
DEPARTMENT OF HEALTH
DEPUTY CLERK
CLERK Vicki R. Kerlen
DATE 6/8/01

RESPONDENT'S EXCEPTIONS TO THE RECOMMENDED ORDER AND MOTION TO REDUCE RECOMMENDED PENALTY

COMES NOW, the Respondent, DAVID I. MINKOFF, M.D., by and through his undersigned counsel and files these his Exceptions to the Recommended Order pursuant to Section 120.57(1)(k), Florida Statutes, and Motion to Reduce Recommended Penalty pursuant to Section 120.57(1)(l), Florida Statutes, and as grounds therefore states:

1. On May 29, 2001, the Honorable William F. Quattlebaum entered a Recommended Order in this matter finding that the Respondent has violated the Medical Practice Act, and recommending the imposition of a one year period of suspension to be followed by a two year probationary period and imposing an administrative fine of $10,000.

2. Florida Statutes, Chapter 120 permits parties to file Exceptions to the Recommended Order, and permits the Board of Medicine to reduce a penalty recommended in a Recommended Order after review of the complete record. Respondent requests that the complete record be prepared and submitted to the Board of Medicine in conjunction with its consideration of the Recommended Order.

I. EXCEPTIONS TO THE RECOMMENDED ORDER

3. Respondent takes exception to that portion of the Judge's Preliminary Statement contained in the third paragraph thereof wherein the Judge recited the following:

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"The Respondent objected to the introduction of the deposition on the grounds that the deposition was sealed under the terms of a Protective Order issued by a Circuit Court with jurisdiction over the separate case."

Respondent maintains this is only a partial recitation of the grounds raised by the Respondent to the admissibility of the deposition of the Respondent taken in an earlier civil action. On November 22, 2000, Respondent filed a Motion in Limine ascertaining that Respondent had a Fifth Amendment privilege against self-incrimination and that the admission of the deposition of the Respondent taken in the civil case would violate his Fifth Amendment rights. Further, it was asserted that Respondent was not properly advised of his Fifth Amendment rights prior to said deposition, and that his testimony at the deposition did not constitute a waiver of his rights. A copy of said Motion in Limine is attached hereto as Exhibit "A". On November 22, 2000, Respondent filed a Memorandum of Law in Support of said Motion in Limine. (see Exhibit "B"). Also on November 30, 2000, Respondent filed an Affidavit of Respondent in Support of the Motion in Limine (see Exhibit "C"). On December 4, 2000, Petitioner filed a Response to Respondent's Motion in Limine (see Exhibit "D"). On December 6, 2000 an Order was entered denying Respondent's Motion in Limine (see Exhibit "E"). On December 11, 2000 Respondent filed a Second Motion in Limine which recited the grounds identified by the Judge in the Recommended Order (see Exhibit "F"). This Motion was denied at hearing as were Respondent's renewed Motion in Limine ore tenus, and objections to admissibility of the deposition. The full basis of Respondent's position should have been recited in the preliminary statement.

4. Respondent also takes exception to a portion of paragraph 4 of the Preliminary Statement of the Recommended Order wherein the Judge stated:

> The hearing was then rescheduled to resume on March 1, 2001, at which time the deposition was admitted.

statement of the case fails to recognize that Respondent again renewed his objections to the admission of the deposition transcript on all grounds previously raised.

5. The Administrative Law Judge found that the deposition was admissible in this proceeding, and entered an Order denying Respondent's Motion in Limine on December 6, 2000. The Judge accepted Petitioner's argument that Respondent had waived his Fifth Amendment privilege by testifying in the deposition in the civil matter (see Petitioner's Response to Respondent's Motion in Limine). Such a determination is error. The Supreme Court of the United States has held that a waiver of a constitutional right must be voluntary, and a knowing intelligent act done with sufficient awareness of relevant circumstances and likely consequences. Robert M. Brady v. United States, 90 S. Ct. 1463 (1970). In addition, a waiver of a privilege in one proceeding does not constitute a waiver in all proceedings. In the case of the State of Florida v. John Spiegel, 710 So.2d 13 (Fla. 3d DCA, 1998) the court held that defendant's prior voluntary statement was inadmissible in a subsequent prosecution. *citing*, Simmons v. United States, 390 U.S. 377 (1968); People v. Douglas, 136 Cal. Rptr. 358, 1977; People v. Sturgess, 317 NE 2d 545, 1974. Therefore, any findings of fact based upon the deposition are not based upon competent substantial evidence.

6. Respondent takes exception to a portion of the Finding of Fact contained in paragraph 8, to wit, the finding that:

> "...but the identity of the patient does not appear to have been significant to him at the time."

This Finding of Fact is not based upon competent substantial evidence in the record. The Finding of Fact may only be based upon the deposition of the Respondent which in and of itself is not competent substantial evidence. In addition, there is no direct testimony by the Respondent in said deposition that the identity of the patient did not have significance to him.

Respondent takes exception to a portion of the Finding of Fact contained in paragraph 9 of the Recommended Order, to wit, that the prescription by Respondent was for "...10 vials of liquid Valium, 5 mg per vial...." Again, the deposition testimony is not competent substantial evidence. In addition, Dr. Minkoff testified as follows in regard to the quantity of medication called to the pharmacy "...one is Valium injectable, two ml IM's needed for sleep, which would be 10 milligrams" (see Transcript page 49, line 14 and 15) and the following passage from the deposition:

"Q. What dosage of Valium?

A. I think 5 mg. (see page 48 lines 19 and 20).

Clearly, Respondent testified that two milliliters of liquid Valium at 5 milligrams per milliliter for a total of 10 milligrams of Valium was ordered. The Judge clearly stated in paragraph 48 of the Recommended Order that he would not rely on the testimony and exhibits produced by the store manager of the pharmacy. Therefore, the only evidence considered by the Judge was the deposition testimony. Paragraph 9 should be deleted or charged to reflect that 10 milligrams of Valium was ordered.

8. Respondent takes exception to the Finding of Fact contained in paragraph 15 of the Recommended Order which states:

> "...the Respondent obtained no medical history for patient L.M. from the patient or from anyone in a position to know the patient's medical history."

This Finding of Fact is not based upon competent substantial evidence. First, this is based solely on the deposition which is not competent substantial evidence for the reasons stated previously. Second, the deposition testimony establishes that Respondent received information relating to the patient's history, to wit, she was suffering from a lack of sleep and the inability of sleep from Janice Johnston, an individual who Respondent believed held a medical doctor degree and David Houghton who Respondent believed to be a licensed dentist in the State of Florida. (See

deposition transcript page 42, 44, 58-60.). In addition, Respondent received further medical history information indicating that patient L.M. was not sick, ill, or physically compromised, that her general physical condition was "OK", but that she just couldn't sleep. (See deposition transcript page 44). At the time of these events, Respondent felt that he knew and trusted the individuals that contacted him and was attempting to be helpful. He would not repeat the conduct today. (See deposition transcript page 54). At the time, Respondent believed that Janice Johnston was experienced, and legitimate and was only awaiting licensure in the State of Florida. He was unaware of any licensure problems previously experienced by Dr. Johnston. (See deposition transcript pages 59 and 60). The Findings of Fact contained in paragraph 15 of the Recommended Order are not based upon competent substantial evidence in the record.

9. Respondent takes exception to the Findings of Fact contained in paragraph 24 of the Recommended Order which provides:

> Upon arrival, Patient L.M. was in cardiac arrest and respiratory arrest, and her pupils were unresponsive.

The Findings of Fact contained in paragraph 24 of the Recommended Order are not based upon competent substantial evidence. First, they are based solely on the deposition which is not competent substantial evidence for the reasons previously stated. Second, the actual testimony of Respondent in the deposition was that she was not breathing and appeared to be in shock. Although CPR was attempted there is no testimony that the patient was in cardiac arrest and respiratory arrest. (See deposition transcript pages 89 through 95).

10. Respondent takes exception to that portion of the Finding of Fact of paragraph 27 as follows: "For reasons unknown..." as not based on competent substantial evidence. The amended Report of Autopsy (Petitioner's Exhibit 6), reflects additional findings under the hearing "Other Significant Conditions", to wit, "History of Auto Accident" (see also Petitioner's Exhibit 5). Clearly, the medical examiner concluded that the history of auto accident received

conclusion that patient L.M. suffered a sudden development of thrombosis of the left popliteal vein as is commonly associated with trauma to the leg, leading to a thromboembolus of the left main pulmonary artery.

11. Respondent takes exception to paragraphs 19, 33, and 44 of the Recommended Order as not being based on competent substantial evidence in the record. These paragraphs are apparently based upon the testimony of the Petitioner's expert, Dr. Kriger. However, Dr. Kriger testified:

a) that it is sometimes acceptable to prescribe medication based upon telephonic history (see transcript pages 83, Lines 18-21); and

b) that can be acceptable to prescribe medication to a patient without first evaluating the patient (see transcript page 84, lines 13-25 and page 85, lines 1-4, and page 87, lines 22-25 and page 88, line 1).

In addition, Dr. Kriger's testimony is not competent substantial evidence as he conceded that he does not treat adult patients.

12. In paragraph 56 through 59 the Judge reviews the penalty guidelines for a violation of subsections 458.331(1)(k)(m)(q), and (t), thus implying that the Judge concluded that Respondent had violated each of these subsections. However, in previous portions of the Conclusions of Law, the Judge recited only that Petitioner had met its burden of proving by clear and convenience evidence the allegations against the Respondent as to inappropriate prescribing of medication in violation Section 458.331(1)(q), Florida Statutes. There is no specific finding or conclusion made by the Judge that the Petitioner met its burden of proving violations of Subsections 458.331(1)(k)(m) or (t), Florida Statutes. Respondent takes exception to any conclusion that may be implied by the Board of Medicine that Petitioner met its burden of proof in establishing the alleged violation of said subsections.

Respondent takes exception to paragraph 50 of the Recommended Order which is characterized as a Conclusion of Law by the Judge. Paragraph 50 misstates in part, Respondent's position in regard to the admissibility of the deposition taken in the related civil action. Respondent maintains that: (1) he was not advised of the consequences of giving a deposition in the civil action and did not make a knowing and intelligent waiver of his Fifth Amendment privilege, and (2) Respondent maintains that even if his participation in the deposition in the civil action constituted a waiver of his Fifth Amendment privilege that said waiver was only a waiver to the use of his statements in that civil action and not a waiver of his Fifth Amendment privilege in other proceedings.

14. Similarly, Respondent takes exception to the content of paragraph 52 of the Recommended Order which is characterized as a Conclusion of Law by the Judge. It concludes that Respondent should have been informed and knowing as to the impact of his decision to sit for the civil deposition. Certainly even if the Judge has concluded that Respondent knowingly waived his Fifth Amendment privilege as to use of his deposition in the civil proceeding, Respondent should be permitted to rely on the line of cases that establish that a waiver of a privilege in one proceeding does not constitute a waiver in all proceedings (see paragraph 5 above).

15. Respondent takes exception to paragraphs 56 through 60 of the Recommended Order which are characterized as "Conclusions of Law". The Judge has attempted to apply the disciplinary guidelines of the Board of Medicine in determining a penalty in this proceeding. However, the Judge failed to document any consideration as required by 120.68(7)(e)3, Florida Statutes of the requirement for consistency with prior agency practice. As stated by the Fourth District Court of Appeal in Gessler v. Department of Business and Professional Regulation, 627 So.2d 501 (Fla. 4th DCA 1993) the requirement for a subject matter index was to protect against arbitrariness through a legislatively mandated equivalent to judicial stare decisis. The Gessler

held that entry of inconsistent orders based upon similar facts without a reasonable explanation may violate the provisions of Chapter 120, Florida Statutes, and the equal protection guarantees of both the Florida and United States Constitutions. In Respondent's Proposed Recommended Order, paragraphs 64 through 89, Respondent advised of the need for consistency in penalty and outlined the penalties imposed in similar factual situations. Actual copies of the Final Order referenced therein were submitted and are a part of the record of this proceeding as the Judge took official recognition of the same.

16. Respondent takes exception to a portion of paragraph 60 of the Recommended Order which is characterized by the Judge as a "Conclusion of Law" to wit

> "Further, had the Respondent performed a medical evaluation to determine the cause of the alleged "sleeplessness", it is possible that the patient outcome could have been different."

This statement, which is actually a Finding of Fact, is not based upon competent substantial evidence in the record. First, it can be based only on the deposition which does not constitute competent substantial evidence. Second, there is no testimony in the deposition that will support this finding to any degree of certainty, and certainly not to "clear and convincing evidence".

