IN THE MATTER OF	*	BEFORE THE
JULIAN PAPPY CHOE, M.D.	*	MARYLAND STATE
Respondent	*	BOARD OF PHYSICIANS
License Number: D45519	*	Case Number: 2218-0265

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FINAL DECISION AND ORDER

BACKGROUND

On February 28, 2020, Disciplinary Panel A of the Maryland State Board of Physicians ("Board") charged Julian Pappy Choe, M.D. with unprofessional and immoral conduct in the practice of medicine and the Board's sexual misconduct regulations. *See* Md. Code Ann., Health Occ. ("Health Occ.") § 14-404(a) (3)(i), (ii), COMAR 10.32.17.

The case was forwarded to the Office of Administrative Hearings ("OAH") for an evidentiary hearing and a proposed decision. On October 6-7, 2020, a hearing was held before an Administrative Law Judge ("ALJ") at OAH. At the hearing, the State presented testimony from one of Dr. Choe's patients and a Board staff member. Dr. Choe appeared with counsel, testified on his own behalf, and presented testimony from three fact witnesses.

On December 29, 2020, the ALJ issued a proposed decision concluding that Dr. Choe is guilty of unprofessional and immoral conduct in the practice of medicine, in violation of Health Occ. § 14-404(a)(3)(i) and (ii), and that Dr. Choe violated the Board's sexual misconduct regulations, COMAR 10.32.17. The ALJ proposed that the Board's charges be upheld and recommended that the Board reprimand Dr. Choe, order him to pay a fine of $10,000.00, and require him to complete a course in appropriate boundaries and use a chaperone whenever he is treating female patients.

Neither party filed exceptions to the ALJ's proposed decision. On February 24, 2021, this matter came before Disciplinary Panel B ("Panel B") of the Board. Panel B has considered the record in this case, including the proposed decision of the ALJ, and now issues this order based on Panel B's findings of fact and conclusions of law. *See* COMAR 10.32.02.05B(4).

FINDINGS OF FACT

Panel B adopts the ALJ's proposed findings of fact 1 - 12. *See* ALJ proposed decision, attached as **Exhibit 1**. These facts are incorporated by reference into the body of this document as if set forth in full. Neither party filed exceptions to any of the factual findings and the factual findings were proved by a preponderance of the evidence. The Panel also adopts the ALJ's discussion set forth on pages 7-31. The discussion section is incorporated by reference into the body of this document as if set forth in full.

CONCLUSIONS OF LAW

Panel B concludes that Dr. Choe is guilty of immoral and unprofessional conduct in the practice of medicine, in violation of Health Occ. § 14-404(a)(3)(i) and (ii), and COMAR 10.32.17.

SANCTION

Panel B adopts the sanction recommended by the ALJ, in part. The ALJ recommended a sanction of a reprimand, a fine of $10,000.00, completion of a course on appropriate boundaries, and a requirement that Dr. Choe use a chaperone whenever he is treating female patients. The Panel will add a one-year period of probation to monitor the completion of the conditions, and the Panel will require that the chaperone Dr. Choe uses not be his spouse or a family member.

ORDER

Based upon the findings of fact and conclusions of law, it is, on the affirmative vote of a majority of the quorum of Board Disciplinary Panel B, hereby

ORDERED that Julian Pappy Choe, M.D., is **REPRIMANDED;** and it is further

ORDERED that Dr. Choe is **PERMANENTLY PROHIBITED** from evaluating or treating female patients without a chaperone. The following terms apply:

(1) The chaperone used shall not be a family member or spouse of Dr. Choe;

(2) If Dr. Choe holds a Maryland medical license, on every January 31st thereafter, Dr. Choe shall provide the Board with:

(a) an affidavit verifying that he has had a chaperone present for every examination or treatment of any female patient;

(b) the names of those persons who have functioned as chaperones in the past year; and

(c) the signatures of those persons who have functioned as a chaperone in the past month attesting that they have done so, together with the schedule of the chaperones for the past month;

(3) If Dr. Choe fails to provide the required annual verification of compliance with this condition:

(a) there is a presumption that Dr. Choe has violated the permanent condition of this Order; and

(b) the alleged violation will be adjudicated pursuant to the procedures of a show cause hearing; and it is further

ORDERED that Dr. Choe is placed on **PROBATION** for a minimum of **ONE (1) YEAR.**[1] During probation, Dr. Choe shall comply with the following terms and conditions of probation:

(1) Within **ONE (1) YEAR**, Dr. Choe is required to take and successfully complete a course in professional boundaries. The following terms apply:

(a) it is Dr. Choe's responsibility to locate, enroll in and obtain the disciplinary panel's approval of the course before the course is begun;

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[1] If Dr. Choe's license expires during the period of probation, the probation and any conditions will be tolled.

(b) the disciplinary panel will accept a course taken in-person or over the internet during the state of emergency

(c) Dr. Choe must provide documentation to the disciplinary panel that Dr. Choe has successfully completed the course;

(d) the course may not be used to fulfill the continuing medical education credits required for license renewal;

(e) Dr. Choe is responsible for the cost of the course.

(2) Within **ONE (1) YEAR**, Dr. Choe shall pay a civil fine of $10,000.00. The Payment shall be by money order or bank certified check made payable to the Maryland Board of Physicians and mailed to P.O. Box 37217, Baltimore, Maryland 21297. The Board will not renew or reinstate Dr. Choe's license if Dr. Choe fails to timely pay the fine to the Board; and it is further

ORDERED that Dr. Choe shall not apply for early termination of probation; and it is further

ORDERED that, after Dr. Choe has complied with all terms and conditions of probation and the minimum period of probation imposed by this Order has passed, Dr. Choe may submit to the Board a written petition for termination of probation. After consideration of the petition, the probation may be terminated through an order of the disciplinary panel. Dr. Choe may be required to appear before the disciplinary panel to discuss his petition for termination. The disciplinary panel may grant the petition to terminate the probation, through an order of the disciplinary panel, if Dr. Choe has complied with all probationary terms and conditions and there are no pending complaints relating to the charges; and it is further

ORDERED that a violation of probation constitutes a violation of this Order; and it is further

ORDERED that, if Dr. Choe allegedly fails to comply with any term or condition imposed by this Order, Dr. Choe shall be given notice and an opportunity for a hearing. If the disciplinary panel determines there is a genuine dispute as to a material fact, the hearing shall be before an Administrative Law Judge of the Office of Administrative Hearings followed by an exceptions process before a disciplinary panel; and if the disciplinary panel determines there is no genuine dispute as to a material fact, Dr. Choe shall be given a show cause hearing before a disciplinary panel; and it is further

ORDERED that after the appropriate hearing, if the disciplinary panel determines that Dr. Choe has failed to comply with any term or condition imposed by this Order, the disciplinary panel may reprimand Dr. Choe, place Dr. Choe on probation with appropriate terms and conditions, or suspend with appropriate terms and conditions, or revoke Dr. Choe's license to practice medicine in Maryland. The disciplinary panel may, in addition to one or more of the sanctions set forth above, impose a civil monetary fine on Dr. Choe; and it is further

ORDERED that Dr. Choe is responsible for all costs incurred in fulfilling the terms and conditions of this Order; and it is further

ORDERED that the effective date of this Order is the date the Order is signed by the Executive Director of the Board or her designee. The Executive Director or her designee signs this Order on behalf of the disciplinary panel which has imposed the terms and conditions of this Order; and it is further

ORDERED that this is a public document. *See* Health Occ. §§ 1-607, 14-411.1(b)(2) and Gen. Prov. § 4-333(b)(6).

04/09/2021
Date

Signature on File

Christine A. Farrelly, Executive Director
Maryland Board of Physicians

NOTICE OF RIGHT TO PETITION FOR JUDICIAL REVIEW

Pursuant to Md. Code Ann., Health Occ. § 14-408, Dr. Choe has the right to seek judicial review of this Final Decision and Order. Any petition for judicial review shall be filed within thirty (30) days from the date of mailing of this Final Decision and Order. The cover letter accompanying this Order indicates the date the decision is mailed. Any petition for judicial review shall be made as provided for in the Administrative Procedure Act, Md. Code Ann., State Gov't § 10-222 and Title 7, Chapter 200 of the Maryland Rules of Procedure.

If Dr. Choe files a petition for judicial review, the Board is a party and should be served with the court's process at the following address:

Maryland State Board of Physicians
Christine A. Farrelly, Executive Director
4201 Patterson Avenue
Baltimore, Maryland 21215

Notice of any petition should also be sent to the Board's counsel at the following address:

Stacey Darin
Assistant Attorney General
Maryland Department of Health
300 West Preston Street, Suite 302
Baltimore, Maryland 21201

Exhibit 1

MARYLAND STATE BOARD OF	* **BEFORE ALECIA FRISBY TROUT,**
PHYSICIANS	* **AN ADMINISTRATIVE LAW JUDGE**
v.	* **OF THE MARYLAND OFFICE**
JULIAN P. CHOE, M.D.	* **OF ADMINISTRATIVE HEARINGS**
RESPONDENT	* **OAH No.: MDH-MBP2-71-20-13233**
LICENSE No.: D45519	* **MBP No.: 2218-0265**

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PROPOSED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSIONS OF LAW
PROPOSED DISPOSITION

STATEMENT OF THE CASE

On February 28, 2020 a disciplinary panel of the Maryland State Board of Physicians (Board) issued charges against Julian P. Choe, M.D. (Respondent) alleging violations of the State law governing the practice of medicine. Md. Code Ann., Health Occ. §§ 14-101 through 14-508, and 14-601 through 14-607 (2014 & Supp. 2020). Specifically, the Respondent is charged with violating sections 14-404(a)(3)(i) (immoral conduct in the practice of medicine) and 4-404(a)(3)(ii) (unprofessional conduct in the practice of medicine), and the Board's sexual misconduct regulations under the Code of Maryland Regulations (COMAR) 10.32.17. The disciplinary panel to which the complaint was assigned held a meeting with the Respondent on June 10, 2020 to explore the possibility of resolution. COMAR 10.32.02.03E(9). The parties did not resolve the issues at that time. On June 19, 2020, the matter was delegated to the Office of Administrative Hearings (OAH) for issuance of proposed findings of fact, proposed

conclusions of law, and a proposed disposition. COMAR 10.32.02.03E(5); COMAR 10.32.02.04B(1).

I held a hearing on October 6-7, 2020, at the OAH in Hunt Valley, Maryland. Health Occ. § 14-405(a) (Supp. 2020); COMAR 10.32.02.04. Bradford Roegge, Esquire, represented the Respondent, who was present. K. F. Michael Kao, Assistant Attorney General, and Roen Taylor, Assistant Attorney General, represented the State of Maryland (State). At the conclusion of the State's case, the Respondent made a Motion for Judgment. I denied that Motion on the Record. COMAR 28.02.01.12B(6).

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the Rules for Hearings Before the Board of Physicians, and the Rules of Procedure of the OAH. Md. Code Ann., State Gov' t §§ 10-201 through 10-226 (2014 & Supp. 2020); COMAR 10.32.02; COMAR 28.02.01.

ISSUES

1. Is the Respondent guilty of unprofessional conduct in the practice of medicine?
2. Is the Respondent guilty of immoral conduct in the practice of medicine?
3. Is the Respondent guilty of sexual misconduct in the practice of medicine?
4. If so, what sanctions, if any, are appropriate?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits into evidence on behalf of the Board:

Bd. Ex. 1 - Maryland Board of Physician Report of Investigation, August 16, 2019

Bd. Ex. 2 - Complaint, received June 1, 2018

Bd. Ex. 3 - Email from [redacted] to Molly Dicken, [redacted], [redacted], and [redacted], August 7, 2018

Bd. Ex. 4 - Email chain between [redacted] and Molly Dicken, August 14, 2018

Bd. Ex. 5 - Interview Transcript of [redacted], September 19, 2018

Bd. Ex. 6 - Interview Transcript of [redacted], September 19, 2018

Bd. Ex. 7 - [redacted], Progress Notes, Patient B, June 2007 – July 2018

Bd. Ex. 8 - [redacted] Progress Notes, Patient A, November 2011 – June 2018

Bd. Ex. 9 - Letter from the [redacted] to Patient B, January 25, 2019[1]

Bd. Ex. 10 - Letter from the [redacted] to Patient A, January 25, 2019[2]

Bd. Ex. 11 - Interview Transcript of [redacted], February 21, 2019

Bd. Ex. 12 - Interview Transcript of [redacted] February 21, 2019

Bd. Ex. 13 - Interview Transcript of [redacted], February 21, 2019

Bd. Ex. 14 - Letter from the [redacted] to the Respondent, April 5, 2019

Bd. Ex. 15 - Information Form, April 13, 2019

Bd. Ex. 16 - Employee list from the Respondent, April 15, 2019

Bd. Ex. 17 - Medical Records from the Respondent for Patient A, certified on April 17, 2019

Bd. Ex. 18 - Medical Records from the Respondent for Patient B, certified on April 17, 2019

Bd. Ex. 19 - Interview Transcript of the Respondent, May 5, 2019

Bd. Ex. 20 - Board Licensing File for the Respondent, printed August 15, 2019

Bd. Ex. 21 - Consent Order in Case number 2016-1028, October 19, 2016

Bd. Ex. 22 - Consent Order in Case number 96-0079, October 1, 1996

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[1] Letter is in Spanish and no translation was provided
[2] Letter is in Spanish and no translation was provided

I admitted the following exhibit into evidence on behalf of the Respondent:

Resp. Ex. 1 - Diagram of the Respondent's medical office including markings by witnesses, undated

Testimony

The following witnesses testified on behalf of the Board:

M.P.D.;[3] and

Molly Dicken, Board Compliance Analyst

The Respondent testified in his own behalf, and presented the following witnesses:

[redacted];

[redacted]; and

[redacted]

PROPOSED FINDINGS OF FACT

Having considered all of the evidence presented, I find the following facts by a preponderance of the evidence:

1. At all times relevant to this proceeding, the Respondent was a licensed physician in the State of Maryland.

2. At all times relevant to this proceeding, the Respondent was self-employed as a solo practitioner with an office in Frederick, Maryland, practicing internal medicine. The Respondent's office also employs one other staff person, the Respondent's wife, [redacted].

3. At the time of the hearing, the Respondent was sixty-two years old. He was born in Seoul, South Korea and moved to the United States with his parents when he was fourteen and in the eighth grade. He learned to speak English during high school and college in the United

[3] M.P.D. was a patient of the Respondent. I will use her initials to maintain confidentiality. She is identified by her full name in the Record.

States. He later attended medical school at Catholic Perpetual Health School of Medicine in Manilla, Philippines in an English language program.

4. From June 1, 1998 to June 15, 2018, the Respondent provided cancer-screening services at his office for participants in the [4]

5. The Respondent started taking Spanish language courses in college in the 1970s. In the mid-1990s, he took further Spanish language courses in an effort to better communicate with his patients who were largely Spanish speaking. He later became the interpreter for his Spanish speaking patients for the purposes of their appointments, and has acted in that role for more than ten years. Additionally, since 2004, the Respondent has participated in medical missions in Guatemala and the Dominican Republic where he speaks Spanish. Since 2005, he has gone on these missions at least three times a year. He also attends a church within the Hispanic community.

6. M.P.D. was a patient in the and saw the Respondent through the program for annual exams in 2011, 2012, 2014, 2016 and 2017. In 2017, while examining M.P.D.'s breasts, the Respondent commented on the large size of M.P.D.'s breasts and commented on how her husband must have been happy about her breasts. When the Respondent made these comments, M.P.D. asked him to stop examining her breasts. M.P.D. only speaks Spanish. The Respondent communicated with M.P.D. in Spanish.