MOTION TO REDUCE RECOMMENDED PENALTY

17. As stated above, there are several obligations imposed in determining an appropriate penalty. These obligations include the requirement that the regulatory agency enact disciplinary guidelines which provide a meaningful range of penalties, that these penalty guidelines be considered in determining the appropriate penalty, and that the penalty be consistent with that imposed under similar circumstances in prior disciplinary cases. Respondent maintains that the recommended penalty, is not consistent with penalties imposed in similar previous disciplinary actions, and that the disciplinary guidelines do not provide a meaningful range of penalties.

The Judge in the Recommended Order paragraph 60 recognizes that the disciplinary guidelines do not provide a meaningful range of penalties, stating "given the great range of penalties possible under the guidelines, no deviation from the rule guidelines is required."

19. The disciplinary guidelines for the subsections allegedly violated by Respondent, are recited in paragraphs 56 through 59 of the Recommended Order. These penalty guidelines do not provide a meaningful range of penalties. In regard to an alleged violation of subsection 458.331(1)(k) the penalty range is from probation to revocation and the imposition of fines. For subsection 458.331(1)(m), Florida Statutes the penalty range is from a reprimand to two year suspension followed by probation and a fine. For subsection 458.331(1)(q) the penalty range is from one year probation to revocation and a fine and for subsection 458 331(1)(t), the penalty range is from two years probation to revocation and a fine. Even if one was to conclude the Respondent had violated each of these subsections, the penalty range included a minimum penalty of probation to revocation. Such a range of penalties is not meaningful as required by the Florida Legislature in enacting the requirement that agencies maintain disciplinary guidelines. In Arias v. State of Florida, Department of Business and Professional Regulation, Division of Real Estate and the Florida Real Estate Commission, 710 So.2d. 655 (3d DCA 1998) (Rehearing Denied June 3, 1998) the Third District Court considered the actions of the Real Estate Commission in imposing discipline. The Court found that the legislature could not have intended the disciplinary section to be a "carte blanche" to suspend a professional's license without meaningful notice of likely penalties and without a mechanism in place to insure that such penalties would be consistently applied. Further, the Third District Court of Appeal found that the Real Estate Commission did not have meaningful penalty guidelines as required by law, and that any future creation and application of penalty guidelines to Ms. Arias would constitute an *ex post facto* application of law. The Third District opined that a remand would not be a viable option and ordered the case reversed. Similarly, in the instant matter, there are no

meaningful disciplinary guidelines relating to the statutory sections in question, as the range of penalties is far too broad.

20. Section 120.53, *Florida Statutes* imposes upon all state agencies an obligation to maintain copies of final orders, and a subject matter index of final orders. The Department of Health has created a subject matter index. The combination of these statutory provisions clearly establishes that it is the legislative intent that regulatory agencies impose consistent penalties in similar cases, and has mandated agencies to provide the tools necessary to allow a review of this process.

21. The Fourth District Court of Appeal has pronounced a purpose for the enactment of the requirement for a subject matter index. In Gessler v. Department of Business and Professional Regulation, 627 So.2d 501 (Fla. 4th DCA 1993), the Fourth District Court of Appeal stated that the requirement for a subject matter index was to protect against arbitrariness through a legislatively mandated equivalent to judicial *stare decisis*. (emphasis applied). The Gessler court cited to the decision of the First District Court in Miami General Hospital v. Department of DHRS, 355 So.2d 1278 (Fla. 1st DCA 1978), where the court noted that the entry of inconsistent orders based upon similar facts without a reasonable explanation, may violate Section 120.68(12)(b), *Florida Statutes* (1991) (now recodified as Section 128.68(7)(e)3, *Florida Statutes*) which requires that the agency exercise discretion consistent with prior agency action, and may violate the equal protection guarantees of both the Florida and United States Constitutions. The Gessler court further held that "(T)he concept of *stare decisis*, by treating like cases alike and following decisions rendered previously involving circumstances, is a core principal of our system of justice."

22. It is clear from the legislative enactments and the decisional law that the legislature intends for the Board to strive for consistency in penalty. In attempting to determine what penalty might be appropriate if the Department successfully established the allegations against

Dr. Minkoff, we reviewed the Department's Subject Matter Index and over two hundred Final Orders of the Board of Medicine and submitted the same to the Judge. The results of our research are detailed below.

23. Dr. Minkoff is charged with violating:

Subsection (1)(t) of Section 458.331, *Florida Statutes*, by prescribing Valium and Chloral Hydrate to Patient L.M. without a physical examination or medical history and without ascertaining the appropriateness of the prescribed drugs and the condition of the patient (Count One);

Subsection (1)(m) of Section 458.331, *Florida Statutes*, by failing to create and maintain any medical records of Patient L.M.'s care including an adequate history and physical, an assessment of physical and psychological function, record of drugs prescribed, recognized medical indication for the use of a dangerous drug and controlled substance and periodic review of the patient's condition (Count Two);

Subsection (1)(k) of Section 458.331, *Florida Statutes*, by prescribing Valium in the name of a third party knowing that the drug was going to be administered to Patient L.M. (Count Three);

Subsection (1)(q) of Section 458.331, *Florida Statutes*, by excessively and inappropriately prescribing Valium and Chloral Hydrate to Patient L.M. without performing a physical examination or psychological evaluation or taking a medical history and based on information provided to him by third parties (Count Four); and

Subsection (1)(p) of Section 458.331, *Florida Statutes*, by prescribing for and treating Patient L.M. without obtaining and/or documenting any consent, either written or oral, from the patient or the patient's legal representative (Count Five).

24. Below are summaries of Board of Medicine cases relative to the issue of penalty. Research fails to reveal a Final Order with a fact pattern identical to the allegations in this case. In most instances, the allegations in the prior cases were more egregious than those alleged in this case. We have included such cases to demonstrate that our approach to a reasonable penalty in this case has a sound basis. Several of the cases with charges similar to those made in the instant matter also include charges of physician impairment which is noted in the abstract of the case. These cases often refer to required participation in the Physicians Resource Network (PRN).

25. Case involving prescribing drugs for fictitious patient:

Dr. Minkoff is not charged with prescribing drugs for a fictitious patient. He is charged with prescribing other than in the intended patient's name. However, in a case where a physician prescribed drugs for a fictitious patient, and was convicted of a criminal charge relative to the same, the Board imposed sanctions that included a 1-year stayed suspension, $,1500 fine, letter of concern and probation with conditions.

See: Jeffrey B. Sack, M.D.; ME 0056807; 1-29-97; Order No. AHCA-97-0110; Case No. 96-13549; AMENDED FINAL ORDER; 458.331(1)(c); 458.331(1)(k); 458.331(1)(q); 458.331(1)(r); [Federal conviction for obtaining controlled substance by fraud by prescribing for fictitious patient]; Informal Hearing; Suspension: 1 year, with said suspension being STAYED, provided Respondent complies with the terms of this Final Order. Fine: $1,500 (within 30 days); Letter of Concern; Probation: For a term to run current with his current advocacy contract with PRN. Obligation: Respondent shall attend prescribing abusable drugs course. Respondent shall not consume, inject or ingest any controlled substances unless prescribed by another practitioner for a medically justifiable purpose with notification to the Board. Respondent shall not consume alcohol. Respondent shall enter into and comply with an after care contract with PRN.

Also see: Jeffrey B. Sack, M.D.; ME 0056807; 3-18-97; Order No. AHCA-97-0300; Case No. 96-13549; SECOND AMENDED FINAL ORDER; 458.331(1)(c); 458.331(1)(k); 458.331(1)(q); 458.331(1)(r); [Alleged prescription of Duragesic, ; a Schedule II controlled substance, to a fictitious patient for personal use; pled guilty to Federal charge of obtaining a controlled substance by fraud and deception]; Informal hearing; Suspension: 1 year with suspension being stayed, provided Respondent complies with the terms of this Final Order.; Fine: $1500 (within 30 days); Letter of Concern; Probation: For a term to run concurrent with his current advocacy contract with PRN.; Obligation: Prescribing abusable drugs course or Board-approved equivalent. Respondent shall not consume, inject or ingest any controlled substances unless prescribed or administered by another practitioner authorized to do so, for a medically justified purpose, and with immediate notification to the Board. Respondent shall not consume alcohol and shall comply with PRN contract, and shall relinquish his Schedule II DEA registration. Respondent shall comply with the terms and conditions of any criminal probation.; Cross Ref.: Order No. AHCA-97-0110 [1-29-97]

We maintain that the alleged actions by Dr. Sack are more egregious than those allegedly committed by Dr. Minkoff. Dr. Sack was accused of obtaining Schedule II controlled substances by fraud, for his own use. He entered a plea of guilty to a criminal offense of acquiring and obtaining possession of a controlled substance by fraud and deception. Dr. Sack suffered no actual suspension. Stayed suspension was imposed and he was placed on probation.

26. Case involving prescribing without seeing patient and falsely dating admission note.

In a case involving failure to timely present and examine patient after admission, medical negligence, prescribing without seeing the patient and falsely dating a hospital admission note, the Board resolved the matter with a 1-year suspension, with the final 6 months stayed under certain conditions, a fine of $2,500, a reprimand, probation for 3 years and indirect supervision. Dr. Minkoff is charged with prescribing without seeing Patient L.M., but there is no allegation that Dr. Minkoff created a false medical record.

See: Carlos C. Vicaria, M.D.; ME 0024612; Order No. AHCA-97-00490; Case No. 92-03096; 458.331(1)(k); 458.331(1)(m); 458.331(1)(q); 458.331(1)(t) [Alleged failure to timely present and examine patient after admission, prescribing without seeing patient and falsely dating admission note]; AC filed: 7-26-94; Informal hearing; Suspension: 1 year; however, final 6 months of suspension period shall be stayed provided that Respondent complies with the terms of this Final Order.; Fine: $2,500 (within 60 days); Reprimand; Probation: 3 years, including indirect supervision.; Obligation: Respondent shall document that he has seen all impatient hospital admissions within 4 hours. Respondent shall complete 10 hours CME in risk management and the FMA medical record keeping course.

We maintain that the allegations against Dr. Vicaria are more egregious than those allegations made against Dr. Minkoff. Dr. Vicaria was alleged to have created a false hospital record to cover up the fact that he did not come and see a patient in the hospital, but prescribed treatment, including the administration of a Schedule II controlled substance, Demerol, to the patient. In addition, Dr. Vicaria was accused of medical negligence in regard to his treatment of the patient in question.

27. Case involving prescribing controlled substances in the names of family members or others for personal use.

Dr. Minkoff is not charged with prescribing controlled substances in the names of family members and others for his personal use. The below case involved an impaired physician. The Board imposed a suspension, until the physician established that he could practice safely due to his impairment, a $4,000 fine and other conditions.

See: Donald W. Crowe, M.D.; ME 0043726; 7-17-97 Order No. DOH-97-055; Case No. 97-04703; Specialty: Emergency Medicine; 458.331(1)(k); 458.331(1)(m); 458.331(1)(q); 458.331(1)(r); [Alleged prescribing of controlled substances for family members or other individuals which were obtained for personal use]; AC filed: 3-17-96; Consent Agreement; Fine: $4,000 (within 90 days); Suspension: Until such time as Respondent appears before the Board and demonstrates that he is able to practice with skill and safety to patients.; Associated charges: This Consent Agreement shall constitute resolution of any criminal violations found regarding specific incidents addressed in this case.; CME: USF abusable drugs course (within 18 months); Probation: Upon reinstatement, to run concurrent with Respondent's advocacy contract with PRN. Respondent shall maintain and comply with all conditions of his PRN after care contract.; Restrictions: During probation, no prescriptions for his fiancé nor any past or present family members; a log of all prescriptions shall be kept; triplicate prescription forms shall be utilized; and Respondent shall practice only under the indirect supervision of a monitoring physician approved by the Probationer's Committee. Cross Ref.: Order No. DOH-97-00367 [11-26-97] (Reinstatement granted)

We maintain that the alleged conduct of Dr. Crowe was more egregious than the allegations made against Dr. Minkoff. Dr. Crowe was accused of prescribing numerous controlled substances to himself for his own abuse over a four-year period of time. It was alleged that Dr. Crowe wrote prescriptions in the names of friends and family members to

obtain these controlled substances for his own abuse. He was also accused of being impaired due to the use of these controlled substances. Dr. Crowe was placed on probation. In addition, his license was suspended. However, the suspension was to remain in effect only until such time as he established that he could practice with skill and safety to patients. This type of suspension is typically imposed by the Board of Medicine when a physician is suffering from a personal impairment problem as is contemplated under the provisions of Section 458.331(1)(s).

28. Case involving fraudulent prescriptions for legend drugs to patients and lying to investigator.

In a case involving fraudulent prescriptions for legend drugs to patient, practicing beyond the scope of licensure and lying to an agency investigator, the Board imposed a fine of $5,000, a reprimand, probation for 3 years and indirect supervision.