[4] The provides clinical breast exams, cervical cancer screenings, and pap smears to uninsured/under-insured women of .

7. In 2018, when [redacted] an interpreter with the [redacted] Department and the [redacted], contacted M.P.D. to schedule her annual exam, M.P.D. told Ms. [redacted] that she wanted to see a provider other than the Respondent. When questioned, M.P.D. told Ms. [redacted] that during her 2017 exam, the Respondent had commented on the large size of M.P.D.'s breasts, and commented on how her husband must have been happy about her breasts.

8. M.S.A.O.[5] was a patient in the [redacted] and saw the Respondent through the program for annual exams in 2007, 2008, 2013 and 2016. In 2016, while examining M.S.A.O.'s breasts, the Respondent stated that M.S.A.O. had the breasts of a fifteen-year-old. M.S.A.O. was sixty-five years old at the time. M.S.A.O. only speaks Spanish. The Respondent communicated with M.S.A.O. in Spanish.

9. In 2018,[6] when Ms. [redacted] contacted M.S.A.O. to schedule her annual exam, M.S.A.O. told Ms. [redacted] that she wanted to see a provider other than the Respondent. When questioned, M.S.A.O. told Ms. [redacted] that during her 2016 exam, the Respondent had commented on M.S.A.O.'s breasts and stated that she had the breasts of a fifteen-year-old, and that the Respondent's comments made her feel ashamed.

10. Ms. [redacted] reported the patients' concerns to the [redacted] Department. On June 1, 2018, the [redacted] Department filed a Complaint (Complaint) against the Respondent with the Board. The Complaint stated that the [redacted] had

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[5] M.S.A.O. was a patient of the Respondent. I will use her initials to maintain confidentiality. She is identified by her full name in the Record.

[6] The medical records admitted as Bd. Ex. 7 show that M.S.A.O. had private insurance in 2017 and therefore received her mammogram from [redacted] in 2017 rather than through the [redacted].

received "numerous complaints"[7] from patients who refused to see the Respondent because they "did not feel comfortable" being seen by the Respondent.

11. After receiving these complaints, the [redacted] terminated its contract with the Respondent.

12. The Board investigated the Complaint, and on February 28, 2020, determined that the Respondent was guilty of immoral conduct in the practice of medicine (Health Occ. § 14-404(a)(3)(i)), unprofessional conduct in the practice of medicine (Health Occ. § 14-404(a)(3)(ii) and in violation of the Board's sexual misconduct regulations under COMAR 10.32.17.

DISCUSSION

Burdens of Proof

When not otherwise provided by statute or regulation, the standard of proof in a contested case hearing before the OAH is a preponderance of the evidence, and the burden of proof rests on the party making an assertion or a claim. Md. Code Ann., State Gov't § 10-217 (2014); COMAR 28.02.01.21K. To prove an assertion or a claim by a preponderance of the evidence means to show that it is "more likely so than not so" when all the evidence is considered. *Coleman v. Anne Arundel Cty. Police Dep't*, 369 Md. 108, 125 n.16 (2002).

In this case, the State (which is prosecuting the charges for the Board), as the moving party, has the burden of proof, by a preponderance of the evidence. Md. Code Ann., State Gov't § 10-217 (2014); Md. Code Ann., Health-Occ. § 14-405 (Supp. 2020); COMAR 28.02.01.21K(1)-(2)(a); *Comm'r of Labor and Indus. v. Bethlehem Steel Corp.*, 344 Md. 17, 34 (1996) (*citing Bernstein v. Real Estate Comm'n*, 221 Md. 221, 231 (1959)).

[7] For the purposes of this hearing, the term "numerous complaints" as utilized by the [redacted] Department refers to the complaints by M.P.D. and M.S.A.O.

Legal Framework

The grounds for reprimand or probation of a licensee, or suspension or revocation of a license under the Maryland Medical Practice Act include the following:

(a) *In general.* – Subject to the hearing provisions of § 14-405 of this subtitle, a disciplinary panel, on the affirmative vote of a majority of the quorum of the disciplinary panel, may reprimand any licensee, place any licensee on probation, or suspend or revoke a license if the licensee:

. . .

(3) Is guilty of:

(i) Immoral conduct in the practice of medicine; or

(ii) Unprofessional conduct in the practice of medicine[.]

Health Occ. § 14-404(a)(3)(i) and (ii) (Supp. 2020). Practicing medicine includes "[d]iagnosing, healing, treating, preventing, prescribing for, or removing any physical, mental, or emotional ailment or supposed ailment of an individual: 1. [b]y physical, mental, emotional, or other process that is exercised or invoked by the practitioner, the patient, or both; or 2. [b]y appliance, test, drug, operation, or treatment… ." Health Occ. § 14-101(o) (2014).

The Board's sexual misconduct regulations under COMAR 10.32.17 state that the behavior described in Health Occ. § 14-404(a)(3)(i) and (ii) includes sexual misconduct. The regulation defines sexual misconduct, in part, as:

C. Sexual misconduct includes, but is not limited to:

(1) Engaging in sexual harassment of a patient…regardless of whether the sexual harassment occurs inside or outside of a professional setting.

. . . .

COMAR 10.32.17.03(C)(1). The Board's sexual misconduct regulation defines "sexual harassment" as "an unwelcome sexual advance, request for sexual favor, or other verbal or physical conduct of a sexual nature." COMAR 10.32.17.02(B)(4).

Arguments of the Parties

The State contends that the Respondent made inappropriate comments of a sexual nature to patients M.P.D. and M.S.A.O. and that those comments constitute immoral and inappropriate conduct in the practice of medicine. The State further argues that the Respondent took advantage of his physician-patient relationship with M.P.D. and M.S.A.O., and their vulnerability as non-English speaking participants in need of free medical care, to target them for sexual harassment.

The Respondent does not categorically denythat he made the inappropriate comments, but argues that it is more likely that he did not make the statements, made innocent statements in Spanish that were misconstrued by patients M.P.D. and M.S.A.O., or that he accidentally made the statements in Spanish, but did not intend to. The Respondent maintains that, even if he did make the statements, it was not intentional and therefore was neither immoral nor unprofessional conduct in the practice of medicine.

Testimony

M.P.D.

In support of its case, the State presented the testimony of M.P.D., who described her experience as the Respondent's patient. M.P.D. testified that she has lived in [redacted] County for eighteen years, does not speak English and in 2011, sought help from the [redacted] to get a mammogram. The [redacted] sent her to the Respondent for a mammogram and she saw him for that purpose five or six times between 2011 and 2017. She stated that when she would visit his office, she would communicate with the Respondent in Spanish and that his Spanish was "very

good" (Transcript, Vol. I, pg. 41), but that Ms. [redacted] spoke "little Spanish" (Transcript, Vol. I, pg. 41). She recounted that at her last appointment with the Respondent, in 2017, when the Respondent examined her breasts, as she lay on her back wearing an open paper drape, he commented that she was very lucky to have such large breasts, and that her husband must have been very happy about her breasts. She stated that, while at previous visits Ms. [redacted] had been present during the exam as a chaperone, she was not present on this date. After the Respondent made these comments, M.P.D. said she asked him to stop touching her, and ended the exam. (Transcript Vol. I, pg. 45). M.P.D. did not file any sort of complaint, and did not intend to, but in 2018, when she was contacted to schedule her next mammogram, she requested a different doctor and told the [redacted] interpreter, Ms [redacted], that the Respondent made her feel uncomfortable because of what he said during the 2017 exam. As part of its investigation, the Board interviewed M.P.D. on February 21, 2019 and she essentially provided the same testimony. (Bd. Ex. 11).