See: Victor Manuel Junco, M.D.; ME 0068893; Order No. DOH-98-1058; Case No. 95-13354; 458.331(1)(k); 458.331(1)(m); 458.331(1)(v); 458.331(1)(x); 458.331(1)(hh); 458.311; [Alleged practice beyond the scope of a restricted license, and issuance of fraudulent prescriptions for legend drugs to patients lying about same to an investigator]; AC filed: 11-25-96; Consent Agreement - amended; Fine: $5,000 (within 18 months); Reprimand; Probation: 3 years, including indirect supervision; Obligation: review of practice by independent, certified risk manager and compliance with any recommendations. Respondent shall pass the Laws & Rules Exam with a score of at least 70%.

We maintain that the alleged conduct of Dr. Junco is more egregious than the allegations made against Dr. Minkoff. Dr. Junco was accused of exceeding the limitations of his licensure. Dr. Junco was the holder of a restricted license which required the direct supervision of a Board-approved supervising/monitoring physician. Dr. Junco allegedly operated as a physician without an approved monitor and fraudulently prescribed medications. In addition, when the investigation of the alleged conduct was undertaken, Dr. Junco allegedly misrepresented and concealed material facts by lying to petitioner's investigator, representing that he had not written the fraudulent prescription in question. No suspension was imposed against Dr. Junco, and he was placed on probation for one year under indirect supervision.

29. Case involving inappropriate prescribing of pain medication without examination or treatment plan.

Where a physician inappropriately prescribed pain medication without examination or plan of treatment, the Board imposed a fine of $2,500, Letter of Concern with an obligation of a Quality Assurance Assessment. Dr. Minkoff is charged with inappropriate prescribing without a physical examination.

See: Richard C. Bryon, M.D. ME 0010413 3-13-97 Order No. AHCA-97-0278 Case No. 94-01362 Specialty: Internal Medicine 458.331(1)(m) 458.331(1)(q) 458.331(1)(t) [Alleged inappropriate prescribing of pain medication without examination or plan of

treatment] AC filed: 8-28-96 Consent Agreement (Amended); Fine: $2,500 (within 90 days) Letter of Concern Obligation: Quality Assurance Assessment to be submitted to the Board within 180 days. Probation: 2 years, including indirect supervision.

We maintain that the allegations made against Dr. Byron are more egregious than those made against Dr. Minkoff. It was alleged that Dr. Byron prescribed 30 pills of Darvocet on each of 38 separate occasions to a patient without performing a physical examination and without the patient's knowledge. In addition, it was alleged that refills were requested by the patient's wife for her own use. No suspension was imposed against Dr. Byron. He was placed on two years probation under indirect supervision.

30. Case involving prescribing a controlled substance without examination or medical record

Dr. Minkoff is charged with prescribing Valium and Chloral Hydrate without examination or medical record. In a case of prescribing a controlled substance Darvocet to informant without examination or patient history, and without creating any medical records, a consent agreement for a fine of $5,000 and restriction of office practice was accepted.

See: Adanto A. D'Amore, M.D. ME 0012870 7-24-98 Order No. DOH-98-0842 Case No. 96-02969 458.331(1)(m) 458.331(1)(q) [Alleged prescribing of controlled substance Darvocet to informant without examination or patient history, and without creating any medical records, resulting in surrender of DEA registration] AC filed: 12-18-97 Consent Agreement. Fine: $5,000 (within 2 years) Restriction: Respondent's practice shall be restricted to his office practice within Westwood Retirement Center, but he may travel to other nursing homes, and see patients at the Detox Center and Addiction/Substance Abuse Intervention Program and the Crisis Line. Respondent shall not see patients in the Emergency Room or hospitals. Respondent may not prescribe controlled substances. Obligation: A review of Respondent's nursing home practice including a 25% review of Respondent's medical records (within 90 days).

We maintain that the allegations against Dr. D'Amore are more egregious than those allegations made against Dr. Minkoff. It was alleged that Dr. D'Amore prescribed 100 tablets of Darvocet to a DEA undercover agent and 60 tablets of Vicodin to the DEA undercover agent without performing a physical examination. When petitioner's investigator requested a copy of patient records for the patient (undercover agent), Dr. D'Amore falsely represented that he could not find the records for that patient. No suspension was imposed against Dr. D'Amore. He was required to practice under restrictions.

31. Case involving prescribing Antabuse without proper history and examination, use of pre-signed prescription blanks.

Dr. Minkoff is charged with prescribing Valium and Chloral Hydrate without examination or medical record. In a case involving prescribing Antabuse for a patient without proper history and examination and without informing patient of potential for severe reaction; and presigning prescription blanks, the matter was resolved by a consent

agreement for a fine of $2,000, a reprimand, permanent restriction from the practice of addiction medicine and probation for a year.

See: Michael L. Safer, M.D. ME 0035933 3-13-97 Order No. AHCA-97-00274 Case No. 94-09524 458.331(1)(f) 458.331(1)(m) 458.331(1)(q) 458.331(1)(t) 458.331(1)(aa) [Alleged prescribing Antabuse for patient without proper history and examination and without informing patient of potential for severe reaction; pre-signed prescription] AC filed: 11-21-95 Consent Agreement Fine: $2,000 (within 60 days) Reprimand Restriction: permanent restriction from the practice of addiction medicine. Probation: 1 year, including indirect supervision Obligation: completion of FMA record keeping course.

32. Case involving excessive prescribing of Schedule II controlled substances with knowledge of indications of addiction by the patient.

Dr. Minkoff is charged with inappropriate or excessive prescribing of controlled substances, but there are no allegations of addiction or knowledge of addiction. In a case involving excessive prescribing of Schedule II controlled substances and with knowledge of indications of addiction by the patient, the matter was resolved by a consent agreement for a fine of $5,000, compliance with the PRN contract; completion of medical records and drug courses, probation for 2 years and indirect supervision.

See: James Ivan Slaff, M.D. ME 0037734 9-10-99 Order No. DOH-99-1170-S Case No. 95-12298 458.331(1)(q) 458.331(1)(t) [Alleged substandard care by excessive prescribing of Schedule II controlled substances and with knowledge of indications of addiction by the patient] AC filed: 1-29-98 Consent Agreement Fine: $5,000 (within 1 year) Obligation: Full compliance with PRN contract; completion of FMA medical records course and USF drug course. Probation: 2 years, including indirect supervision. Cross Ref.: Order dated 12-30-99 [Order setting terms of probation prior to Respondent resuming practice.]

We maintain that the allegations against Dr. Slaff are more egregious than the allegations made against Dr. Minkoff. Dr. Slaff was accused of prescribing controlled substances that appear in Schedule II, the most abusable controlled substances available by prescription under Chapter 893, at least 243 times to a patient within a three-year, three-month period of time without adequate medical justification. It was alleged that Dr. Slaff admitted to knowledge of the patient's abuse of these medications but continued to prescribe the same. No suspension was imposed. Dr. Slaff was placed on probation with indirect monitoring for a period of two years and was required to complete continuing education classes.

33. Case involving failure to perform complete physical or medical exam.

Dr. Minkoff is charged with prescribing drugs without performing a physical examination. In a case involving failure to perform a complete physical or medical exam, the Board resolved the matter by a consent agreement for a fine of $500, costs and an evaluation.

See: Gloria Bringas Hankins, M.D. ME 0050359 12-30-99 Order No. DOH-99-1613-S Case No. 96-11265 Bariatric medicine 458.331(1)(g) 458.331(1)(m) 458.331(1)(t) 893.05(2)(a)-(e) [Alleged substandard care in failing to perform a complete physical or medical exam on a weight control patient nor formulating a treatment plan prior to prescribing medications, and failure to properly label medication as required by law] AC filed: 5-10-99 Consent Agreement - amended PL50 Fine: $500 (within 6 months) Costs: $686 Obligation: Respondent shall undergo an evaluation by UF CARES (Comprehensive Assessment, Remediation, and Education Services) program and comply with any and all recommendations of said evaluation (within 6 months). Respondent shall also complete the FMA medical records keeping course (within 1 year) and obtain a risk management review (within 90 days).

34. Case involving prescribing multiple controlled substances without medical justification; criminal conviction for attempted possession of controlled substance; impaired physician.

Dr. Minkoff is charged with prescribing controlled substances (Valium and Chloral Hydrate) on two occasions. In a case involving prescribing multiple controlled substances without medical justification, and criminal conviction for attempted possession of controlled substance, and physician impairment the Board resolved the matter by a consent agreement for a fine of $5,000, suspension until the physician established ability to practice with reasonable skill and safety (i.e. no longer impaired), and record-keeping courses.

See: Steven G. Shellabarger, M.D. ME 0016488 3-2-2000 Order No. DOH-00-0308-S Case No. 96-01539; 97-07932; 97-06765; 99-52985 Family Practice 458.331(1)(c) 458.331(1)(g) 458.331(1)(m) 458.331(1)(n) 458.331(1)(q) 458.331(1)(s) 458.331(1)(t) 458.331(1)(ee) [Alleged substandard treatment in prescribing multiple controlled substances without medical justification, and criminal conviction for attempted possession of controlled substance] AC filed: 6-17-97; 2-25-98; 7-28-99 Consent Agreement. Fine: $5,000 (to be paid within 2 years of Respondent's return to the practice of medicine) Suspension: until such time as Respondent appears before the Board and demonstrates that he is able to practice with skill and safety to patients. Obligation: Completion of the FMA record keeping course (within 18 months) Probation: Upon reinstatement, to run concurrent with his PRN contract and for no less than 5 years, with full compliance with PRN requirements, with direct supervision required. Also, during probation Respondent may not prescribe any controlled substances to any family members, immediate or otherwise, or to ex- family members or members of his staff, nor except as permitted by the terms of his criminal probation and DEA. Respondent shall utilize triplicate, sequentially numbered prescriptions and provide the Agency's investigator with a copy of each; Respondent may petition the Board that this requirement be terminated after 1 year. Respondent shall relinquish his Schedule 2, 2N, and 3N Controlled Substances Registration for at least 2 years after his return to practice, subject to certain conditions and restrictions specified at that time.

We maintain that the allegations against Dr. Shellabarger are more egregious than those made against Dr. Minkoff. Dr. Shellabarger was accused of the intentional sale of steroids, which are controlled substances, for muscle-building purposes, a purpose that is illegal under Florida law. It was alleged that he prescribed these controlled substances

without examination of patients. Dr. Shellabarger was convicted of possession of controlled substances. In addition, it was alleged that Dr. Shellabarger was unable to practice with reasonable skill and safety due to personal impairment. Dr. Shellabarger was suspended. However, the suspension was only to remain in effect until such time as he demonstrated that he able to practice with skill and safety to patients. Again, this penalty is typically imposed on impaired physicians as contemplated by Section 458.331(1)(s), *Florida Statutes*. Dr. Shellaharger was then placed on probation.

35. Case involving dispensing controlled substances without examination.

Dr. Minkoff is charged with prescribing controlled substances without examination. In a case which involved inappropriate dispensing of controlled substances without examination, inappropriate surgery and fraudulent billing, Dr. Rene Hasbun's license was suspended for one year, stayed while in compliance with the other terms of the final order; probation for two years; an administrative fine of $5,000; a letter of concern; 100 hours of community service and a quality assurance review. In Dr. Hasbun's cases set forth below, please note that the first case was modified on appeal to the District Court of Appeal; the disposition described above is the Board's final disposition on remand.

Hasbun Initial Case

See: Rene Hasbun, M.D. ME 0043628 3-13-97 Order No. AHCA-97-00284 Case No. 89-06995; 92-07009 DOAH No. 94-0607; 94-0778 458.331(1)(h) 458.331(1)(k) 458.331(1)(m) 458.331(1)(n) 458.331(1)(q) 458.331(1)(t) [Alleged performance of inappropriate surgery on lymph node on patient with terminal pancreatic cancer without consultation with prior treating physicians; fraudulent billing; inappropriate dispensing of controlled substances without examination] AC filed: 4-22-92; 2-11-93 Recommended Order Hearing Officer: Joyous Parrish; Fine: $10,000 (within 30 days) Suspension: 1 year Probation: 2 years, including indirect supervision Obligation: 10 hours CME per year during probation in the area of medical ethics and completion of the FMA medical record keeping course. NOTE: This Order reversed in part on appeal; subsequent Final Order on Remand issued by Board. Cross Ref.: Order No. DOH-93-0293 [3-23-98]

Hasbun Appeal

See: Rene Hasbun, M.D. (ME0043628) - Miami, FL - 3/23/98 — District Court of Appeals found no violation of practicing below the acceptable standard care in final order of 3/13/97, and remanded to Board for reconsideration of penalty. Charged with exercising influence on the patient in such a manner as to exploit the patient for financial gain; making or filing a report which the licensee knows to be false; making deceptive, untrue, or fraudulent representations in or related to the practice of medicine; failing to keep written medical records justifying the course of treatment of the patient; prescribing dispensing, administering, mixing, or otherwise preparing a legend drug, including all controlled substances other than in the course of the physician's professional practice. Action Taken — Suspension for one year which is stayed while in compliance with the other terms of the final order; probation for two years; administrative fine of $5,000; letter of concern; 100 hours of community service; quality assurance review of practice within six months.

Hasbun Remand

See: Rene Hasbun, M.D.; ME 0043628; 3-23-98; Order No. DOH-98-0293; Case No. 89-06995; 92-07009; DOAH No. 94-607; 94-778; DCA Case No. 97-1046; FINAL ORDER ON REMAND; 458.331(1)(h); 458.331(1)(k); 458.331(1)(m); 458.331(1)(n); 458.331(1)(q); 458.331(1)(t) [vacated/dismissed]; [Alleged performance of inappropriate surgery on lymph node on patient with terminal pancreatic cancer without consultation with prior treating physicians; fraudulent billing; inappropriate dispensing of controlled substances without examination]; PL13; Recommended Order; Hearing Officer: J. Parrish; Fine: $5,000 (within 30 days); Letter of Concern; Suspension: 1 year, but stayed provided Respondent remains in compliance with the terms of the Final Order.; Probation: 2 years, including indirect supervision; Cross Ref.: Order No. AHCA-97-0284 [3-13-97]

36. Case involving prescribing controlled substances to a live-in female roommate.

Dr. Minkoff is charged with prescribing Valium and Chloral Hydrate on two separate occasions without adequate examination. In a case involving prescribing controlled substances including Oxycodone and Meprobamate to a live-in female roommate without maintaining any medical records, and without medical justification, the Board of Medicine entered an Order of Default and revoked the license.

See: Teodoro Rivas-Alexander, M.D. ME 0021932 9-11-98 Order No. DOH-98-1035 Case No. 95-06159 458.331(1)(m) 458.331(1)(q) 458.331(1)(t) [Alleged substandard care in prescribing controlled substances including Oxycodone and Meprobamate to a live-in female roommate without maintaining any medical records, and without medical justification] AC filed: 2-16-98 Default REVOKED.

We do not believe that the penalty of revocation imposed against Dr. Rivas-Alexander is instructive. This penalty was imposed after the entry of an Order of Default. Dr. Rivas-Alexander did not appear and made no argument through counsel in regard to penalty. The Final Order reflects that Dr. Rivas-Alexander failed to even respond to the Administrative Complaint by filing an Election of Rights form or responding in any other way.

37. Case involving prescription of controlled substances to be administered by unlicensed and/or unqualified persons.

Dr. Minkoff is charged with prescribing Valium in the name of a third party knowing that the drug was going to be administered to Patient L.M. (Count Three). In two cases, one involving prescribing numerous controlled substances to treat his wife's cervical disk disease and associated pain without proper medical precautions, administered by unlicensed and/or unqualified persons at home, and without medical records, and another involving permitting a patient to phone in her own prescriptions, the Board resolved each matter by consent agreement for a fine of $10,000, CME and courses.

See: Steven D. Gelbard, M.D. ME 0059560 11-2-98 Order No. DOH-98-1170 Case No. 95-16957 Neurological Surgery 458.331(1)(m) 458.331(1)(q) 458.331(1)(t)

458.331(1)(w) [dismissed] [Alleged substandard care in prescribing numerous controlled substances to treat his wife's cervical disk disease and associated pain without proper medical precautions, administered by unlicensed and/or unqualified persons at home, and without medical records] AC filed: 1-29-98 Consent Agreement - Fine: $10,000 (within 6 months) Obligation: Completion of 5 hours of CME in the area of Risk Management, the USF prescribing course, and the FMA medical records course (within 1 year). Respondent shall present the most recent report of a review of his practice by a licensed, certified Risk Manager or Health Care Organization to the Board at the time the Consent Agreement is considered.

The allegations against Dr. Gelbard are difficult to equate with those against Dr. Minkoff. Dr. Gelbard allegedly prescribed over a lengthy period of time to his girlfriend, or fiancée, significant amounts of controlled substances. Although he was apparently aware of his fiancée's back condition, he kept no records that justified his prescribing to her. The prescribing continued for approximately four years. The Board of Medicine imposed no suspension and no probation against Dr. Gelbard. He was required to pay a fine and undergo continuing education and quality assurance review.

See: Bill Byrd, M.D. ME 0043323 1-26-99 Order No. DOH-99-00107 Case No. 96-01029 458.331(1)(m) 458.331(1)(q) 458.331(1)(t) 458.331(1)(w) 64B8-10.002(3), F.A.C. [Alleged substandard care in treating an obese patient without creating medical records and permitting the patient to phone in her own prescriptions to a pharmacy] AC filed: 9-19-97 Consent Agreement – Fine: $1,000 (within 60 days) Obligation: Respondent shall complete the USF Drug Course as well as the FMA record keeping course (within 1 year) and undergo a Quality Assurance Review (1 year after issuance of the Final Order in this case)—the QA Reviewer shall be Susan Goddard, M.S., L.H.R.M., who also performed a QAR on Respondent on 7-14-98, and Respondent shall comply with any and all recommendations made at this second review.

We believe that the allegations against Dr. Byrd are more egregious than those made against Dr. Minkoff. Dr. Byrd delegated the responsibility to prescribe controlled substances to the patient herself. This activity continued for seven to eight years. Obviously, during this period of time, no adequate examinations were performed. Dr. Byrd's license was placed under a stayed suspension; no actual suspension was imposed. He was required to complete continuing education, a quality assurance review, and pay a fine.

38. The Board of Medicine has also accepted voluntary relinquishments from several physicians who were accused of violations relating to the prescription of controlled substances inappropriately. However, it should be noted that it is the practice of the Board to accept the relinquishment of a license if offered by a physician who has been charged with a violation of Chapter 458, F.S. without regard to the seriousness of the violation. Therefore, we do not belief

that the Department can effectively argue that these orders stand for the proposition that relinquishment was the only acceptable penalty in the individual case.

39. In a case involving prescribing controlled substances to patients over 7-year period without justification and often without examination.

> John L. Farrior, M.D. ME 0003291 11-25-97 Order No. DOH-97-00359 Case No. 97-01498 458.331(1)(m) 458.331(1)(q) 458.331(1)(t) [Alleged prescribing of controlled substances to patients over 7-year period without medical justification and often without examination] AC filed: 5-23-97 Voluntary Relinquishment.

40. In a case involving prescribing a controlled substance to a person who was not a patient, who had no medical record, who had no psychiatric examination performed.

> See: Antonio Carias, M.D. ME 000029495 12-30-99 Order No. DOH-99-1621-S Case No. 97-09700 458.331(1)(m) 458.331(1)(q) 458.331(1)(t) [Alleged substandard care in prescribing a controlled substance to a person who was not a patient, who had no medical record, who had no psychiatric examination performed, and for no recorded legitimate medical reason to a person who was not under his care at any time] AC filed: 2-1-99 Voluntary Relinquishment.

41. In cases involving prescriptions in excessive quantities, without medical indication and selling controlled substances for cash.

> See: Toxsen Rex Castleson, M.D.; ME 0035760; 9-18-98; Order No. DOH-98-1064; Case No. 98-01033; OB/GYN; 458.331(1)(h); 458.331(1)(k); 458.331(1)(m); 458.331(1)(n); 458.331(1)(q); 458.331(1)(t); [Alleged excessive prescriptions of Lorcet, Valium and Xanax in excessive quantities and without medical indication, and selling controlled substances for cash to patients and undercover agents]; AC filed: 4-22-98; Voluntary Relinquishment.
>
> See: Lucy Okhi Cho, M.D.; ME 0029529; 4-9-98; Order No. DOH-98-0384; Case No. 97-19952; 97-12713; 458.331(1)(k); 458.331(1)(m); 458.331(1)(n); 458.331(1)(q); 458.331(1)(t); [Alleged selling of controlled substances for cash to undercover detectives]; AC filed: 8-1-97; 12-18-97.

42. In a case involving selling narcotics to undercover informant without appropriate examination or legitimate medical purpose.

> See: Modesto Odoqui, M.D. ME 0043469 6-14-2000 Order No. DOH-00-0942-FOI Case No. 99-61785 458.331(1)(m) 458.331(1)(q) 458.331(1)(t) [Alleged substandard care in selling narcotics to an undercover informant without an appropriate examination or legitimate medical purpose] AC filed: 12-17-99 Voluntary Relinquishment.

43. In a case involving ordering controlled substances for dispensing to family and friends or for self-use.

See: Charles F. Lescher, M.D. ME 0009536 9-18-2000 Order No. DOH-00-1699-S Case No. 98-21972 Radiology 458.331(1)(m) 458.331(1)(q) 458.331(1)(r) 458.331(1)(s) 458.331(1)(t) [Alleged ordering of controlled substances for dispensing to family and friends or for self-use without maintaining medical records as revealed by DEA inspection] No AC filed PL04 Voluntary Relinquishment.

44. In a case involving prescribing multiple narcotics and other controlled substances without medical justification to patients seeking drugs.

See: Barbara Mazzella, M.D. ME 0036758 9-18-2000 Order No. DOH-00-1706-S Case No. 99-54436; 99-54440; 99-54876; 96-14301; 99-54439; 99-54874; 99-54875 458.331(1)(m) 458.331(1)(q) 458.331(1)(t) [Alleged substandard care in prescribing multiple narcotics and other controlled substances without medical justification to patients seeking drugs and without referral of the patients to a pain management specialist] AC filed: 6-2-99; 9-21-99 Voluntary Relinquishment.

45. In a case involving prescribing excessive quantities of controlled substances to a patient without documented medical exams or medical justification, practicing without an active license and misrepresentation to the investigator.

See: Jeffrey Martin Myers, M.D. ME 0058727 9-11-98 Order No. DOH-98-01038 Case No. 94-09779 DOAH No. 96-5597 Family Practice 458.331(1)(k) 458.331(1)(m) 458.331(1)(q) 458.331(1)(t) 458.331(1)(x) 458.319(3) 458.327(2)(e) [Alleged practicing of medicine on an expired license; misrepresenting to Agency investigators that his license was reactivated by the Board when it had not been; prescribing excessive quantities of controlled substances including Schedule II controlled substances over a lengthy period of time to a patient without documented medical exams or medical justification] AC filed: 8-31-95 Consent Agreement - Reprimand Suspension: Indefinitely, taking effect 8-21-98. Respondent may petition the Board for reinstatement at such time the following conditions have been met: (a) successful completion of the UF practice evaluation program and compliance with the recommendations thereof; (b) passage of the Special Purpose Examination; and (c) receipt of a satisfactory report from PRN with regard to Respondent's ability to safely practice medicine. Probation: Upon reinstatement, 5 years with terms and conditions to be set at that time.

On this occasion the Board ordered indefinite suspension of a physician. However, in this case the physician had also practiced without an active license, mislead Agency investigators in regard to his license status, and was apparently impaired himself such that an evaluation by the PRN was required.

46. Dr. Minkoff's alleged conduct is much less egregious than many of those physicians who have been charged with similar violations. Dr. Minkoff's actions were based upon his good faith reliance on individuals who he believed to be trained health care practitioners. He prescribed very small quantities of medications. His decision to prescribe in the name of David Houghton instead of directly in the name of the patient L.M., in regard to the initial prescription, was not motivated by any attempt to deceive but merely for convenience of the individual who was to pick up the prescription from the pharmacy. Dr. Minkoff never attempted to "cover up" or mislead anyone in regard to his actions. In fact, he was totally cooperative during an investigation of the events by law enforcement individuals and during the taking of his deposition and in the civil action.

47. Aggravating and mitigating circumstances must be considered. An application of the findings of fact to the disciplinary guidelines relating to aggravating and mitigating circumstances 64B8-8(3), FAC, follows:

(a) The exposure of the patient or public to injury or potential injury, physical or otherwise, would be from none to slight.

(b) Dr. Minkoff's legal status at the time of the offense reveals no restraints or legal constraints; in fact, Dr. Minkoff has never had a prior disciplinary action.

(c) Although the Administrative Complaint frames several charges, all charges arise out of the same conduct.

(d) Dr. Minkoff has never previously committed any offense.

(e) Dr. Minkoff has practiced in the State of Florida since 1990, and before that in California since 1980 without disciplinary history or incident.

(f) There was no evidence of any pecuniary benefit or self gain inuring to Dr. Minkoff.