On cross-examination M.P.D. acknowledged that she may not remember whether the Respondent or Ms. [redacted] brought her into the exam room for her exam in 2017, or whether or not the Respondent remained in the room when she changed into the drape. The Respondent's counsel indicated that M.P.D. also had a colonoscopy-prep exam on the same date as her last mammogram with the Respondent, and M.P.D. testified that she did not remember having anything other than the breast exam on that day. The Respondent described the colonoscopy exam as a clearance for the procedure that involved taking the patient's vital signs. However, M.P.D. did recollect having her blood pressure and temperature checked, both procedures that were done during the colonoscopy-prep exam, but not during the breast exam. So M.P.D. did

remember elements of both exams. Also, on cross-examination, M.P.D. inaccurately recollected the exact date of the appointment.

I found M.P.D.'s testimony credible. She sat up proudly, provided eye contact to the attorney questioning her, and did not avoid eye contact with the Respondent. She calmly admitted when she may have been wrong on specific details rather than becoming upset or defensive. Her testimony matched that of her 2019 interview by the Board on the details of the sexual harassment, and the details as she first described them to Ms. [redacted]. She has consistently stated that the Respondent told her that her breasts were large, and that her husband must be happy about her breasts. She has never added additional allegations or facts. She has never filed a complaint or taken action against the Respondent. I do not find she has any reason to embellish or falsify her testimony. I did not find her failure to recollect every detail, or to be mistaken on some details, to detract from the credibility on her recollection of the Respondent's statements to her about her breasts. When she recounted the specific statements, M.P.D. took deep breaths and appeared ashamed. Her hands shook and she appeared uncomfortable. The effects that the Respondent's statements had on M.P.D. clearly continue to today and bolster her credibility as to their specific nature. The Respondent's counsel questioned M.P.D. on several documents that were written entirely in English. M.P.D.'s inability to respond to these questions or answer questions about medical documents and diagrams written in English was confusing and explained by her inability to read the English language, and did not diminish her credibility.

Molly Dicken

The Board also presented the testimony of Molly Dicken, Compliance Analyst with the Board. Ms. Dicken has been employed by the Board for five-and-a-half years. As a compliance analyst, Ms. Dicken investigates complaints filed with the Board. When the Board received the

Complaint, she was assigned to conduct the investigation. Ms. Dicken testified that the Complaint was filed by [redacted] of the [redacted] Department after the [redacted] received concerning reports from various clients that they were not comfortable seeing the Respondent for their exams.

On September 19, 2018, Ms. Dicken interviewed four [redacted] Department employees, under the penalty of perjury, including Ms. [redacted] and interpreter Ms. [redacted]. Ms. [redacted] stated during her interview that she believed the Respondent was bilingual, speaking both English and Spanish. (Bd. Ex. 5, pgs. 20-21). Ms. [redacted] stated during her interview that she had been an English/Spanish interpreter for the [redacted] Department and the [redacted] for fifteen years. She had accompanied patients to visits with the Respondent and expressed that the Respondent had knowledge of the Spanish language. She recounted that Hispanic clients were referred to the Respondent because he speaks Spanish. (Bd. Ex. 6, pgs. 34-35). Ms. Dicken further testified that Ms. [redacted] told her that she received a request from M.P.D. to see a doctor other than the Respondent because the Respondent had made her uncomfortable. Ms. [redacted] also stated that M.P.D. sounded upset, was reluctant to give details, but stated that the Respondent had told her that her breasts were large, and that when she was younger, she was likely very voluptuous. Ms. [redacted] later heard from M.S.A.O. who also requested to see a provider other than the Respondent because the Respondent had made her feel uncomfortable. M.S.A.O. told Ms. [redacted] that the Respondent said to her during her appointment that she had the breasts of a fifteen-year-old, and that her breasts were nice. M.S.A.O. reported to Ms. [redacted] that she saw the Respondent one more time after that incident, but brought her daughter with her into the exam room. (Bd. Exs. 5 and 6).

Ms. Dicken subpoenaed M.P.D. and M.S.A.O.'s patient records from the Respondent and reviewed them. She noted that the information in the record was consistent with the patient complaints in terms of the exams completed, and the dates of the most recent and final appointments. In the records, which were introduced into the record as Board Exhibits 17 and 18, the Respondent had drawn pictures of breasts throughout to indicate the dates that M.P.D. and M.S.A.O. were scheduled for appointments.

On February 21, 2019, Ms. Dicken interviewed both M.P.D. and M.S.A.O. M.P.D. stated, during her interview, that the Respondent had commented on the large size of her breasts, and that her husband must be very happy about them. M.P.D. told Ms. Dicken that the comments made her feel bad. M.S.A.O. stated during the interview that the Respondent was nice, and a good doctor, but made her feel uncomfortable when he told her that she had the nice breasts of a fifteen-year-old. (Bd. Exs. 12 and 13).

Finally, Ms. Dicken then recounted her interview of the Respondent on May 5, 2019. She testified that the Respondent reported that he did not remember M.P.D. or M.S.A.O. at all. He stated that he could not recall saying either of the alleged statements, and that he was not sure he could say either of the statements in the Spanish language. When Ms. Dicken asked the Respondent what he would say to a patient who had large breasts, the Respondent replied, "I probably don't say anything." (Bd. Ex. 19, pg. 184).

On cross-examination, Ms. Dicken acknowledged that in both M.P.D. and M.S.A.O.'s patient records, a [redacted] form titled "Core Client Report" stated that each patent required an interpreter. Ms. Dicken could not say when the form was completed, what specific appointment it was in reference to, or who completed the form. Ms. Dicken also confirmed that Ms.

received the complaints from M.P.D. and M.S.A.O. within two days of one another and further provided that Ms. believes that was why they stood out.

I found Ms. Dicken's testimony credible. She referenced facts that were entirely corroborated by the other exhibits and testimony. She did not appear to have an agenda other than to recount the facts of her investigation. She was careful in choosing her words so as not to misstate the facts, or recount facts not relevant to this proceeding. Through questioning, the Respondent's attorney attempted to establish that because the Core Client Report for both M.P.D. and M.S.A.O. stated that each patient required an interpreter, the Respondent did not speak Spanish sufficiently enough to intentionally communicate the alleged inappropriate statements. Ms. Dicken explained that the Core Client Report was not necessarily specific to the patient's visits with the Respondent. I conclude that it is most likely that the Core Client Report contains general information and reflects the fact that both patients would need to communicate in Spanish with any provider. I conclude that the sent Hispanic patients to the Respondent, including M.P.D. and M.S.A.O. because, based on M.P.D.'s testimony and Ms. , Ms. and Ms. Dicken's statements, the Respondent was capable of effectively communicating in Spanish.

Ms. testified on behalf of the Respondent. She is the Respondent's wife, and the Respondent's sole co-worker at his primary care medical practice. Ms. has been married to the Respondent since 1991. She received her nursing license in Maryland in 1986 and has worked as a Registered Nurse, office manager and receptionist at the Respondent's practice since it opened in 1997. In that role, among other things, she does administrative work, runs the reception desk, greets patients, takes insurance information, answers the phone, schedules

appointments, triages patients, does EKGs, preps patients for exams, and acts as the chaperone when the Respondent performs certain exams. Ms. [redacted] testified that she understands basic Spanish and would have known if the Respondent had said the alleged statements in Spanish to the patients while she was in the room. She specifically demonstrated that she knows the words *breast, fifteen, large* and the phrase, *your husband is very happy* in Spanish. (Transcript Volume I, pgs. 171, 198). She testified that she cannot recall any time that the Respondent had performed an exam on a female patient who had to disrobe without her presence as a chaperone. She declared that she would never allow a breast exam to occur without her presence because she is the chaperone. (Transcript, Volume I, pgs. 173, 182-183, 192, 194, 195-197).