(g) There was no evidence of any trade, barter, or sale of any controlled substance.

(h) The other relevant mitigating factors include Dr. Minkoff's reliance on individuals who he perceived to be medically trained, and his relationship with those individuals as well as patient L.M., as members of the same religious organization. The evidence establishes that Dr. Minkoff's sole motivation was to assist patient L.M. in obtaining sleep.

48. Considering all of these mitigating circumstances, and the disciplinary guidelines and previous actions of the Board of Medicine, the following penalties are appropriate:

(i) Probation under indirect supervision of a monitoring physician for a period of one year.

(j) A fine of $5,000.00.

(k) A reprimand.

(l) A requirement that Dr. Minkoff maintain a log of controlled substances that he prescribes for review by his monitoring physician for one year.

(m) That Dr. Minkoff complete the University of South Florida course entitled "Clinical, Legal and Ethical Consideration in Prescribing Abusable Drugs" within one year.

WHEREFORE, Respondent respectfully request that the Board of Medicine grant his exceptions, and reduce the recommended penalty of the Administrative Law Judge.

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STATE OF FLORIDA
DEPARTMENT OF HEALTH
BOARD OF MEDICINE

FILED
DEPARTMENT OF HEALTH
DEPUTY CLERK
CLERK Vicki R. Kenon
DATE 12/18/01

DEPARTMENT OF HEALTH,

Petitioner,

vs.

DOAH CASE NUMBER 00-0023
DOH CASE NUMBER 1997-15802

DAVID IRA MINKOFF, M.D.,

Respondent,

PETITIONER'S RESPONSE TO RESPONDENT'S EXCEPTIONS TO RECOMMENDED ORDER AND MOTION TO DECREASE PENALTY

COMES NOW the Petitioner, by and through its contracting Agent, Agency for Health Care Administration, by and through its undersigned attorney and files this Response to Respondent's Exceptions to Recommended Order and Motion to Decrease Penalty and states:

1. On June 5, 2001, Respondent filed exceptions to the recommended order in this case. Respondent takes exception to several of the findings of fact based upon the argument that the Petitioner failed to present competent substantial evidence of the allegations and the Administrative Law Judge erred in ruling against Respondent. However, the Administrative Law Judge, as the trier of fact in this case, concluded that Petitioner and the evidence established Respondent failed to practice medicine with the level of care, skill, and treatment recognized by a reasonably prudent similar physician

as being acceptable under similar conditions and circumstances, failed to maintain adequate medical records, made a deceptive, untrue, and fraudulent representation in his practice of medicine, and prescribed a legend drug, including a controlled substances, other than in the course of his professional practice.

2. In Respondent's exceptions, Respondent improperly argues a *de novo* review of the finding of facts in this case, and thus, these exceptions should be rejected. The proper standard of review for findings of fact in a recommended order is outlined in Section 120.57(l), Florida Statutes, which states:

> The agency may adopt the recommended order as the final order of the agency. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. When rejecting or modifying such conclusion of law or interpretation of administrative rule, the agency must state with particularity its reasons for rejecting or modifying such conclusion of law or interpretation of administrative rule and must make a finding that its substituted conclusion of law or interpretation of administrative rule is as or more reasonable than that which was rejected or modified. Rejection or modification of conclusions of law may not form the basis for rejection or modification of findings of fact. The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based upon competent substantial evidence or that the proceedings on which the findings were based did not comply with essential requirements of law. The agency may accept the recommended penalty in a recommended order, but may not reduce or increase it without a review of the complete record and without stating with particularity its reasons therefor in the order, by citing to the record in justifying the action.

The Administrative Law Judge's findings of fact are based upon competent substantial evidence and they should not be disturbed by this Board.

3. The proper standard of review for findings of fact as outlined in Section 120.57(l), Florida Statutes, is further defined by case law. In Heifetz v Department of Business Regulation, 475 So. 2d 1277, 1281 (1st DCA 1985), the court stated that:

> [i]t is the hearing officer's function to consider all evidence presented, resolve conflicts, judgements of credibility of witnesses, draw permissible inferences from the evidence, and reach ultimate findings of facts based upon competent substantial evidence.

The Heifetz court also stated:

> If, as is often the case, the evidence presented supports two inconsistent findings, it is the hearing officer's role to decide the issue one way or the other. The agency may not reject the hearing officer's finding unless there is no competent, substantial evidence from which the finding could reasonably be inferred. The agency is not authorized to weigh the evidence presented, judge credibility of witnesses, or otherwise interpret the evidence to fit its desired ultimate conclusion. Id.

4. Petitioner's medical expert, Alberto I. Krieger, M.D., (hereinafter Dr. Krieger) testified that Respondent violated Sections 458.331(1)(t), (m), (k) and (q), Florida Statutes. On the other hand, Respondent failed to present a medical expert. Instead, Respondent merely cross-examined Petitioner's expert on possibilities and hypotheticals. The Administrative Law Judge (hereinafter ALJ) concluded in both the findings of fact and conclusions of law that Respondent violated Sections 458.331(1)(t), (m), (k) and (q), Florida Statutes. The Administrative Law Judge weighed the evidence presented at the formal hearing and resolved any possible conflict by relying upon the testimony of Petitioner's medical expert and Respondent's own testimony contained in his deposition. Therefore, the findings of fact in this case are based upon competent, substantial evidence, and should be accepted by the Board.

References to the transcript will be designated as (Tr.).

References to Exhibits will be designated as (Exh. #, pg #).

EXCEPTIONS TO FACTS

5. Respondent initially takes exception to the ALJ's preliminary statement. However, Respondent failed to cite any authority that would allow the alteration of the preliminary statement. Respondent argues the ALJ failed to articulate the full basis of Respondent's position on the introduction of the deposition of the Respondent in a separate but factually related case. Yet, part of Respondent's objections were raised after the record was closed and after the submission of the Proposed Recommended Orders (see Respondent's Notice of Additional Authority). It is clear in the ALJ's order denying the Motion in Limine and in the Recommended Order that he considered, and rejected, all of Respondent's objections. This exception should be denied.

6. Respondent again takes exception to the ALJ's preliminary statement. Respondent takes exception to paragraph four of the preliminary statement of the Recommended Order. However, Respondent failed to cite any authority that would allow the alteration of the preliminary statement. Respondent argues paragraph four fails to take into account Respondent's renewed objection to the admission of the deposition transcript on all grounds previously raised when the hearing resumed on March 1, 2001, the date the deposition was admitted. The ALJ considered all of Respondent's objections

and rejected them all; paragraph four merely states the ALJ's conclusions. This exception should be denied.

7. Respondent next takes exception to the ALJ's prior ruling concerning admissibility of respondent's deposition. The agency in its final order may reject or modify the conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction. The ALJ in his role as hearing officer interpreted the rules of evidence, case law and civil procedure to deny the Respondent's motion in limine to bar admission of the Respondent's deposition, and his ruling should not be disturbed by this Board. Respondent filed a motion in limine on November 22, 2000 and a memorandum of law in support of the motion in limine on December 4, 2000. Petitioner filed a response to Respondent's motion in limine on December 4, 2000. The ALJ issued an order denying Respondent's motion in limine on December 6, 2000. The parties fully argued this matter both in submitted pleadings and oral arguments before the Administrative Law Judge assigned to this case. Respondent's Motion in Limine was denied on December 6, 2000, and the deposition was properly admitted into evidence.

8. Respondent relies on Robert M. Brady v United States, 90 S.Ct. 1463 (1970) and asserts that Respondent did not make a voluntary and knowing and intelligent waiver of his constitutional rights. Respondent also relies on State of Florida v John Spiegel, 710 So. 2d 13 (Fla. 3d DCA, 1998) where Respondent asserts the Court held that defendant's prior voluntary statement was inadmissible. Respondent's reliance on the aforementioned

case is misplaced. State v. Spiegel involved a criminal proceeding in which the state offered for admission into evidence statements made by an attorney during a Bar disciplinary proceeding. This case and the ruling is unique and distinguishable from the instant case in several aspects.

9. The *Spiegel* ruling was primarily based on the fact that admissions made during an interview by Spiegel's professional governing body, if used against Spiegel in a subsequent proceeding might chill the truth seeking function of the bar grievance committee's role in protecting the public. In the case before Board of Medicine there is no such concern. In *Spiegel,* the court considered the fact that the attorney was compelled to answer all questions posed to him. In the instant case the Respondent freely, knowingly and with the assistance of counsel provided the testimony in question. In the case at bar, the Respondent freely participated in the Liebreich v Church of Scientology case and was not compelled. The admissions made in the deposition in Liebreich v Church of Scientology on October 22, 1997, were done voluntarily with the assistance of counsel during the discovery period in a civil claim in which Respondent was involved. Respondent freely testified about the medical care he provided to a citizen of the State of Florida. The *Spiegel* court's ruling was based on a concern that the utilization of the compelled admissions of a witness who testified without the benefit of, presence of, and advice from an attorney, in a subsequent proceeding would be fundamentally unfair. The court stated:

> In sum, to admit such statements under these circumstances would not only adversely affect the truth seeking function of the grievance committee to protect the public, such a ruling would negatively infringe

deposition testimony of the Respondent alludes to the authenticity and trustworthiness of the prescriptions. (Exh. 7, pg 48) This exception should be denied.

12. Respondent takes exception to paragraph fifteen of the findings of fact in that Respondent obtained no medical history for Patient L.M. from the patient or from anyone in a position to know the patient's medical history. Respondent did not speak with, did not examine, did maintain or review medical records of Patient L.M. prior to prescribing medication to and for Patient L.M. The extent of the conversation with church members corresponding with Respondent was, "still having trouble sleeping. Valium never given. Is there any liquid she could take?" Respondent testified that was the whole conversation. (Exh. 7, pg 73) The ALJ weighed the evidence and made a finding of fact. There is no indication Respondent was apprised of Patient L.M.'s medical history by someone in a position to know that history. Someone in a position to know would be the patient's relatives. The Respondent's beliefs and unfounded trust is part of the problem with his standard of care in prescribing medications. This exception should be denied.

13. Respondent takes exception to paragraph twenty-four in that he alleges there is no evidence that Patient L.M. was in cardiac arrest or respiratory arrest. The ALJ weighed the testimony and determined that due to Patient L.M. not breathing, appearing to be in shock, moribund and draped over a wheel chair that an inference can be made that Patient L.M. was in cardiac and respiratory arrest. The ALJ also took into account that a code was called and CPR was administered. The evidence provided the ALJ with

competent substantial evidence to infer Patient L.M. arrived at Respondent's Emergency Room in cardiac and respiratory arrest. This exception should be denied.

14. Respondent takes exception to a portion of paragraph twenty-seven in that the ALJ begins the paragraph with the words "For reasons unknown". The Respondent comes to the mistaken conclusion that these three words are an indication that the ALJ's findings were not based on competent substantial evidence. The ALJ is weighing the evidence and has found as a fact that it is unknown why the autopsy of Patient L.M. was amended on February 16, 2000, but that it was amended and these are the findings of the amended report. Respondent did not call the medical examiner to testify at the hearing and cannot, now, argue hyhpotheticals that are not supported by credible substantial evidence. The ALJ made a permissible inference and the exception should be denied.

15. Respondent takes exception to paragraphs nineteen, thirty-three, and forty-four. Paragraph nineteen is a finding of fact based on the testimony of Petitioner's expert witness Dr. Krieger. The ALJ is the trier of fact he weighed the testimony of Dr. Krieger and determined a reasonably prudent physician would not prescribe medication including Valium and Chloral Hydrate without establishing a proper patient-physician relationship. Respondent failed to introduce any evidence to the contrary at the hearing and therefore cannot refute the ALJ's finding of fact. Respondent argues that Dr. Krieger's testimony is not competent substantial evidence because he does not treat adult patients. Dr. Krieger testified to the standard of care of a reasonably prudent similar physician, the fact that

Patient L.M. was an adult is inconsequential to the behavior of the Respondent. Further, Dr. Krieger testified that in fact he might treat the whole family, mother, father and siblings, if they have symptoms of an illness. (Tr. 78) Paragraphs thirty-three and forty-four are conclusions of law determined by the ALJ after reviewing the testimony of Petitioner's expert. This exception should be denied.

EXCEPTIONS TO LAW

16. Respondent takes exception to paragraphs fifty-six through fifty-nine in that the ALJ reviews the penalty guidelines for violations of subsections 458.331(1)(q), (k), (m), and (t), Florida Statutes, thus concluding Respondent had violated each of these sections. A review of the Recommended Order would illustrate the ALJ stated in paragraph thirty-two (32) the Petitioner's burden of proof. Paragraph thirty-three (33), then states the evidence establishes Respondent failed to practice medicine 'that is recognized as acceptable by a reasonably prudent similar physician. A review of paragraphs thirty-seven (37) through forty-four (44) sets forth the ALJ's findings that Respondent violated Sections 458.331(1)(q), (k), (m) and (t), Florida Statutes. Obviously the ALJ was utilizing the correct standard of proof when making these findings. This exception should be denied.

17. Respondent in his exception to paragraph fifty again requests a review of issues that have been repeatedly argued before the ALJ. As mentioned in paragraph seven of this response the admissibility of the deposition has been briefed and argued

and determined by the ALJ. The ALJ clearly addressed each of Respondent's objections; even the ones addressed in his Notice of Additional Authority, and rejected them all. This exception should be denied.

18. Respondent takes exception to paragraph fifty-two in that Respondent having waived his Fifth Amendment privilege as to use of his deposition in the civil proceeding, that Respondent should have been permitted to rely on the line of cases that establish that a waiver of a privilege in one proceeding does not constitute a waiver in all proceedings. The ALJ received motions and case law in support of motions and did not agree with Respondent's interpretation of the law. This exception should be denied.

19. Respondent takes exception to paragraphs fifty-six through sixty, in that the ALJ failed to document any consideration of prior agency orders. The ALJ properly utilized the penalty guidelines and the Respondent's inactions and actions to determine a penalty. The ALJ granted Respondent's Motion to Take Official Recognition concerning the prior orders. The Respondent seems to suggest that the ALJ did not consider these orders. Petitioner would claim that the ALJ did consider the prior orders and the facts of this case in determining an appropriate penalty. This exception should be denied.

20. Respondent takes exception to a portion of paragraph sixty in that the statement is based on the deposition and is not competent substantial evidence. The conclusion by the ALJ is based on the testimony elicited at trial and is a permissible inference elicited from the evidence presented to the ALJ. This exception should be denied.

RESPONSE TO MOTION TO REDUCE RECOMMENDED PENALTY

1. Respondent claims that the ALJ's recommended penalty is not consistent with penalties imposed in similar previous disciplinary actions. Respondent has cited cases in which he wishes the BOM to use as a guide to impose penalty. The submitted final orders ostensibly include impaired physicians self-prescribing or physicians prescribing to family members and drug seekers. Fundamental to Respondent's claim is his admission that his research failed to find a fact pattern identical to those in this case. The Board should apply the Subject-Matter Index and the disciplinary guidelines to the facts in this case. Respondent's behavior is more egregious because he prescribed to a patient unknown to him socially or professionally. Respondent prescribed medicine to and for a patient even though he knew his first prescription was not given to the intended patient. Respondent prescribed without assurance his prescription was being utilized for the intended patient. Therefore, a more stringent penalty should be imposed on Respondent due to his disregard for the risk of exposure of harm to the public with his prescribing practices.

2. The disciplinary guidelines provide a distinct and meaningful range of penalties. Petitioner maintains a subject matter index and the disciplinary guidelines outlined in the Recommended Order cited by the ALJ provide meaningful notice to Respondent of likely penalties. Both the guidelines and statutory range of penalties

establish specified penalties for the violation of the statutes charged in the administrative complaint.

3. The Respondent's assertion that the "ALJ recognizes that the disciplinary guidelines do not provide a meaningful range of penalties" is a misreading of his statement. Paragraph sixty begins with a discussion of Rule 61F6-20.001(3), Florida Administrative Code, which provides for application of aggravating and mitigating circumstances that permit the Board of Medicine to deviate from the potential penalties set forth in the rule. The ALJ then states that given the range of penalties under the guidelines, from revocation to a lesser penalty, no deviation from the guidelines is required.

4. Respondent's asserts that the range of penalties outlined in the Recommended Order do not provide a meaningful range of penalties. Respondent's assertion that the range of penalty from probation to revocation is not meaningful illustrates a lack of understanding of the penalties and appreciation for the violations proven in this case.

5. Respondent relies on Arias v. State of Florida, Department of Business and Professional Regulation, Division of Real Estate and Florida Real Estate Commission 710 So. 2d 655 (3d DCA 1998). This reliance is misplaced. Arias, was a decision based on the conduct of an Agency that failed to have penalty guidelines in place, so as to alert licensees of penalties for the commission of proscribed actions. Petitioner has established penalty guidelines and an index of final orders to ensure consistency in

penalties imposed. Therefore, Arias is not relevant in regard to the Respondent's sanctions and penalties imposed by the ALJ. Petitioner was given meaningful notice of the likely penalties established in the penalty guidelines relied upon and cited in the Recommended Order by the ALJ. Respondent's claim that they are too broad is also a failure to appreciate how the guidelines and the Subject-Matter Index interact to reach an appropriate penalty. The ALJ considered both of these sources in reaching an appropriate penalty.

6. Aggravating and mitigating circumstances must be considered in determining the appropriate penalty. The risk of exposure to the public from the practice of prescribing medication without personal knowledge of the patient is great. Respondent failed to offer any explanation or mitigation of his action and Petitioner cannot be assured that this behavior will not reoccur. The evidence shows that the Respondent, with total disregard for the safety of the citizens of Florida, prescribed medication on the mere word of members of his religious organization. The Petitioner has no assurances that the Respondent will not receive another call from a member of his religious organization and put the safety and welfare of other citizens of Florida in jeopardy.

7. Considering the great risk to the public and citizens of Florida, the disciplinary guidelines and the mitigating facts, the appropriate penalty is that recommended by the ALJ: Suspension of Respondent's licensure for a period of one year to be followed by a two-year probationary period and imposing an administrative fine of $10,000.

WHEREFORE, Petitioner respectfully would request that this Board reject the exceptions proffered by the Respondent and adopt the penalty recommended by the ALJ.

Respectfully submitted,

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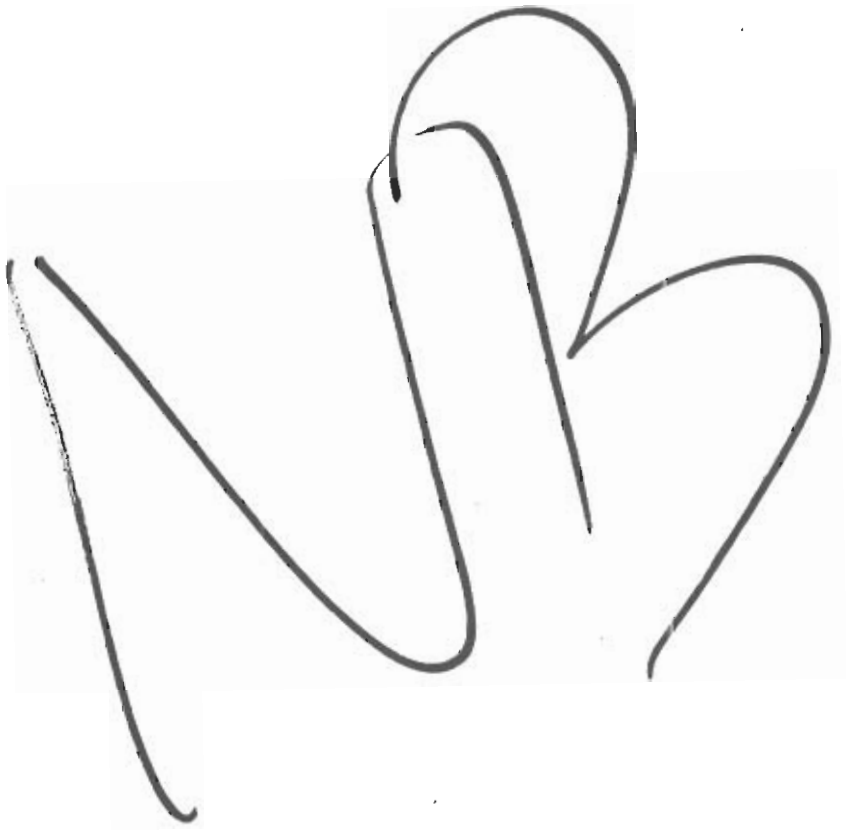
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Respondent's Exceptions to Recommended Order and Motion to Decrease Penalty has been forwarded by U.S. mail this 18 day of June, 2001 to Counsel for Respondent Bruce D. Lamb, Esquire, Ruden, McClosky, Smith, Schuster & Russell, P.A., 401 East Jackson Street, Suite 2700, Tampa, Florida 33602

Ephraim D. Livingston, Senior Attorney



STATE OF FLORIDA
DEPARTMENT OF HEALTH

DEPARTMENT OF HEALTH, PETITIONER, v. DAVID IRA MINKOFF, M.D., RESPONDENT.	)	CASE NO. 1997-15802

ADMINISTRATIVE COMPLAINT

COMES NOW the Petitioner, Department of Health, hereinafter referred to as "Petitioner," and files this Administrative Complaint before the Board of Medicine against David I. Minkoff, M.D., hereinafter referred to as "Respondent," and alleges:

1. Effective July 1, 1997, Petitioner is the state agency charged with regulating the practice of medicine pursuant to Section 20.43, Florida Statutes; Chapter 455, Florida Statutes, and Chapter 458, Florida Statutes. Pursuant to the provisions of Section 20.43(3), Florida Statutes, the Petitioner has contracted with the Agency for Health Care Administration to provide consumer complaint, investigative, and prosecutorial services required by the Division of Medical Quality Assurance, councils, or boards, as appropriate.

2. Respondent is and has been at all times material hereto a licensed physician in the state of Florida, having been issued license number ME 0056777. Respondent's last known address is 129 Garden Avenue, North, Clearwater, Florida, 33755.

3. Respondent is board certified in pediatrics.

4. At all times relevant to this complaint, Respondent was employed by Copenhaver Bell and Associates, an emergency room physicians group, and served as an emergency room physician at Columbia HCA Hospital, New Port Richey, Florida.

5. On or about November 18, 1995, Patient L.M., a 36 year old female, residing in the Fort Harrison Hotel, owned by a religious organization, in Clearwater, Florida, was involved in a minor automobile accident. Paramedics attended the scene of the accident and determined that Patient was not injured.

6. As the paramedics were preparing to leave the scene of the accident, Patient L.M. removed her clothes and told the paramedics that she needed help and needed to talk to someone.

7. The paramedics transported Patient L.M. to Morton Plant Hospital in Clearwater for a psychiatric evaluation. Members of the religious organization came to the hospital, said they would look after her, and Patient L.M. left the hospital with them.

8. Patient L.M. was returned to the Fort Harrison Hotel and was placed in "isolation" (church terminology) for treatment by church staff for a "psychotic break" (church terminology). She remained in isolation until December 5, 1995 under the supervision of church staff.

9. On or about November 20, 1995, Respondent received a telephone call from several members of the religious organization identified as medical liaison officers, including but not limited to David Howton, an unlicensed dentist and Janice Johnson, a physician who was unlicensed in Florida and whose Arizona license had been revoked. Respondent was told that they had a member that was having difficulty sleeping and she needed a prescription to help her sleep. They described her in the organization's terminology as a Type III (psychotic).

10. Respondent called in a prescription for 10 vials of Valium for injections each containing 5 milligrams of Valium. Respondent called in the prescription in the name of David

Howton (spelled Haughton on the prescription) knowing that the drugs were to be administered to Patient L.M. Respondent did not obtain any medical history of Patient L.M., did not perform a physical examination nor had Patient L.M. ever been a patient of Respondent. Further, Respondent failed to document any record of prescriptions or treatment plan for the patient.

11. Valium contains Diazepam, a Schedule IV controlled substance, pursuant to Chapter 893, Florida Statutes. Valium is indicated for the management of anxiety disorders and has the potential for abuse.

12. On or about November 29, 1995, Respondent received another telephone call from Church members, including but not limited to Janice Johnson and David Howton, indicating that Patient L.M. had continued difficulty sleeping. They told Respondent that the patient could not swallow a pill and therefore she needed a liquid medication. Respondent called in a prescription for Patient L.M. for Chloral Hydrate. Respondent did not inquire why the patient could not swallow pills and he prescribed the medication without seeing or examining her. Further, Respondent failed to document any record of prescriptions or treatment plan for the patient.

13. Chloral Hydrate is a Schedule IV Controlled Substance, pursuant to Chapter 893, Florida Statutes. Chloral Hydrate is indicated as a pre-operative sedative to reduce anxiety and has some short term hypnotic effects.

14. On or about 7:30 p.m. December 5, 1995, Respondent received a telephone call from Janice Johnson indicating that Patient L.M. was ill and requesting that he see her at the emergency room at Columbia New Port Richey Hospital. Respondent said he would see her but it was a forty-five minute drive from Clearwater and she should be taken to a closer facility. Johnson said she would prefer to bring her to Respondent.