On cross-examination Ms. [redacted] acknowledged that it was in her best interest for the Respondent to have his medical license and be able to continue working as a physician as his practice was her family's sole source of income. She also acknowledged that she does not specifically remember the exams of either M.P.D. or M.S.A.O., but based her conclusion that she was present for their exams on the fact that it is the office policy for her to be there. Ms. [redacted] again testified that she would have known if the Respondent made the alleged statements. Utilizing the Spanish language interpreter that the OAH obtained through Ad Astra, the State's counsel asked Ms. [redacted] several questions in Spanish and Ms. [redacted] could not understand or respond to any of the questions. The State's counsel asked, in Spanish, "when you were a young girl, your breasts gave pleasure to your husband?" but Ms. [redacted] could not understand and stated in response, "I'm not familiar with those words." (Transcript Volume I, pg. 206). Ms. [redacted] consistently said that the Respondent had not said the alleged statements during the two breast exams, but that if he had said those things, it would have been unprofessional. (Transcript Volume I, pg. 172; 178-179).

Overall, I did not find Ms. [redacted] to be a credible witness. She had a careful, rehearsed, robotic quality to her tone and pace. Her responses on cross-examination were evasive and unintelligible at times. Her testimony never faltered from supporting the Respondent, but her testimony was often contradicted by other evidence and testimony. The most obvious contradiction was when she was unable to understand the question stated to her in Spanish which mirrored one of the alleged statements the Respondent made, despite her testimony that she was sure she would have known if the Respondent said a similar phrase. She also testified to the office policy that all breast exams and pap smears were performed in her presence, without exception, since the time the office opened. Ms. [redacted] statement that they have always, steadfastly, followed the policy because it would be improper to do otherwise, was contradicted by the Respondent in his interview with Ms. Dicken. During that interview, the Respondent referred to a past similar allegation and stated that the policy was adopted, or at least strictly adhered to, in response to that prior allegation. The exchange was as follows:

> Respondent: It's a very small room. She would hear. She would see everything I do. And then, as you mentioned, I'm very paranoid about the [Board of Physicians] thing after that incident.[8] And I am absolutely paranoid about the whole female thing. And then we made some changes and my typical practice does not deviate because I –
>
> Ms. Dicken: What changes did you make after that, I guess?
>
> Respondent: For example, I follow the guidelines as I told you about the breast exam, the pap smear. And actually, I do not see, I do not go or even talk to patient until [Ms. [redacted]] says they are ready.

Bd. Ex. 19 pg. 186.

[8] This exchange references a patient allegation previous to those in this case. This previous allegation was not addressed during the hearing, and reference to it was redacted. I do not know the facts, including the date, of the previous allegation as they were redacted. It is my understanding that this allegation was dismissed. I did not consider any facts regarding the previous allegation, or the fact that there was a previous allegation, in making this decision.

Ms. ████ testified that she could not remember the exams with either M.P.D. or M.S.A.O., but based her conclusions concerning the two patient allegations on the premise that the Respondent would never preform a breast exam without her present, and that she would have known if the Respondent had made the alleged statements, even if they were made in Spanish.

However, the Record is clear that despite her view that it is unethical to perform a breast exam without a chaperone, there was a time when it was done in the Respondent's practice. It is also clear that Ms. ████ would not have necessarily understood the alleged statements if made in Spanish. For these reasons, coupled with her acknowledged invested interest in the outcome of this proceeding, I did not give her testimony much weight.

████

The Respondent called ████ as a witness. Ms. ████ is a loan officer in Frederick. She was referred to see the Respondent for weight-loss in 2004. She saw him and referred her daughter to see him as well. Ms. ████ testified that as her physician, he was kind and that she had no sense that he was sexually objectifying her. In 2011, Ms. ████ created a non-profit, ████, with the mission of creating a safety net for women battling cancer. As part of ████ she contracted with the Respondent to see women who fall outside the guidelines for the ████. In that role, the Respondent had seen 160 patients as of the end-of 2019 and continues to receive referrals. Ms. ████ stated that she has never received a complaint about the Respondent, and that if she knew the things that were alleged were true, she would not continue making referrals to him. (Transcript Vol. II, pgs. 11-12).

On cross-examination, Ms. ████ acknowledged that she has never referred a Spanish speaking patient to the Respondent. She admitted that she chose him for ████ based on her personal experience with him, but had not run a background check and was unaware that he

had been found in violation of a standard of care in 2004, or of dispensing medication without a license in 2014.[9] She was likewise not aware that the [REDACTED] Department had filed the Complaint against the Respondent in 2018. Finally, she admitted that [REDACTED] does not have a protocol or procedure in place to receive a complaint from its participants.

Ms. [REDACTED] testimony was credible. She spoke from her experience and credibly offered her impressions of the Respondent based on her interactions with him. It is important to note, that to compare Ms. [REDACTED] experience with that of M.P.D. and M.S.A.O, they are clearly members of different demographics. Specifically, demographics that can factor into the analysis of a power dynamic, as is important in the overall analysis of this case. Ms. [REDACTED] appeared to be a Caucasian woman with blonde hair and blue eyes. She is English speaking and quite a bit younger than either M.P.D. or M.S.A.O. Ms. [REDACTED] was also not a participant in a service providing free and reduced medical exams, so she more likely than not had a greater choice in selecting her medical providers. For all of these reasons, I do not find her particular experience to give much insight into the Respondent's overall demeanor with non-English speaking Hispanic woman who are participants in a program for free medical care. However, Ms. [REDACTED] interactions go beyond her personal experience as his patient, but also include her daughter's experience, and any feedback she has received from the [REDACTED] participants who have seen him. It appears the Respondent has been positively involved with the program because there have not been any complaints against the Respondent from [REDACTED]-referred patients; however, I have also considered the fact that [REDACTED] does not have a protocol or mechanism for receiving complaints from patients referred to the Respondent. Additionally, the

[9] Facts about the prior charges and dispositions were allowed, over the Respondent's objection, for the purposes of assessing a penalty, and will be addressed in greater detail later in the decision.

patients are desperate for care. Ms. testified that one patient in particular returned from her appointment with the Respondent weeping because she desperately needed a biopsy and was so relieved the Respondent had agreed to take care of her during this time. (Transcript Vol. II, pg. 11). It is possible that such patients would so value the care they were receiving that they would not complain, even if they felt uncomfortable. This possibility did not factor into my decision making because there was no evidence of poor behavior towards the participants was presented, but it is important to note that in the instance of those patients, and the patients, there is a distinct power differential created by the desperation of the patients for free services, and the ability and willingness of the Respondent to provide that care, that cannot be ignored. I find Ms. testimony credible that the Respondent does not act inappropriately with all of his patients, which was not the allegation by the Board. The fact that there have not been complaints from other patients is not dispositive as to how the Respondent behaved with M.P.D. or M.S.A.O. on the dates in question.

The Respondent called as a witness. Ms. used to live in , Maryland and worked for the Department as an English/Spanish interpreter. She started as a volunteer in 1995, working sporadically, and worked as a part-time employee for approximately ten years starting in or about 1996. Ms. interpreted for the Respondent's patients starting in or about 1998. During that time, she would go with approximately two patients a week to see the Respondent. During breast exams, Ms. would go into the exam room with the patient, the Respondent, and Ms. . Her role was to interpret, and she would try not to observe the procedure. She said that the Respondent would

have basic conversations with the patients in Spanish and at that time, his Spanish was very basic, but that he was obviously taking steps to improve. She said that, based on her experience in his office, she thought it would be very uncharacteristic of the Respondent to say something of a sexual nature.

On cross-examination, Ms [redacted] acknowledged that the last time she interpreted for the Respondent was fourteen years ago. She said that between 1998 and 2006, the Respondent went on mission trips to Central America and the Caribbean and took classes so that he could get exposure to different dialects of Spanish, and that he was obviously trying to improve his Spanish during that time.

Ms. [redacted] estimony was credible. She spoke from her experience and credibly offered her impressions of the Respondent based on her interactions with him. Ms. [redacted] could not provide insight on the Respondent's current demeanor with patients, or his current Spanish fluency. One could easily conclude that his Spanish is significantly better than it was fourteen years ago as he has continued the same steps to improve his Spanish over those fourteen years including taking college courses, visiting Spanish-speaking countries on mission trips at least three times a year, conversing regularly with Spanish-speaking patients, and attending a church in the Hispanic community. I found Ms. [redacted] testimony credible to establish that the Respondent has not acted inappropriately with all of his patients, and to establish that the Respondent has actively sought to improve his Spanish for the past twenty-plus years, sohis Spanish proficiency in 2017 would have been better than "basic."

Respondent

The Respondent testified in his own behalf. He has been licensed to practice medicine in Maryland since 1994. He was born in Seoul, South Korea and his native language is Korean.

He came to the United States with his family when he was fourteen years old. He attended eighth grade and completed high school and college in the United States. He became more comfortable with the English language during his second year of college, and then completed medical school in an English-language program. He testified that he also speaks Spanish and described his proficiency as being at a first or second grade level. (Transcript Vol. II, pg. 21). He explained that he took some Spanish language classes in college in the 1970s. The Respondent opened his medical practice in 1997. He obtained a contract with the [redacted] several months later and realized that most of his [redacted] patients spoke only Spanish. To better facilitate his communication with those patients, he took Spanish language courses at Frederick Community College. In 2004, he started going on mission trips with his church to Spanish-speaking countries including Guatemala and the Dominican Republic, and was once abroad for forty days. He also attends a church in the Hispanic community. (Bd. Ex. 19, pg. 186).

The Respondent explained that his primary practice is in internal medicine as a primary care physician, but that he also provides a weight loss program and, prior to losing the contract in 2018, the rest of his practice involved the [redacted] and another similar program, the [redacted].[10]

The Respondent explained that Ms. [redacted] is the Registered Nurse, the receptionist, and runs everything in the medical office, including acting as the chaperone during breast and cervical exams. He stated that since his medical residency, he understood that if he does any procedures requiring a female to disrobe, that a chaperone must be present. (Transcript Vol. II, pgs. 29-30, 43). He testified that the concept was "not just training, but common sense." (Transcript Vol. II, pg. 30). The Respondent acknowledged that he does not have any

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10 [redacted] is a [redacted] Department program providing free colo-rectal exams and colonoscopies for low-income patients.

independent recollection of either M.P.D. or M.S.A.O. and his testimony is based on custom and routine. He stated that he could not recall a time when Ms. [redacted] was not present during such an exam. He added anecdotally that in order to ensure that Ms. [redacted] is able to be present in the exam room, she brings along a wireless phone and takes calls during the exams. (Transcript Vol II, pg. 44). The Respondent denied making the statements that M.P.D. and M.S.A.O. alleged, and said he would never say such things in front of his wife.

On cross-examination, the Respondent testified that while he had the [redacted] contract, he spoke Spanish with about twenty percent of his patients, but now that the contract has been terminated, Spanish-speaking patients make up "zero percent" of his practice. (Transcript Vol. II, pg. 67). He stated that he did not remember either M.P.D. or M.S.A.O., even when he saw M.P.D. in person during her testimony, and therefore must rely on his medical records to provide information about his experience with them. He stated that he is sure he did not make the alleged comments because "it just doesn't sound right, does not sound professional…I don't make those kinds of comments. I don't even say those things to my own wife." (Transcript Vol. II, pg. 45, 74). He agreed that, during his interview with Ms. Dicken, he had volunteered that he could have said what was alleged. Specifically, he stated, "It is possible, because of the language, maybe I say something. I don't know, maybe it was conceived a different way. Once again, even though I have limited Spanish it can be misunderstood…." (Bd. Ex. 19, pg. 186). He agreed that he might have said something that was misinterpreted or misunderstood. He also agreed that if he had said those things intentionally, it would have constituted harassment. (Transcript Vol. II, pg. 46).

I found that the Respondent downplayed his proficiency in Spanish in order to support the argument that he either could not have said the things that were alleged, or that he could have easily said something he did not mean. The Respondent testified that after five years in the United States, he was able to complete an undergraduate degree at a university in the United States. He stated that two years after college, he felt proficient in English. He also proudly testified about his dedication to learning the Spanish language including taking multiple college courses in Spanish, attending mission trips in Spanish-speaking countries at least three times a year for the past sixteen years where he speaks Spanish as much as possible, and speaking with his patients in Spanish for at least the past ten years. Additionally, he attends a church in the Hispanic community. In comparing the amount of time it took him to become proficient in the English language, it is unreasonable to conclude his Spanish proficiency, after more than sixteen years of regular practice, does not include such words as *breast*, *husband*, *fifteen-year-old*, *happy*, and *large*, or that he could unintentionally stumble into saying, "you have the breasts of a fifteen-year old" or "your large breasts must make your husband very happy" during a routine breast exam where the dialogue is presumably routine and repetitive. The Respondent testified that the conversations he has during these exams are routine and include "the same sentences I've been saying for years." (Transcript Vol. II, pg. 23). It is impossible to fathom, in these routine and brief exchanges, that after more than ten years the Respondent would unintentionally make unprofessional comments in Spanish and not realize his mistake. His concerted effort to diminish his Spanish ability to support his position, raises questions about his credibility overall.

Similar to Ms. [redacted] testimony, the Respondent testified that he could not remember the exams with either M.P.D. or M.S.A.O., but based his conclusions concerning the allegations on the premise that he would never perform a breast exam without Ms. [redacted] presence, and

that he would not have made the statements in front Ms. [redacted] because she would have known, even if they were made in Spanish. However, as addressed previously, the Record is clear that despite the Respondent's belief that it is unprofessional to perform a breast exam without a chaperone, there was a time when it was done in the Respondent's practice, or at least a time when the policy was not strictly followed. The Record is also clear that Ms. [redacted] would not have necessarily understood the alleged statements if they were made in Spanish. Further, it is highly likely that Ms [redacted] would have been distracted during an exam because she is responsible for many things in the office and multi-tasks, even bringing a phone into the exam room to take calls. If Ms. [redacted] were on the phone during an exam, there is little likelihood that she would have also been able to recognize phrases that were being said in Spanish.

There were other inconsistencies between the Respondent's testimony and his previous interview with Ms. Dicken which was given under oath. In that interview, the Respondent explained, "I have an extensive amount of Spanish patients other than the [redacted] program." (Bd. Ex. 19, pg. 186). In testimony at the hearing, the Respondent said that without the [redacted] contract, Spanish speaking patients make up "zero percent" of his practice. (Transcript Vol. II, pg. 67). This is a small discrepancy, but illustrates the Respondent's inability to accurately describe and characterize his practice. Problems with the Respondent's characterizations continue with his explanation of his Spanish-language proficiency. The Respondent categorized his ability to speak Spanish at a "first or second grade level," or less. (Transcript Vol. II, pg. 21). Ms. [redacted] categorized the Respondent's ability to be at a "second or third grade level." (Transcript Vol. I, pg. 179). It was never clear what metrics either used to come to those conclusions, but regardless, the words the Respondent was alleged to have said were all basic vocabulary that a physician who regularly speaks to Spanish-speaking patients during breast

exams, would have known. The Respondent argued that Ms. [redacted], who everyone agreed spoke very little Spanish, would have most certainly known if the Respondent had said the alleged statements because, as she demonstrated at the beginning of her testimony, she knew the words contained in those phrases. (Transcript Vol. I, pg. 41). In striking contradiction, the Respondent argued that those same words were too advanced for his Spanish speaking ability, and were not words included in his vocabulary. He testified that such phrases would require a "300 level Spanish" (Transcript Vol. II, pg. 43), alluding to the college-level course one would have to have taken to be able to say the phrases alleged. Additionally, in his interview with Ms. Dicken, the Respondent said that despite having extensive numbers of Spanish-speaking patients, and communicating with them in Spanish, he has never received a complaint that he does not speak Spanish well, or should not speak Spanish. (Bd. Ex. 19, pg. 186). His characterization on one hand, that he has very limited Spanish proficiency, while on the other, that he communicates with an "extensive amount of Spanish patients" and receives "no complaints" about his Spanish proficiency, points to a disconnect and leads me to conclude that he is not providing an accurate evaluation of his ability in the Spanish language.