15. At or about 9:30 p.m. Johnson arrived at the New Port Richey Hospital with Patient L.M. On arrival, Patient L.M. was in cardiac arrest, respiratory arrest, and her pupils were unresponsive. Resuscitation efforts were unsuccessful and the patient was pronounced dead approximately fifteen minutes later by Respondent.

16. An autopsy was performed on Patient L.M. and the autopsy report listed as the immediate cause of death thromboembolus of the left main pulmonary artery (blood clot), thrombosis of the left popliteal vein (blood clot), and severe dehydration and bed rest. In addition to the above, the final anatomic diagnosis reported severe old and recent hematomas (bruises) on the arms and legs.

17. A reasonably prudent physician under similar conditions and circumstances would not prescribe Valium and Chloral Hydrate to a patient without establishing a doctor/patient relationship, without a physical examination and medical history, and without ascertaining the appropriateness of the prescribed drugs and the condition of the patient.

18. A reasonably prudent physician would have documented at a minimum the following: a full physical examination, an adequate medical history, an assessment of psychological function, a treatment plan, records of drugs prescribed, recognized medical indication for the use of a dangerous drugs and controlled substances, and records of consultations.

19. A reasonably prudent physician would not prescribe Valium, a Schedule IV controlled substance, for a third party (David Haughton) when he knew that the drug was to be administered to Patient L.M.

COUNT ONE

20. Petitioner realleges and incorporates paragraphs one (1) through nineteen (19), as if fully set forth herein this Count One.

21. Respondent failed to practice medicine within the standard of care in that he: prescribed Valium and Chloral Hydrate to Patient L.M. without establishing a doctor/patient relationship, without a physical examination or medical history, and without ascertaining the appropriateness of the prescribed drugs and the condition of the patient.

22. Based on the foregoing, Respondent violated Section 458.331(1)(t), Florida Statutes, by failing to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances.

COUNT TWO

23. Petitioner realleges and incorporates paragraphs one (1) through nineteen (19) and paragraph twenty-one (21) as if fully set forth herein this Count Two.

24. Respondent failed to document any aspect of Patient L.M.'s medical records including, but not limited to: an adequate history and physical, an assessment of physical and psychological function, records of drugs prescribed, recognized medical indication for the use of a dangerous drug and controlled substance, and the periodic review of the patient's condition.

25. Based on the foregoing, Respondent violated section 458.331(1)(m), Florida Statutes, by failing to keep medical records that justify the course of treatment of the patient, including, but not limited to, patient histories, examination results, test results, records of drugs prescribed, dispensed, or administered and reports of consultations and hospitalizations.

COUNT THREE

26. Petitioner realleges and incorporates paragraphs one (1) through nineteen (19) and paragraphs twenty-one (21) and twenty-four (24), as if fully set forth herein in this Count Three.

27. Respondent prescribed Valium in the name of a third party knowing that the drug was going to be administered to Patient L.M.

28. Based on the foregoing, Respondent violated 458.331(1)(k), Florida Statutes, in that he made a deceptive, untrue, and fraudulent representation in his practice of medicine.

COUNT FOUR

29. Petitioner realleges and incorporates paragraphs one (1) through nineteen (19) and paragraphs twenty-one (21), twenty-four (24), and twenty-seven (27), as if fully set forth herein in this Count Four.

30. Respondent excessively and inappropriately prescribed Valium and Chloral Hydrate to Patient L.M. without a physical examination, medical history or psychological evaluation and based on information provided to him by third parties.

31. Based on the foregoing, Respondent violated section 458.331(1)(q), Florida Statutes, by prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug, including any controlled substance, other than in the course of the physician's professional practice. For the purpose of this paragraph, it shall be legally presumed that prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug, including all controlled substances, inappropriately or in excessive or inappropriate quantities is not in the best interest of the patient and not in the course of the physician's professional practice, without regard to intent.

32. Based on the foregoing, Respondent violated section 458.331(1)(q), Florida Statutes, by prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug, including any controlled substance, other than in the course of the physician's professional practice. For the purpose of this paragraph, it shall be legally presumed that prescribing, dispensing, administering, mixing, or otherwise preparing a legend drug, including all controlled substances, inappropriately or in excessive or inappropriate quantities is not in the best interest of the patient and not in the course of the physician's professional practice, without regard to intent.

COUNT FIVE

33. Petitioner realleges and incorporates paragraphs one (1) through twenty (20) and paragraphs twenty-two (22), twenty-five (25), twenty-eight (28), and thirty-one (31), as if fully set forth herein in this Count Five.

34. Respondent prescribed for and treated Patient L.M. without obtaining and/or documenting any consent, either written or oral, from the patient or the patient's legal representative.

35. Based on the foregoing, Respondent violated section 458.331(1)(p), Florida Statutes, by performing professional services which have not been duly authorized by the patient or client, or his or her legal representative, except as provided in s. 743.064, s. 766.103, or s. 768.13.

WHEREFORE, the Petitioner respectfully requests the Board of Medicine enter an order imposing one or more of the following penalties: permanent revocation or suspension of the Respondent's license, restriction of the Respondent's practice, imposition of an administrative fine, issuance of a reprimand, placement of the Respondent on probation, the assessment of costs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by regular U.S. Mail this June 5, 2001, to: Ephraim D. Livingston, and John Terrel, Senior Attorneys, Agency for Health Care Administration, Post Office Box 14229, Tallahassee, FL 32317-4229 and to Tanya Williams, Executive Director of the Board of Medicine, Department of Health, 4052 Bald Cypress Way, Bin C-03, Tallahasse, FL 32399-1701, and the original to Theordore M. Henderson, Agency Clerk, Department of Health, 4052 Bald Cypress Way, .Bin A-02, Tallahassee, FL 32399-1703.

Attorney

related to the investigation and prosecution of this case, other than costs associated with an attorney's time, as provided for in Section 455.624(3), Florida Statutes, and/or any other relief that the Board deems appropriate.

SIGNED this 16th day of December, 1999.

Robert G. Brooks, M.D., Secretary

Kathryn L. Kasprzak
Chief Medical Attorney

COUNSEL FOR DEPARTMENT:

Kathryn L. Kasprzak
Chief Medical Attorney
Agency for Health Care Administration
P. O. Box 14229
Tallahassee, Florida 32317-4229
Florida Bar # 937819
RPC/clg
PCP: December 8, 1999
PCP Members: Skinner, Zachariah, Cherney

FILED
DEPARTMENT OF HEALTH
DEPUTY CLERK
CLERK Vicki R. Ellison
DATE 12/16/99

DISTRICT COURT OF APPEAL
FIRST DISTRICT
STATE OF FLORIDA
TALLAHASSEE, FLORIDA 32399-1850

JON S. WHEELER
CLERK OF THE COURT

(850) 488-6151

August 12, 2002

Angela T. Hall, Clerk
Department Of Health
4052 Bald Cypress Way
Bin A02
Tallahassee, FL 32399-1703

RE: David I. Minkoff, M. D. v. St. of Fl., Dept. of Health, Bd. of Medicine

Docket No: 1D01-3642
Lower Tribunal Case No.: 00-0023

Dear Ms. Hall:

I have been directed by the court to issue the attached mandate in the above-styled cause. It is enclosed with a certified copy of this Court's opinion.

Yours truly,

Jon S. Wheeler
Clerk of the Court

JSW/je
Enclosures
c: (letter and mandate only)

J. Travis Godwin
John E. Terrel
Ephraim D. Livingston
Bruce D. Lamb
William W. Large, G.C.
John H. Pelzer
Pamela H. Page

M A N D A T E

From

DISTRICT COURT OF APPEAL OF FLORIDA
FIRST DISTRICT

To Tanya Williams, Board Director, Department of Health

WHEREAS, in that certain cause filed in this Court styled:

DAVID I. MINKOFF, M. D. Case No : 1D01-3642

v. Lower Tribunal Case No : 00-0023

ST. OF FL., DEPT. OF
HEALTH, BD. OF MEDICINE

The attached opinion was issued on July 25, 2002.

YOU ARE HEREBY COMMANDED that further proceedings, if required, be had in accordance with said opinion, the rules of Court, and the laws of the State of Florida

WITNESS the Honorable MICHAEL E. ALLEN, Chief Judge

of the District Court of Appeal of Florida, First District,

and the Seal of said Court done at Tallahassee, Florida,

on this 12th day of August 2002.

DISTRICT COURT OF APPEAL STATE OF FLORIDA FIRST DISTRICT

JON S. WHEELER, Clerk
District Court of Appeal of Florida, First District

IN THE DISTRICT COURT OF APPEAL,

FIRST DISTRICT, STATE OF FLORIDA

DAVID I. MINKOFF, M.D.,

Appellant,

v.

STATE OF FLORIDA,
DEPARTMENT OF HEALTH,
BOARD OF MEDICINE,

Appellee.
_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED.

CASE NO. 1D01-3642

Opinion filed July 25, 2002.

An appeal from an order of the Department of Health.

John H. Pelzer and Fabienne E. Leconte of Ruden, McClosky, Smith, Schuster & Russell, P.A., Fort Lauderdale, for Appellant.

Pamela H. Page, Senior Attorney - Appeals, Agency for Health Care Administration, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED.

KAHN, WEBSTER and DAVIS, JJ., CONCUR.

I CERTIFY THE ABOVE TO BE A TRUE COPY
JON S. WHEELER
CLERK DISTRICT COURT OF APPEAL, FIRST DISTRICT

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF MEDICINE,	)	
Petitioner,	)	
vs.	)	Case No. 00-0023
DAVID IRA MINKOFF, M.D.,	)	
Respondent.	)	

RECOMMENDED ORDER

On December 11, 2000, and March 1, 2001, a formal administrative hearing in this case was held in Largo, Florida, before William F. Quattlebaum, Administrative Law Judge, Division of Administrative Hearings.

APPEARANCES

For Petitioner: Ephraim D. Livingston, Esquire
John E. Terrel, Esquire
Agency for Health Care Administration
Post Office Box 14229
Tallahassee, Florida 32317-4229

For Respondent: Bruce D. Lamb, Esquire
J. Travis Godwin, Esquire
Ruden, McCloskey, Smith,
Schuster & Russell, P.A.
401 East Jackson Street, 27th Floor
Tampa, Florida 33602

STATEMENT OF THE ISSUE

The issue in the case is whether the allegations set forth in the Administrative Complaint filed against the Respondent are correct and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On December 16, 1999, the Department of Health, Board of Medicine (Petitioner), filed an Administrative Complaint against David Minkoff, M.D. (Respondent), alleging that he acted inappropriately in prescribing medication for an individual with whom he had no professional medical relationship. The Respondent filed a request for formal hearing. The request was forwarded to the Division of Administrative Hearings. At the request of the parties, the matter was scheduled for hearing on July 17 through 19, 2000. The hearing was continued and rescheduled for December 11 through 12, 2000, at the request of the parties who asserted that settlement was imminent. The hearing commenced on December 11, 2000, settlement efforts apparently concluding unsuccessfully.

At the December 11, 2000, hearing, the Petitioner indicated its intention to introduce deposition testimony of the Respondent into the record. The deposition was taken for use in a separate but related case. Different legal counsel represented the Respondent during the deposition than in this administrative case.

The Respondent objected to the introduction of the deposition on the grounds that the deposition was sealed under the terms of a Protective Order issued by a Circuit Court with jurisdiction over the separate case. The Petitioner stated that it was aware of the Protective Order that restricted the use of the deposition and had filed a motion in the Circuit Court a few days prior to the administrative hearing to have the Protective Order set aside for purposes of the administrative hearing. The Protective Order was apparently issued in the interests of protecting the religious freedom of certain individuals involved in the related case. As of December 11, 2000, no action on the motion had been taken. In order to permit the deposition issue to be resolved, the hearing was recessed after taking the testimony of witnesses present.

Subsequently, the Petitioner informed the Administrative Law Judge that the Circuit Court had resolved the issue and that the Petitioner was ready to proceed. The matter was resolved, at the direction of the Circuit Court, by redacting portions of the deposition that related to religious issues. The redactions were jointly made by counsel representing the Respondent in the separate case and by counsel for the Petitioner. The hearing was then scheduled to resume on March 1, 2001, at which time the deposition was admitted.

During the proceeding, the Petitioner presented the testimony of three witnesses and had Exhibits numbered 1-7 admitted into evidence. The Respondent had Exhibit numbered 1 admitted into evidence. Two documents were admitted as Administrative Law Judge's exhibits.

A Transcript of the hearing was filed on March 22, 2001. Both parties filed Proposed Recommended Orders that have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Respondent is a licensed physician in Florida, holding license number ME0056777.

2. According to the Respondent's curriculum vitae, he graduated Magna Cum Laude in 1974 from the University of Wisconsin Medical School and has apparently practiced since, primarily in pediatrics, infectious diseases, and emergency medicine.

3. At all times material to this case, the Respondent worked as an emergency room physician at the Columbia HCA Hospital in New Port Richey, Florida. A private company providing emergency room physicians to the hospital employed the Respondent.

4. Patient L. M. was a 36-year-old female living in Clearwater, Florida.

5. Patient L. M. was apparently involved with a religious organization and resided at a facility operated by the organization.

6. On or about November 20, 1995, the Respondent received a telephone call from a person or persons at the facility who reported that a resident was sleepless and in need of rest. The caller(s) requested that the Respondent prescribe medication for the patient.

7. Although the Respondent is unable to specifically recall the identity of the caller, he believes he spoke with "Janice Johnson," "David Haughton," or "Alain Kartuzinski," or a combination thereof.

8. The Respondent acknowledges that he was likely advised during the call that the resident was Patient L. M., but the identity of the patient does not appear to have been significant to him at the time, and he has no specific recollection of being told of her identity.

9. Based on the telephone call, the Respondent telephoned in a prescription for ten vials of liquid Valium, 5mg per vial, to an Eckerd's pharmacy he often used. The prescription was called in for issuance to a person identified as "David Haughton."

10. On or about November 29, 1995, the Respondent received another telephone call from a person or persons at the facility

who reported that the resident continued to be sleepless. The call suggested that the Valium had not been administered to the patient. The caller requested the Respondent prescribe something in a liquid form because the resident could not swallow a pill.

11. Although the Respondent is unable to specifically identify the caller, he again believes he spoke with "Janice Johnson," "David Haughton," or "Alain Kartuzinski," or a combination thereof.

12. Based on the telephone call, the Respondent called in a prescription to the same pharmacy as on November 20, this time for a medication identified as "Chloral Hydrate 500" to be issued in the name of Patient L. M. He believed the Chloral Hydrate was a liquid medication.

13. The Respondent did not know Patient L. M. and never met her.

14. The Respondent performed no physical examination of Patient L. M. and, other than what others told him, had no personal knowledge of her condition.

15. The Respondent obtained no medical history for Patient L. M. from the patient or from anyone in a position to know the patient's medical history.

16. The Respondent performed no tests and made no independent diagnosis of any medical problems experienced by Patient L. M.

17. The Respondent failed to document any reason for providing medication to Patient L. M.

18. The Respondent failed to document any reason for providing the medication at issue in this case to any person involved in the situation including "David Haughton."

19. A reasonably prudent physician would not prescribe medication including Valium and Chloral Hydrate without establishing a proper patient-physician relationship, including a physical examination, obtaining a medical history, and ascertaining the appropriateness of the medication for the patient's condition.

20. As set forth herein, the Respondent's actions in this case were below the acceptable standard of care and constitute a failure to practice medicine with the level of care, skill, and treatment recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances.

21. At about 7:30 p.m., on December 5, 1995, the Respondent, working as an emergency room physician at Columbia HCA Hospital in New Port Richey, Florida, received a telephone call from Janice Johnson about Patient L. M.

22. Ms. Johnson reported that Patient L. M. was ill and required medical attention. The Respondent advised Ms. Johnson to take Patient L. M. to the closest emergency room.

23. At about 9:30 p.m., Ms. Johnson delivered Patient L. M. to the New Port Richey Columbia HCA Hospital emergency room.

24. Upon arrival, Patient L. M. was in cardiac arrest and respiratory arrest, and her pupils were unresponsive.

25. Attempts to resuscitate the patient were unsuccessful, and she was declared dead approximately 15 minutes after her arrival.

26. By autopsy on December 6, 1995, the immediate cause of death was identified as thromboembolus of the left main pulmonary artery, due to thrombosis of the left popliteal vein, due to bed rest and severe dehydration.

27. For reasons unknown, an amended autopsy report dated February 16, 2000, identified the immediate cause of death as pulmonary thromboembolus due to thrombotic occlusion of left popliteal vein with traumatic hemorrhage of left popliteal area.

28. There was no evidence that any trace of the medications identified herein were present or detectable upon examination of the body of the deceased.

29. There was no evidence presented at the hearing that the medications prescribed by the Respondent were administered to Patient L. M.

30. There was no evidence that the medications prescribed by the Respondent were responsible for or contributed to the death of Patient L. M.

CONCLUSIONS OF LAW

31. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding. Subsection 120.57(1), Florida Statutes.

32. The Petitioner has the burden of proving by clear and convincing evidence the allegations against the Respondent. Ferris v. Turlington, 510 So. 2d 292 (Fla. 1987). In this case, the burden has been met as to inappropriate prescribing of medication.

33. The evidence establishes that the Respondent failed to practice medicine with the level of care, skill, and treatment recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances.

34. Section 458.331, Florida Statutes, sets forth the grounds for disciplinary action by the Board of Medicine against a licensed physician.

35. Subsection 458.331(1)(q), Florida Statutes, prohibits "[p]rescribing, dispensing, administering, mixing, or otherwise

preparing a legend drug, including any controlled substance, other than in the course of the physician's professional practice."

36. Pursuant to Subsection 893.03(4), Florida Statutes, Valium (identified as Diazepam) and Chloral Hydrate are "Schedule IV Controlled Substances."

37. The evidence establishes that on November 20, 1995, the Respondent prescribed Valium to "David Haughton" with whom the Respondent had no professional medical relationship.

38. The evidence establishes that on November 29, 1995, the Respondent prescribed Chloral Hydrate to Patient L. M. with whom the Respondent had no professional medical relationship.

39. Subsection 458.331(1)(k), Florida Statutes, prohibits "[m]aking deceptive, untrue, or fraudulent representations in or related to the practice of medicine . . . ."

40. The evidence establishes that on November 20, 1995, the Respondent called in a prescription for Valium and identified the patient as "David Haughton" although the Respondent was aware that the medication was intended for administration to Patient L. M.

41. Subsection 458.331(1)(m), Florida Statutes, requires that medical records identifying the licensed physician responsible and which "justify the course of treatment of the patient, including, but not limited to, patient histories;

examination results; test results; records of drugs prescribed, dispensed, or administered; and reports of consultations and hospitalizations" be maintained.

42. The evidence establishes that the Respondent kept no records justifying any course of treatment related to the prescriptions at issue in this proceeding.

43. Subsection 458.331(1)(t), Florida Statutes, provides that discipline is warranted for "the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances."

44. The prescribing of medication as set forth herein constitutes a violation of Subsection 458.331(1)(t), Florida Statutes.

45. At the hearing, the Petitioner presented testimony about an automobile accident involving Patient L. M. on November 18, 1995. Although the patient was not injured in the accident, based on her bizarre behavior at the scene of the accident she was taken by paramedics to Morton Plant Hospital for psychiatric evaluation. After her arrival at the hospital, she apparently left with persons allegedly affiliated with the religious organization with whom she lived.

46. There is no evidence that the Respondent was involved in the accident, in the post-accident treatment or evaluation of

her condition at Morton Plant Hospital, or in her departure from the hospital. Although the Respondent acknowledges that he was likely informed of the patient's identity during the initial November 20, 1995, request for medication, it appears not to have been a significant factor in his decision to call the prescription into the pharmacy.

47. Presumably the evidence related to the automobile accident was intended to suggest that the Respondent should not have prescribed medication for this particular patient given her behavior at the accident site. Although the circumstances might have been unusual, the disciplinary statute indicates that no medication should be prescribed to any person with whom the prescribing physician has no professional medical relationship.

48. It should be noted that the Respondent raised objections to copies of prescriptions introduced by the Petitioner during case presentation based on lack of authentication. The witness who testified to the documents (the Eckerd's store manager) was not the records custodian and had no independent information related to the prescriptions. The findings of fact set forth herein and related to two prescriptions at issue are based, not on the documents or the testimony of the store manager, but on the subsequently admitted deposition testimony of the Respondent.

49. As to the deposition, after the submission of the Proposed Recommended Orders, the Respondent filed a Notice of Additional Authority again asserting that the Respondent's Fifth Amendment right against self-incrimination had been violated by the admission of the deposition testimony. The issue had been raised previously in the Respondent's Motion in Limine and had been denied prior to the hearing.

50. The Respondent asserts that the waiver of the Fifth Amendment right against self-incrimination must be "voluntary and a knowing intelligent act done with sufficient awareness of relevant circumstances and likely consequences" and apparently suggests that his decision to sit for deposition was not a "voluntary and knowing intelligent act."

51. According to the deposition, the Respondent was represented by legal counsel during the deposition, though not the same counsel representing him in this case. The attorney representing the Respondent in the separate case participated in preparation of the redacted transcript that was admitted into the record of this case.

52. Given the involvement of counsel at all stages of this legal proceeding and the fact that the Respondent, a physician for more than 25 years, asserts that his actions in this case were outside his normal prescription practice, it is simply inconceivable that the Respondent's decision to sit for the

deposition was as ill-informed and as unknowing as the Respondent now suggests. The Respondent's deposition testimony was admitted and forms the basis for the Findings of Fact set forth herein.

53. Subsection 458.331(2) Florida Statutes, provides as follows:

> (2) When the board finds any person guilty of any of the grounds set forth in subsection (1), including conduct that would constitute a substantial violation of subsection (1) which occurred prior to licensure, it may enter an order imposing one or more of the following penalties:
>
> (a) Refusal to certify, or certification with restrictions, to the department an application for licensure, certification, or registration.
>
> (b) Revocation or suspension of a license.
>
> (c) Restriction of practice.
>
> (d) Imposition of an administrative fine not to exceed $10,000 for each count or separate offense.
>
> (e) Issuance of a reprimand.
>
> (f) Placement of the physician on probation for a period of time and subject to such conditions as the board may specify, including, but not limited to, requiring the physician to submit to treatment, to attend continuing education courses, to submit to reexamination, or to work under the supervision of another physician.
>
> (g) Issuance of a letter of concern.
>
> (h) Corrective action.

(i) Refund of fees billed to and collected from the patient.

(j) Imposition of an administrative fine in accordance with s. 381.0261 for violations regarding patient rights.

In determining what action is appropriate, the board must first consider what sanctions are necessary to protect the public or to compensate the patient. Only after those sanctions have been imposed may the disciplining authority consider and include in the order requirements designed to rehabilitate the physician. All costs associated with compliance with orders issued under this subsection are the obligation of the physician.

54. Rule 61F6-20.001, Florida Administrative Code, was in effect at the time of the violations established herein, and provides guidelines for the determination of appropriate discipline imposed upon a violation of the statute. (Current guidelines are set forth at Rule 64B-8.8001, Florida Administrative Code.)

55. As set forth at Rule 61F6-20.001, Florida Administrative Code, the purpose for the imposition of discipline is "to punish the applicants or licensees for violations and to deter them from future violations; to offer opportunities for rehabilitation, when appropriate; and to deter other applicants or licensees from violations."

56. For a violation of Subsection 458.331(1)(q), Florida Statutes, the rule provides a penalty range of one-year

probation to revocation of licensure, and an administrative fine of $250 to $5,000.

57. For a violation of Subsection 458.331(1)(k), Florida Statutes, the rule provides a penalty range of probation to revocation of licensure, and an administrative fine of $250 to $5,000.

58. For a violation of Subsection 458.331(1)(m), Florida Statutes, the rule provides a penalty range of reprimand to two years suspension followed by probation and an administrative fine of $250 to $5,000.

59. For a violation of Subsection 458.331(1)(t), Florida Statutes, the rule provides a penalty range of two years' probation to revocation of licensure and an administrative fine of $250 to $5,000.

60. Rule 61F6-20.001(3), Florida Administrative Code, provides for application of aggravating and mitigating circumstances that permit the Board of Medicine to deviate from the potential penalties set forth in the rule. In this case, there is no evidence that the Respondent has been involved in any prior disciplinary proceedings. While the patient outcome in this case was tragic, there is no evidence that the medications prescribed by the Respondent affected the outcome. On the other hand, the risk of exposure to the public from the practice of prescribing medication without personal knowledge of

the patient is great. Further, had the Respondent performed a medical evaluation to determine the cause of the alleged "sleeplessness," it is possible that the patient outcome could have been different. Given the great range of penalties possible under the guidelines, no deviation from the rule guidelines is required.

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 suspending the Respondent's licensure for a period of one year to be followed by a two-year probationary period and imposing an administrative fine of $10,000.

DONE AND ENTERED this 29th day of May, 2001, in Tallahassee, Leon County, Florida.

WILLIAM F. QUATTLEBAUM
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
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Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of May, 2001.

COPIES FURNISHED:

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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.