The Respondent failed to present any credible testimony proving, or suggesting that he did not, or could not have, made the statements as alleged.

Prior Board charges against the Respondent[11]

The Respondent addressed the two previous charges brought by the Board; in both cases the Respondent entered into Consent Orders. The first charge stemmed from an incident on August 4, 1995 when [redacted] suspended the

[11] Evidence and testimony regarding the previous Board charges was allowed for the purposes of analyzing the appropriate Sanctions.

Respondent's hospital privileges and submitted an Adverse Action Report to the Board. The report detailed that the Respondent administered an injection of allergy serum to a twenty-three-year-old Patient, despite not having antidote medication available, after which the patient had an anaphylactic reaction and died. The Board issued charges against the Respondent on February 24, 1996 and the Respondent entered into a Consent Order on October 23, 1996. In addition to the above facts, the Board also found that the Respondent altered the medical record entry in the chart on the date of the incident to change the dose given from .5 cc to .05 cc. The Consent Order notes that the Respondent disputes that he altered the medical record entry. The Consent Order concluded that:

> The Respondent willfully made or filed a false report or record in the practice of medicine in violation of Md. Code Ann. Health Occ. § 14-404(a)(11); and
>
> The Respondent failed to meet appropriate standards as determined by appropriate peer review for the delivery of quality medical care performed in an office in this State in violation of Md. Code Ann. Health Occ. § 14-404(a)(22).

(Bd. Ex. 22, pg. 235).

The Consent Order required that the Respondent's license be suspended for ninety days, but stayed the suspension and ordered that the Respondent be placed on probation for three years; attend a Board-approved course on anaphylaxis and allergic reactions and response; perform one-hundred hours of community service; remain current in advanced cardiac life support certification at all times during his medical licensure in Maryland; submit, during probation, a written list of on-site emergency medications and supplies available at his medical office; and undergo peer review to include an on-site inspection of emergency medications and supplies approximately one year after the date of the Consent Order. Because of this charge, the

Respondent was precluded from taking an exam to become Board certified. (Transcript Vol. II, pg. 60).

The Respondent testified that he entered the 1996 Consent Order based on the advice of ineffective legal counsel. He said that he believed it should have been [redacted] Hospital's responsibility, and not his, to ensure that his medical office was fully stocked. He denied altering the medical record. He stated that he entered into the Consent Order because, at the time, he "wanted to sign the paper and be done with it." (Transcript Vol. II, pg. 54). On cross-examination, he explained that at the time of the incident, he was working for the hospital in a remote office and that he felt it was the hospital's responsibility to ensure the office was equipped in the same way that a doctor who worked on the hospital campus would not be responsible for ensuring the hospital had x-ray machines and syringes. (Transcript Vol. II, pgs. 50-54; 80-83).

The second charge resulted following the Board's finding that the Respondent dispensed prescription medication without a permit. On March 15, 2011, the Board issued the Respondent a permit to dispense prescription medications. The Respondent failed to file an application to renew the license and it expired on March 13, 2016. The Respondent continued to dispense prescription medication after the permit expired. He reapplied for a permit on June 3, 2016. The Respondent entered into a Consent Order on October 19, 2016. The Consent Order found that:

> [The Respondent] failed to comply with § 12-102 of the Health Occupations Article in violation of § 14-404(a)(28) of the Health Occupations Article. Section 12-102 of the Health Occupations Article requires that a physician dispensing prescription medication or devices has a permit issued by the Board.

(Bd. Ex. 21, pg. 226).

The Consent Order required that the Respondent pay a $3,000.00 fine.

Analysis

The case was well-presented by both sides. The issues regarding alleged immoral and unprofessional conduct largely involve a credibility determination. As addressed above, neither M.P.D. nor M.S.A.O. had an incentive to falsify their allegations, remained consistent in their recollection of what occurred, did not embellish their experience and, in the case of M.P.D., provided testimony in a manner that evoked trustworthiness. For these reasons, I find that their allegations were credible. During a breast exam, the Respondent spoke to M.P.D. in Spanish and told her that her breasts were large, and that her husband must have been very happy with her breasts. During a breast exam, the Respondent spoke to M.S.A.O. in Spanish and told her that she had the breasts of a fifteen-year old.

The Respondent raised a concern that both M.P.D. and M.S.A.O. knew Ms. [redacted] outside of the [redacted] program because they all attended the same church. The Respondent bolstered this argument by alleging that it was too coincidental that the two allegations came within days of one another, and a year or more after the alleged incident occurred. M.P.D. testified that while she knew which church Ms. [redacted] attended, they did not attend the same church. (Transcript Vol. I, pg. 65). The Record does not include any evidence of collusion between M.P.D., M.S.A.O. and Ms. [redacted] or what incentive the three of them would have to create the allegations against the Respondent. The timing of both of the reports a year or more after the alleged incident is explained by the fact that both allegations were in response to Ms. [redacted] calls to schedule the patient's annual appointments. The fact that the two were in close proximity could be a coincidence, or it could underscore why the statements stood out to Ms. [redacted] and prompted her to make the report to the [redacted]. Regardless, there is no proof or evidence in the Record that the patients' allegations were anything other than truthful.

The Respondent also raised the argument that M.P.D. and M.S.A.O. lacked credibility because they never reported their concerns to the Respondent or Ms. [redacted]. He also raised the argument that M.P.D.'s allegation lacked credibility because her husband had not confronted the Respondent after she reported the incident to him. M.P.D. and M.S.A.O. both expressed feelings of embarrassment and shame based on the Respondent's statements. They were also participants in a County program providing free medical services that they relied on. It is certainly not a requirement that a victim, or victim's family, confront her abuser directly in order for her allegations to be believed. That is perhaps heightened in the case of a power imbalance as that in the instant scenario. M.P.D. and M.S.A.O. did not intend to press charges, file a complaint or seek damages. They only raised the concerns to avoid returning to see the Respondent. Their motivation in making the reports, consistency in their accusations, and disinterest to seek some sort of benefit from the report only bolsters their credibility.

There is no question that the statements were made in the practice of medicine. The statements were made by a physician during breast exams of patients.

The final inquiry is whether it matters to the issues regarding alleged immoral and unprofessional conduct if the Respondent made the statements with lewd intent. The Respondent argued that if he did make the statements, it was an accidental and unfortunate mistake caused by his poor usage of the Spanish language, and never intended as harmful.

The Board offered no direct legal authority to support its contention that the statements violated sections 14-404(a)(3)(i) and (ii) of the Health Occupations Article. They argued that intent is not required by the statute if the action itself is immoral or unprofessional. The Board's sexual misconduct regulation defines "sexual harassment" as "an unwelcome sexual advance, request for sexual favor, or other verbal or physical conduct of a sexual nature." COMAR

10.32.17.02(B)(4). Based on that definition, if the act on its face is verbal or physical conduct of a sexual nature, it does not appear to require that there be an intent.

The Board also pointed to the Respondent's testimony where he stated that, if the statements were made by a doctor to a patient during a breast exam, they would be unprofessional and unethical. The Merriam-Webster Dictionary defines "immoral" as "conflicting with generally or traditionally held moral principles." Merriam-Webster Online Dictionary. 2020. http://merriam-webster.com (27 September 2020). It defines "unprofessional" as "characterized by or conforming to the technical or ethical standards of a profession." *Id.* Both of these definitions underscore the conclusion that if the act on its face would be considered by a reasonable person to be verbal or physical conduct of a sexual nature, there is no requirement that the actor be shown to have intended that response.

There was a consensus between the witnesses that, if the statements were made, they would have been unprofessional and problematic. Ms. [redacted] agreed in her testimony that if she had heard the Respondent make such a statement, she would be taken aback, would tell the Respondent that it was inappropriate, and might apologize to the patient. (Transcript Vol. I, pg. 172). Ms. [redacted] clearly felt the statements were inappropriate because they prompted her to make a formal report to the [redacted] program. Ms. [redacted] testified that she would not continue to send patients to the Respondent if she knew he had made these statements. (Transcript Vol. II, pgs. 11-12). Finally, Ms. [redacted] testified that if she heard anything like the alleged statements, she would have immediately made a report to her superiors. (Transcript Vol. II, pg. 105).

Most importantly, the comments affected M.P.D. and M.S.A.O. in a way that harmed them by causing them to feel ashamed, uncomfortable and embarrassed. These emotions continued a year later when they were each prompted to request a different physician. They

continued for M.P.D. several years later as she recounted the statements during her testimony. Her proud posture diminished, her hands shook, and her voice wavered as she sheepishly repeated the phrases and remembered the harassment. As stated previously, I do not find that the Respondent lacked a sexualized intent when he made the statements. The Respondent had more than ten years of experience with the Spanish language at the time he made the statements and could not have possibly made them unintentionally. The statements cannot be construed to have anything other than lewd intent in the context of a breast exam. As the Respondent testified, there would be no medical reason for the comments (Transcript Vol. II, pgs. 45-46), and therefore they were meant to objectify and sexualize the patient's breasts. However, even without sexualized intent, the statements were unprofessional and immoral because they were outside the scope of the breast exam. Further, if the Respondent was so uncertain about his ability in the Spanish language such that he believed he could accidentally sexually harass his patients during a breast exam, it was unprofessional and immoral to attempt to speak to them in Spanish rather than utilizing an interpreter. The Respondent's behavior violated sections 14-404(a)(3)(i) (immoral conduct in the practice of medicine) and 4-404(a)(3)(ii) (unprofessional conduct in the practice of medicine) and the Board's sexual misconduct regulations under COMAR 10.32.17.

Sanctions

The Board seeks to impose the following disciplinary sanction:

> The Respondent shall be reprimanded and placed on probation for one year with the following terms and conditions: 1) a course on appropriate boundaries to be completed within six months; 2) a chaperone when treating female patients; and 3) a $10,000.00 fine.

COMAR 10.32.02.10B(3)(a); COMAR 10.32.17.02.

I have found that the Respondent engaged in unprofessional and immoral conduct in the practice of medicine, and violated the Board's sexual misconduct regulation by engaging in sexual harassment as defined by COMAR 10.32.17.02(4). Based on those conclusions, the Board's sanctioning guidelines provide for a minimum sanction of reprimand, and a maximum sanction of revocation. The guidelines provide for a minimum fine of $10,000.00 and a maximum fine of $50,000.00. The Board seeks to impose the minimum sanction and minimum fine available to them based on these charges.

The Respondent has a prior disciplinary history. He has been charged by the Board on two previous occasions, once in 1996 and once in 2016. The Respondent demonstrated a concerning lack of remorse or acceptance of responsibility for each of these incidents. The Respondent blamed the 1996 incident on the hospital for failing to inventory the stock of his remote office, and his ineffective attorney. In that incident, a twenty-three-year-old patient died after receiving allergy injections for pollen and mites when she went into anaphylactic shock and the Respondent did not have the appropriate antidote to treat her. He greatly downplayed his role in the incident and did not accept responsibility. The Respondent's counsel likewise downplayed the 2016 incident where he prescribed medication without a license for several months. Finally, in the instant case, the Respondent alleged that the patients either made up the allegations against him, or misunderstood him due to his poor grasp of the Spanish language. This is the Respondent's third violation and accordingly, COMAR 10.32.02.07 supports a fine of $10,000.00 as proposed by the Board.

In addition to the prior record (COMAR 10.32.02.09(B)(6)(a)), there are other aggravating factors that should impact the determination of a sanction and fine for these charges. First, the conduct was either committed intentionally, or with gross recklessness. I find the Respondent made the statements with a lewd intent. If the Board finds that the Respondent did not have such intent, but misspoke when he made the statements, then he heedlessly spoke to two separate patients about the size and shape of their breasts, in a manner that could lead to such misstatements and harm, rather than employing the use of either an in-person, video or telephonic interpreter. Such behavior is likewise reckless. COMAR 10.32.02.09(B)(6)(b). Secondly, the Respondent's behavior caused harm to his patients and to the public. M.P.D. and M.S.A.O. both experienced lasting feelings of discomfort, embarrassment and shame as a result of the Respondent's actions. The Respondent had to be removed from the roster of available physicians for the [redacted] program as a result of his actions, which caused harm to the community. COMAR 10.32.02.09(B)(6)(c). Thirdly, the Respondent's behavior targeted particularly vulnerable patients. The two victims were non-English speaking patients who were enrolled in a program for individuals requiring free medical care. Additionally, both patients were of advanced age. All of these factors make them particularly vulnerable and susceptible of abuse by those in power. The Respondent had power for many reasons, but most specifically because the victims needed the services he was providing, and lacked the ability to easily advocate for themselves due to language barriers. COMAR 10.32.02.09(B)(6)(g).

In light of my findings, I recommend that the grounds for the Board's proposed penalty of a Reprimand has been supported.

Given the level of unprofessionalism and immorality displayed by commenting on his patients' breasts in a sexualized manner, I also find that a fine is appropriate and that the grounds for the Board's proposed fine of $10,000.00 has been supported.

Finally, as recommended by the Board, the Respondent shall also be required to 1) complete a course on appropriate boundaries within six months of the date of the final order and 2) utilize a chaperone whenever he is treating female patients.

PROPOSED CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact and Discussion, I conclude as a matter of law that the Respondent is guilty of unprofessional conduct, and immoral conduct. Md. Code Ann., Health Occ. § 14-404(a)(3)(i) and (ii) (Supp. 2020) and is in violation of the Board's sexual misconduct regulation. COMAR 10.32.17. As a result, I conclude that the Respondent is subject to disciplinary sanction of a Reprimand for the cited violations. *Id.*; COMAR 10.32.02.09A(3)(a)(ii). I further conclude that the Respondent is subject to a fine of $10,000.00 for the cited violations. COMAR 10.32.02.09A(3)(a)(iii).

PROPOSED DISPOSITION

I **PROPOSE** that the charge filed by the Maryland State Board of Physicians against the Respondent on February 28, 2020, for unprofessional conduct be **UPHELD;** and

The charge filed for immoral conduct be **UPHELD**; and

The charge for violation of the Board's sexual misconduct regulation be **UPHELD**; and

I **PROPOSE** that the Respondent be sanctioned by imposition of a Reprimand; and

I PROPOSE that the Respondent be ordered to pay a fine of $10,000.00; and the Respondent shall also be required to 1) complete a course on appropriate boundaries within six months of the date of the final order and 2) use a chaperone whenever he is treating female patients.

Alecia Frisby Trout

December 29, 2020
Date Decision Issued

Alecia Frisby Trout
Administrative Law Judge

AFT/sw
#189716

NOTICE OF RIGHT TO FILE EXCEPTIONS

Any party adversely affected by this proposed decision may file written exceptions with the disciplinary panel of the Maryland State Board of Physicians that delegated the captioned case to the Office of Administrative Hearings (OAH) and request a hearing on the exceptions. Md. Code Ann., State Gov' t § 10-216(a) (2014); COMAR 10.32.02.05. Exceptions must be filed within fifteen (15) days of the date of issuance of this proposed order. COMAR 10.32.02.05B(1). The exceptions and request for hearing must be addressed to the Disciplinary Panel of the Board of Physicians, 4201 Patterson Avenue, Baltimore, MD, 21215-2299, Attn: Christine A. Farrelly, Executive Director.

A copy of the exceptions should be mailed to the opposing attorney, and the other party will have fifteen (15) days from the filing of exceptions to file a written response addressed as above. *Id.* The disciplinary panel will issue a final order following the exceptions hearing or other formal panel proceedings. Md. Code Ann., State Gov't §§ 10-216, 10-221 (2014); COMAR 10.32.02.05 C. The OAH is not a party to any review process.

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